# *Future Performance and Proof in Contract Damages*

**Michael Dimarco*** **and David Winterton†**

## *Abstract*

A longstanding common law controversy is whether, following a contract's termination for the defendant's repudiatory breach, the plaintiff's entitlement to substantial damages depends upon proving its ability to have performed any outstanding, and now discharged, obligations. This question may arise in various distinct contexts and consideration of the relevant case law reveals that courts have not imposed identical proof requirements across these different scenarios. Despite these ostensible inconsistencies, the adoption of a two-stage model reveals the existence of an intelligible order within the leading authorities. The first stage involves determining the nature of the relationship between the parties' unperformed obligations. This relationship may decisively determine what the plaintiff must prove to recover substantial damages. But if not, the onus of proving whether the plaintiff would have been able to perform any remaining obligations, if relevant to its entitlement to substantial damages, must be allocated. Proper allocation of this onus requires consideration of certain other features of the case, including most notably the presumptive availability of specific performance to the plaintiff. This article explains the operation of this model by analysing the leading English and Australian decisions, providing a framework for resolving the various scenarios that may arise.

## I Introduction

The settled principle that, following a contract's termination for (or after)[1] a defendant's repudiatory breach, the plaintiff is entitled to an award aiming to put it into 'the same situation … as if the contract had been performed'[2] (hereafter, 'the

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* Australian lawyer; Master of Laws (Legal Theory) candidate, New York University. Email: m.dimarco@nyu.edu; ORCID iD: https://orcid.org/0009-0005-0526-1124.

† Associate Professor, The University of Hong Kong; Senior Lecturer (on leave), The University of Sydney Law School. Email: dwin@hku.hk; ORCID iD: https://orcid.org/0000-0002-9575-1661.

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1 See Frederick Wilmot-Smith, 'Termination After Breach' (2018) 134 (April) *Law Quarterly Review* 307.

2 *Robinson v Harman* (1848) 1 Ex 850; 154 ER 363, 365 (Parke B).

*Robinson v Harman* principle'), generates a range of theoretical and practical difficulties regarding what the plaintiff must prove to recover substantial damages. The difficulties are particularly acute in cases where, at the time of breach, the plaintiff had multiple contractual obligations remaining unperformed. But difficulties may still arise in simpler cases involving a single set of dependent, or concurrent, obligations. Depending on the particular scenario, moving from the general to the specific, the following questions may arise and are considered below:

(i) When, if ever, should the plaintiff's entitlement to substantial damages depend upon proof of its future capacity to perform some or all of its now discharged contractual obligations?

(ii) To what extent does it matter whether the defendant's breach was actual or anticipatory in nature?

(iii) What impact, if any, does the availability of other remedial options have upon what the plaintiff must prove to recover substantial damages?

The nature of the central problem this article examines is exemplified by the following scenario. Suppose that the charterer of a ship commits a repudiatory breach of an affreightment contract, discharging the owner's obligation(s) to carry cargo on the six remaining shipments. Does the owner's entitlement to substantial damages for the difference in value between the freight that would have been earned for those shipments and the (lower) market rate depend upon proving that, but for the charterer's breach, it would have been able to perform its remaining obligations? That question was considered in *Flame SA v Glory Wealth Shipping PTE Ltd* ('*The Glory Wealth*'),[3] where Teare J controversially held that proof by the plaintiff of future capacity to perform was indeed necessary to recover substantial damages. As we will explain, *The Glory Wealth* has been forcefully criticised,[4] and is inconsistent with the earlier House of Lords authority.[5] We examine Teare J's reasoning below in Part IV(B). But for now, what is most striking is that the leading Australian authorities, albeit occurring in the distinct context of a failed conveyancing transaction, suggest that his Lordship's decision in *The Glory Wealth* was entirely orthodox.[6] One important question that this article therefore seeks to resolve is whether the leading English and Australian authorities can be reconciled.

As foreshadowed, there are certain ostensible inconsistencies within the leading decisions that consider what a plaintiff must prove in relation to its own future capacity to perform to recover substantial damages following the defendant's repudiatory breach. Sometimes the plaintiff's future capacity to perform (or to obtain the defendant's counter-performance) has been treated as wholly irrelevant to its

3 *Flame SA v Glory Wealth Shipping PTE Ltd* [2014] QB 1080 ('*The Glory Wealth*').

4 See, eg, M Bridge (ed), *Benjamin's Sale of Goods* (Sweet & Maxwell, 9th ed, 2014) 1703–6 [19.179] (this chapter relevantly being authored by Treitel); Edwin Peel, 'Desideratum or Principle: The "Compensatory Principle" Revisited' (2015) 131 (January) *Law Quarterly Review* 29.

5 *Gill & Duffus SA v Berger & Co Inc (No 2)* [1984] AC 382 ('*Gill & Duffus SA*').

6 See especially *Foran v Wight* (1989) 168 CLR 385 ('*Foran*'); *Upside Property Group Pty Ltd v Tekin* (2017) 19 BPR 38,137 (Meagher JA, McColl JA agreeing at 38,137 [1], MacFarlan JA agreeing at 38,137 [2]) ('*Upside Property Group (NSWCA)*').

entitlement to damages.[7] In other cases, future events affecting the plaintiff's capacity to perform were considered relevant to what damages were recoverable, but it was held (or, often, simply assumed) that the defendant bore the onus of establishing that the plaintiff would not have received the promised performance had the breach not occurred.[8] Elsewhere, courts have held that the recovery of substantial damages depends upon the plaintiff affirmatively establishing its future capacity to perform any remaining obligation(s).[9]

Despite these apparent incongruities, we contend that application of a two-stage model reveals the existence of an intelligible order within the relevant case law. At the first stage of analysis, cases where the relationship between the parties' unperformed obligations logically determines what the plaintiff must prove in relation to its future capacity to perform must be distinguished from cases where it does not. This first category of cases comprises two diametrically opposed situations: one is where there is an actual breach of a concurrent (and mutually dependent) obligation; and the other is the breach of an obligation that is independent in the sense that it is not conditionally-related to any of the plaintiff's unperformed obligations.

Within the second category of case, where what the promisee must prove in relation to its future ability to perform is not logically determined by the relationship between the parties' unperformed obligations, there is always some kind of conditional relationship between the parties' unperformed obligations. Thus, if proving causation is treated as functionally equivalent to establishing that the defendant's breach was a necessary condition for occurrence of the claimed loss, it follows that the plaintiff must prove its future capacity to perform to recover a substantial award since it is always possible that the plaintiff would have been unable to perform its remaining obligation(s). But if proving causation does not require eliminating the possibility that the claimed loss might have been suffered regardless, as we argue it should be, a second stage of analysis is required, which involves weighing any considerations relevant to proper allocation of the relevant onus of proof.[10] Significantly, we here identify one underappreciated consideration relevant to that assessment: whether an order for specific performance was 'presumptively available' to the plaintiff.[11]

This article focuses principally on cases where the relevant counterfactual uncertainty concerns whether the plaintiff would have been able to perform some or

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7 See, eg, *Braithwaite v Foreign Hardwood Company* [1905] 2 KB 543 ('*Braithwaite*'); *Taylor v Oakes, Roncoroni and Co* (1922) 127 LT 267 ('*Taylor*'); *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] AC 48 ('*British and Beningtons*'); *Continental Contractors v Medway Oil and Storage Company* (1925) 23 Lloyd's List Rep 124 ('*Continental*'); *Gill & Duffus SA* (n 5).

8 See, eg, *Bradley v Benjamin* (1877) 46 LJQB 590; *Watts, Watts & Co Ltd v Mitsui & Co Ltd* [1917] AC 227; *Maredelanto Cia Naviera SA v Bergbau-Handel GmbH* [1971] 1 QB 164 ('*The Mihalis Angelos*'); *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2007] 2 AC 353 ('*The Golden Victory*'); *Bunge SA v Nidera BV* [2015] 3 All ER 1082 ('*Bunge*').

9 See *Foran* (n 6); *Upside Property Group (NSWCA)* (n 6); *The Glory Wealth* (n 3).

10 For a sample of prevailing opinion regarding proper allocation of an onus of proof, see Bruce L Hay, 'Allocating the Burden of Proof' (1997) 72(3) *Indiana Law Journal* 651; Alex Stein, *Foundations of Evidence Law* (Oxford University Press, 2005) 133, 214; David Hamer, 'Presumptions, Standards and Burdens: Managing the Cost of Error' (2014) 13(3–4) *Law, Probability and Risk* 221.

11 We explain what we mean by this in Part IV.

all of its remaining, and now discharged, obligations. But it is important to recognise that a plaintiff may (counterfactually) not have obtained the defendant's performance for another reason, such as the occurrence of a post-termination event that would have discharged the contract for frustration or enabled the contract to be terminated via an express power, as famously occurred in *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* ('*The Golden Victory*').[12] Although cases of this kind are not our primary concern, we do integrate consideration of them into our analysis where appropriate.

The argument we advance is presented across three substantive parts. In Part II, we provide necessary background for the arguments that follow, outlining three important preliminary matters upon which the proposed model depends. In Part III, we consider cases where the relationship between the parties' unperformed obligations determines what the plaintiff must prove to recover substantial damages. In Part IV, we consider the most difficult cases, where determining the plaintiff's proof requirements requires recourse to further considerations. After detailing these considerations, we demonstrate their utility in resolving the apparent tension between the leading English and Australian authorities.

## II Preliminaries

As outlined above, our proposed model distinguishes between cases where the relationship between the parties' unperformed obligations determines what the plaintiff must prove regarding its future capacity to perform to recover substantial damages, and cases where it does not. We therefore begin by explaining the different relationships that may obtain between contracting parties' unperformed obligations. We next explain how, generally speaking, identifying the plaintiff's proof requirements is best understood as determining what constitutes the minimum necessary causal connection[13] between the defendant's breach and the plaintiff's loss to generate a (potentially defeasible) entitlement to a substantial award.[14] Finally, we address another important preliminary matter: the distinction between claims for 'loss of bargain damages' and claims for 'consequential loss'.[15] Although we are principally concerned with claims of the former kind, we here explain how the plaintiff's future capacity to perform also may be relevant to claims of the latter kind.

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12 *The Golden Victory* (n 8).

13 In this article, we adopt the generally accepted view that the purpose of causal inquiries in the law is the attribution of responsibility for outcomes: see, eg, HLA Hart and Tony Honoré, *Causation in the Law* (Clarendon Press, 2nd ed, 1985) 62–8; Leonard Hoffmann, 'Causation' (2005) 121 (October) *Law Quarterly Review* 592, 593.

14 It still remains open for the defendant to establish that some or all of the performance for which damages are claimed would have been lost anyway due, for example, to the occurrence of a post-termination event, as occurred in *The Golden Victory* (n 8) and *Bunge* (n 8).

15 This term is used simply to denote 'losses which are particular to [the plaintiff's] individual circumstances': James Edelman, Jason Varuhas and Andrew Higgins (eds), *McGregor on Damages* (Sweet & Maxwell, 22nd ed, 2024) [3-016]. Loss of bargain damages, by contrast, aim to approximate the objective value of the promised performance, disregarding the plaintiff's individual circumstances.

## A *Possible Relationships between Unperformed Contractual Obligations*

Promises exchanged by contracting parties create obligations that are either independent, dependent, or concurrent. In contrast to the position obtaining when mutual promises first became enforceable via the action of assumpsit, there is nowadays a presumption against construing contractual promises as independent. The complex process by which the modern presumption in favour of dependency evolved was lucidly explained by Stoljar in an earlier edition of this journal.[16] Here, it suffices to note that the case generally taken to have established the modern presumption of dependency is *Kingston v Preston*.[17] As English recently explained, Lord Mansfield there distinguished

> three kinds of covenants: (i) independent covenants, 'where either party may recover damages from the other, … and where it is no excuse for the defendant, to allege a breach of the covenants on the part of the plaintiff'; (ii) dependent covenants which are conditions, 'in which the performance of one depends on the prior performance of another'; and (iii) covenants 'which are mutual conditions, to be performed at the same time' …[18]

One difficulty with this division of contractual obligations is that it does not expressly provide for a scenario involving two obligations that, while not strictly dependent in the narrow sense of the performance of one promise depending upon the *prior* performance of the other, are nonetheless conditionally-related in the sense that the plaintiff's entitlement to *retain* the defendant's performance depends upon the plaintiff's subsequent strict or substantial performance of one or more obligations.[19] As explained below in Part III(A), this was the kind of unperformed obligation at issue in *Gill & Duffus SA*, which is widely regarded as the leading English authority considering the relevance of a plaintiff's ability to perform in the post-termination period when assessing loss of bargain damages following discharge after a repudiatory breach.[20] The parties' relevant unperformed obligations there were technically independent in the strict sense used by Lord Mansfield in *Kingston v Preston*. But due to the conditional relationship that existed between these obligations, we suggest below that, for the purpose of *assessing loss of bargain damages*, the relationship between these unperformed obligations is best characterised as relevantly analogous to one of dependency. Finally, we note that 'concurrent obligations', the third type of covenant identified by Lord Mansfield, are also technically 'dependent' on one another in this broader sense. However, for

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16 See SJ Stoljar, 'Dependent and Independent Promises: A Study in the History of Contract' (1957) 2(2) *Sydney Law Review* 217, 223.

17 *Kingston v Preston* (1773) E 13 Geo 3, cited in *Jones v Barkley* (1773) 2 Dougl 685; 99 ER 434, 437–8. Notably, however, Stoljar describes this view as a 'gross oversimplification': ibid 238.

18 Jordan English, 'The Nature of "Promissory Conditions"' (2021) 137 (October) *Law Quarterly Review* 630, 632; Jordan English, *Discharge of Contractual Obligations* (Oxford University Press, 2025) 30 [2.12]. See also Michael Bridge, 'Discharge for Breach of the Contract of Sale of Goods' (1982) 28(4) *McGill Law Journal* 867, 874.

19 Admittedly, Lord Mansfield's statement might be interpreted as *impliedly* addressing this possibility, but this is not obvious, particularly because in outlining his division in *Kingston v Preston* (n 17), his Lordship was not principally concerned with the assessment of damages. On this difficulty, see English, *Discharge of Contractual Obligations* (n 18) ch 9.

20 See, eg, Guenter Treitel, 'Rights of Rejection under CIF Sales' [1984] (4) *Lloyd's Maritime and Commercial Law Quarterly* 565, 569–73; Peel (n 4) 31.

reasons made clear below, unless otherwise stated, we treat cases involving such obligations separately.

## B *Identification of the Plaintiff's Proof Requirements as a Causal Question*

More recent English and Australian authorities indicate that where the defendant's unperformed contractual obligation is conditionally-related to one of the plaintiff's unperformed obligations, the plaintiff's capacity to perform that conditional obligation is necessarily relevant to what loss is causally attributable to the breach.[21] If establishing factual causation requires establishing that the defendant's breach was a necessary condition of the plaintiff's loss, this conclusion follows logically because to say that contractual obligations are conditionally-related just means that the parties have agreed that the plaintiff's entitlement to receive or retain the defendant's performance depends upon the plaintiff's performance of the relevant conditional obligation(s). But even on this understanding of the necessary causal connection between breach and loss, rather than requiring the plaintiff positively to establish its own future ability to perform any remaining obligations, the law could place the onus of proof on the defendant to prove the plaintiff's *in*ability to perform some or all of these obligations in order to 'deny'[22] the required causal connection.[23]

An alternative way of resolving cases raising the central problem we here address would be to require the plaintiff simply to prove that there is a 'NESS'[24] connection between the defendant's breach and the plaintiff's loss in order to establish a prima facie entitlement to substantial damages. In focusing on the sufficiency, rather than necessity, of the salient event in producing the relevant loss, the weaker NESS causal relation is probably a more plausible candidate for a universally applicable test of causation within the law of obligations.[25] The critical difference between taking this approach and adopting the one described in the preceding paragraph is that requiring only a NESS connection means that the defendant's successful assertion that the loss would have been suffered anyway is properly characterised as a 'defence', somewhat analogously to proving a failure to

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21 See, eg, *The Glory Wealth* (n 3); *Bunge* (n 8) 1089–90 [16] (Lord Sumption JSC); *Foran* (n 6); *Upside Property Group (NSWCA)* (n 6). But cf *Gill & Duffus SA* (n 5), discussed further below, which implicitly appears to reject adoption of the 'but-for' test in this context.

22 See Ben Cartwright, 'Denials, Defences, and Damages-Limiting Rules in Breach of Contract' (2022) 22(1) *Oxford University Commonwealth Law Journal* 21.

23 For a similar framing of the issue, see JW Carter and Wayne Courtney, '"Ready and Willing to Perform": Discharge for Breach and Damages' [2020] (2) *Lloyd's Maritime and Commercial Law Quarterly* 251, 252. Notably, a similar approach to determining causation in the contractual context, albeit in relation to a claim for consequential loss, was adopted in *Reg Glass Pty Ltd v Rivers Locking System Pty Ltd* (1968) 120 CLR 516, 521 (Barwick CJ, McTiernan and Menzies JJ).

24 According to the 'NESS' test 'a particular condition was a cause of (or condition contributing to) a specific consequence if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence': Richard W Wright, 'Causation in Tort Law' (1985) 73(6) *California Law Review* 1735, 1790 (emphasis omitted).

25 Although establishing that the breach of a legal duty caused loss is often equated with establishing that the former was a necessary condition of the latter's occurrence, it is increasingly recognised that this approach is inadequate as a universal test: see, eg, *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] AC 649, 723–4 [182]–[185].

mitigate consequential loss. Conversely, as noted, under the alternative approach an assertion of this kind would constitute a 'denial' of the required causal connection.

In determining who bears the onus of proving a particular fact in issue, the generally accepted default position from which departure may occasionally be justified is that 'the one who asserts must prove'. The most compelling rationale for this default position is the necessity of justifying the making of a coercive order against the defendant, though there may be additional efficiency-based reasons to favour this approach too.[26]

Irrespective of this, it is uncontroversial that to maintain an action for substantial damages for breach of contract, the plaintiff bears the legal onus[27] of proving both the existence of the alleged contract and a sufficiently serious failure to perform by the defendant to justify the plaintiff being discharged from any further obligation to perform.[28] The critical question then becomes whether, to establish a prima facie entitlement to substantial damages, the plaintiff need only also prove the objective value of the provisionally lost bargain — or perhaps a non-remote adverse consequence of the breach — or whether the plaintiff must go further and also refute the possibility that some loss would have been suffered anyway due to its own inability to perform some or all of its now discharged, and conditionally-related, obligations.

As noted, the specific problem we address can accordingly be understood as one relevant test case for the broader debate regarding what constitutes the minimum causal relation between breach and loss required to establish a (potentially defeasible) entitlement to substantial damages following the breach of a legal duty. More specifically, the various cases examined in this article raise the question whether an entitlement to substantial damages following a repudiatory breach of contract always depends upon proving the breach was a necessary condition for the occurrence of the claimed loss; or whether, more plausibly,[29] the plaintiff is only required to prove that the defendant's repudiatory breach was one necessary element of a set of antecedent actual conditions sufficient for the occurrence of the relevant loss,[30] with the onus then shifting to the defendant to prove that the loss would have been suffered anyway.

But whatever view one takes regarding this broader question, assessing damages for breach of contract necessarily involves comparing the plaintiff's present position with its 'non-breach position'.[31] Determining the latter inevitably involves

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26 See below Part IV(A).

27 According to Heydon, '[t]he legal burden of proof is the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved (or disproved) either by a preponderance of the evidence or beyond reasonable doubt': JD Heydon, *Cross on Evidence* (LexisNexis Butterworths, 11th ed, 2017) 331 [7010].

28 For recent detailed consideration of the basis for contractual discharge, see English, *Discharge of Contractual Obligations* (n 18) chs 2–3.

29 For detailed consideration of this question in relation to tortious claims, see Allan Beever, 'Cause-in-Fact: Two Steps Out of the Mire' (2001) 51(4) *University of Toronto Law Journal* 327, 348–51; Jane Stapleton, 'An "Extended But-For" Test for the Causal Relation in the Law of Obligations' (2015) 35(4) *Oxford Journal of Legal Studies* 697.

30 This is just an abbreviated statement of the NESS test: see Wright (n 24) 1774–813.

31 Adam Kramer, *The Law of Contract Damages* (Hart Publishing, 3rd ed, 2022) 14–15.

speculation regarding what (hypothetically) would have happened but-for the breach, with the degree of speculation necessarily increasing the more distant in time the relevant unperformed obligations are from the breach. The effect of this uncertainty on damages assessment is accordingly most stark in cases involving a claim for damages for the non-performance of multiple dependent obligations that are very temporally distant from the breach. But the problem of prospective uncertainty can still arise in the otherwise more straightforward case of a contract containing a single set of dependent obligations.[32]

Given this uncertainty, courts must make certain assumptions. But as Stone recognised when considering an analogous problem within the law of frustration, at least for certain factually relevant matters, there is no logically pre-determined answer regarding what initial assumptions should be made.[33] In a civil dispute, the party making a claim bears the legal onus of proving on the balance of probabilities[34] the existence of any fact that is essential to establishing the claim.[35] But it is not always clear 'whether an assertion is essential to a party's case or that of his adversary'.[36] Thus, unless the plaintiff must positively exclude other plausible candidate events to which the relevant loss might alternatively be attributed, appropriate allocation of the onus of proving the plaintiff's future (in)ability to perform depends upon an assessment (and weighing)[37] of any relevant considerations.

## C *Distinguishing Claims for Loss of Bargain Damages from Claims for Consequential Loss*

The argument advanced here is principally concerned with claims for loss of bargain damages brought following a repudiatory breach of contract. Like certain awards made following a mere breach of warranty,[38] these are generally assessed when performance of the relevant obligation was due.[39] We also contend that such awards are best understood as valuing the *performance* that the plaintiff has lost due to the

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[32] This observation is lucidly made in Michael Gordon Lloyd, 'Ready and Willing to Perform: The Problem of Prospective Inability in the Law of Contract' (1974) 37(2) *Modern Law Review* 121.

[33] See Julius Stone, 'Burden of Proof and the Judicial Process: A Commentary on *Joseph Constantine Steamship Ltd v Imperial Smelting Corporation Ltd*' (1944) 60 (July) *Law Quarterly Review* 262, 278–84.

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

[35] See *Currie v Dempsey* (1967) 69 SR (NSW) 116, 125 (Walsh JA).

[36] Heydon (n 27) 341 [7075]. See, eg, *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154, which is examined in Stone (n 33).

[37] This again raises the ever-present problem of value incommensurability: see Philip Sales and Frederick Wilmot-Smith, 'Justice for Foxes' (2022) 138 (October) Law Quarterly Review 583.

[38] See, eg, *Clark v Macourt* (2013) 253 CLR 1; *MDW Holdings Ltd v Norvill* [2023] 4 WLR 33 ('*MDW*').

[39] See, eg, *Hoffman v Cali* [1985] 1 Qd R 253. Complications arise where damages are claimed in relation to multiple unperformed obligations, but the law generally adopts the simplified approach of assessing the value of the lost obligations by reference to their value at the date of breach, at least in the case of an actual repudiatory breach. *The Golden Victory* (n 8) nevertheless establishes that such an award may be reduced if the *defendant* establishes that some of the performance would not have been received anyway due to the occurrence of a post-termination event.

breach,[40] and therefore should be distinguished from claims for consequential loss. Rather than seeking to substitute for the promised performance directly, the aim of awards of the latter kind is to make good sufficiently certain, non-remote, causally attributable adverse consequences of the breach assessed at the date of trial (or when the plaintiff should have taken reasonable post-breach mitigatory action).[41] Although lively debate persists,[42] and terminological ambiguity abounds,[43] courts have increasingly recognised the distinction between these two different kinds of claim.[44]

To recover loss of bargain damages following an accepted repudiatory breach of contract, what the plaintiff must prove in relation to its own future ability to perform depends upon the relationship between the parties' unperformed obligations. But the plaintiff's future ability to perform might also impact its ability to recover damages designed to compensate for some alleged benefit that probably would have been obtained following performance of the defendant's contractual obligation(s). Here, however, the plaintiff's hypothetical ability to perform a discharged obligation is only relevant to damages assessment if the plaintiff's actual performance of that obligation was a necessary precondition to earning the (allegedly) lost consequential benefit.

The point just made may be illustrated by comparing two scenarios. Suppose, for example, that following a vendor's accepted repudiatory breach of a contract for the sale of land, the plaintiff purchaser seeks to recover as damages the profits it alleges would have been made under a separate contract with a third party to on-sell the property.[45] Completion of the original sale is clearly a necessary *pre*condition to realising this profit, making it appropriate to require the plaintiff to prove that this would in fact have happened in order to recover such profits as damages. This scenario may be contrasted with a case involving a claim for damages arising from a (non-repudiatory) breach of warranty of quality in respect of a chattel that has been transferred, but not yet fully paid for. Unless the buyer's entitlement to possess and use the chattel was subject to a prior (or concurrent) condition of full payment, the seller here should not be permitted to defend itself against the buyer's claim for the lost profits it would have made from the chattel's 'reasonably contemplated'[46] use by showing that the buyer could not have paid the balance owing under the contract.[47]

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40 Notable support for this understanding of loss of bargain damages can be found in *Bunge* (n 8) 1091 [21] (Lord Sumption JSC), but it is recognised that this conceptualisation is not universally accepted. For a more detailed defence, see David Winterton, 'Claims for the Value of the Lost Contractual Performance' (2019) 45(1) *University of Western Australian Law Review* 75.

41 See, eg, *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653 ('*Burns*').

42 See, eg, Katy Barnett, 'A Critical Consideration of Substitutive Awards in Contract Law' (2018) 81(6) *Modern Law Review* 1064.

43 For detailed discussion, see David Winterton, *Money Awards in Contract Law* (Hart Publishing, 2015) ch 3.

44 See, eg, *MDW* (n 38) [70] (Newey LJ, Asplin and Whipple LJJ agreeing); *Upside Property Group (NSWCA)* (n 6).

45 See *Upside Property Group (NSWCA)* (n 6), discussed below in Part IV(C).

46 See *Hadley v Baxendale* (1854) 9 Ex 341, 354; 156 ER 145, 150–1.

47 This broadly describes what occurred in *Burns* (n 41). Although there was no such condition on the buyer's entitlement to possess and use the relevant chattel there, some of the losses were nevertheless held to be irrecoverable on the ground that they were too remote.

To observe that the plaintiff's future capacity to perform is only relevant in the first of these two scenarios leaves open whether the plaintiff or defendant should be allocated the onus of persuading the court as to the likelihood of the plaintiff's future capacity to perform. As regards a claim where the plaintiff's own future performance of an obligation was necessary to obtain the contingent, consequential, benefit for which damages are now sought — the plaintiff should be required to prove a capacity to have performed this obligation because, as noted above, completion of the initial contract is a precondition to realisation of the consequential profit. But this is not logically entailed when loss of bargain damages are claimed since here there is a NESS connection between the defendant's breach and the plaintiff's failure to obtain the promised performance.[48]

Still, when damages for consequential loss are claimed, it occasionally may be appropriate to allocate to the defendant the onus of proving a particular fact relevant to whether the plaintiff's alleged loss is properly attributable to the defendant's breach. This is most clearly demonstrated by the avoidable loss rule of mitigation, which requires the defendant to establish that the plaintiff could have avoided some or all of the alleged adverse consequences occasioned by the breach by taking reasonable post-breach action.[49] This rule is best understood as identifying when responsibility for the relevant adverse consequence is more appropriately attributed to the plaintiff's failure to act reasonably following breach than the defendant's failure to perform as promised.[50]

## III Scenarios where the Relationship between the Parties' Obligations Determines the Plaintiff's Proof Requirements

In the remainder of this article, we prosecute our central thesis on what a plaintiff must prove regarding its own future ability to perform to recover substantial damages following an accepted repudiatory breach of contract. In this Part, we outline two scenarios where the relationship between the parties' unperformed obligations decisively determines the plaintiff's proof requirements. The first is where damages are claimed following the defendant's (accepted) repudiatory breach of an obligation that is not conditionally-related to any of the plaintiff's remaining obligations. The second, more theoretically significant, scenario is where damages are claimed following the *actual* repudiatory breach of a concurrent obligation.

### A *Damages Claims Following Repudiatory Breach of a Non-Conditionally Related Obligation*

If independent covenants are obligations 'where either party may recover damages from the other, … and where it is no excuse for the defendant, to allege a breach of

[48] As noted in Part II(B), the NESS test constitutes a more plausible candidate for a generally applicable causal relation within the law of obligations. See, eg, Stapleton (n 29).

[49] See *Koch Marine Inc v D'Amica Societa di Navigazione ARL* [1980] 1 Lloyd's Rep 75, 88 (QB) ('*The Elena D'Amico*') (Goff J).

[50] See ibid. For further consideration, see Andy Summers, *Mitigation in the Law of Damages* (Oxford University Press, 2024); David Winterton, 'Examining Mitigation in the Law of Damages and the Limits of the Compensatory Principle' (2026) 46(1) *Oxford Journal of Legal Studies* 201.

the covenants on the part of the plaintiff',[51] it might seem to follow that the plaintiff's ability to perform any prospective obligation is irrelevant when damages are claimed for the breach of an independent obligation. But, as discussed above in Part II(A), a difficulty with Lord Mansfield's tripartite division of obligations is that it does not distinguish between obligations that, although technically independent because their performance is not dependent on the prior performance of another obligation, are still subject to a condition *subsequent* that the plaintiff perform one or more of its promises. As English has explained, 'even obligations to perform in advance [that is, independent obligations] are often subject to a condition subsequent extinguishing the duty of performance if the agreed exchange is not received'.[52] Crucially, an obligation of this kind formed the basis of the dispute in *Gill & Duffus SA*, the leading modern authority to consider the relevance of a plaintiff's future ability to perform when assessing loss of bargain damages following the defendant's (accepted) repudiatory breach.[53]

The case concerned a dispute under a cost, insurance, freight ('CIF') contract, which the buyers had repudiated by refusing to accept the shipping documents. The seller accepted this repudiation and claimed damages. Writing for a unanimous House of Lords, Lord Diplock relevantly held that acceptance of the seller's 'fundamental breach of contract'[54] terminated the parties' unperformed obligations and entitled the seller to an award assessed by reference to 'the difference between the contract price of … [the subject goods] and the price obtainable on the market for the documents representing the goods at date of the acceptance of the repudiation'.[55] Significantly, however, while Lord Diplock held that the buyer may claim, or set off 'damages for any *past* non-performance of [the seller's] own primary obligations, due to be performed before the contract was rescinded',[56] his Lordship also made clear, at least by implication, that the buyer's ability to counter-claim for damages did not extend to hypothetical breaches that it could show would have occurred if the actual breach had not occurred.[57]

As Teare J observed in *The Glory Wealth*, *Gill & Duffus SA* accordingly supports Treitel's view that the plaintiff's ability to perform its future obligations is wholly irrelevant to the assessment of damages following a defendant's repudiatory breach.[58] Notably, however, McLauchlan has suggested that the decision's authoritative status can be quarantined on the basis that the relevant obligation breached was 'independent'.[59] While this view is understandable given that the relationship between the parties' unperformed obligations in *Gill & Duffus SA*

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51 English, 'The Nature of "Promissory Conditions"' (n 18) 632, quoting *Jones v Barkley* (n 17), citing *Kingston v Preston* (n 17) 690.

52 See English, *Discharge of Contractual Obligations* (n 18) 315 [9.52].

53 *Gill & Duffus SA* (n 5).

54 Ibid 391 (Lord Diplock).

55 Ibid 392.

56 Ibid 390 (emphasis in original). Note that this in fact occurred in *Gill & Duffus SA* because, alongside the goods not conforming to the quality certificate, only 445 tonnes (rather than the 500 tonnes promised) were delivered. But this breach relating to quantity did not allow the buyers to retrospectively justify their repudiation.

57 See *Gill & Duffus SA* (n 5) 390 (Lord Diplock).

58 *The Glory Wealth* (n 3) 1098 [55].

59 See David McLauchlan, 'Repudiatory Breach, Prospective Inability and *The Golden Victory*' (2015) 7 *Journal of Business Law* 530, 535–8.

technically fits within the narrow definition of independence stipulated by Lord Mansfield in *Kingston v Preston*, it is also not a plausible interpretation of Lord Diplock's reasoning because his Lordship also accepted as 'trite law'[60] the proposition that

> when a buyer under a [CIF] contract accepts shipping documents which transfer the property in the goods to him, the property in the goods that he obtains is subject to the *condition subsequent* that it will revest in the seller if upon examination of the goods themselves upon arrival the buyer finds them to be not in accordance with the contract in some respect which would entitle him to reject them, and he does in fact reject them.[61]

The buyers in *Gill & Duffus SA* were not entitled to reject the conforming shipping documents, and their obligation to pay the price upon presentation of these documents was not dependent upon the seller's delivery of conforming goods in the strict sense identified by Lord Mansfield. However, the buyer's obligation to pay was nevertheless conditionally-related to the seller's obligation to deliver conforming goods, since a CIF seller cannot retain the price (hypothetically) paid by the buyer of the goods if those goods were later validly rejected.[62] Consequently, Lord Diplock's authoritative statements of principle regarding the relevance of the plaintiff's future ability to perform in assessing damages cannot be confined to situations where the parties' obligations are wholly independent in the sense that there is no relationship of conditionality at all between them.

As Todd has persuasively argued, a preferable explanation for the decision in *Gill & Duffus SA* is that international commodity sales justify a different approach to damages assessment from that adopted in cases involving mutually dependent obligations. This is because, objectively speaking, the central purpose of intermediate contracts within a chain of CIF sales is just to allocate the risk of market fluctuation.[63] From the perspective of the contracting parties, therefore, the central purpose of at least these intermediate contracts within the chain is simply to allocate market risk rather than, as is typical in most contractual bargains, actually to obtain *performance* of the promises made (that is, a transfer of the underlying goods).

To summarise, *Gill & Duffus SA* cannot be explained by the technical relationship of independence that there existed between the parties' relevant unperformed contractual obligations because these obligations were in fact conditionally-related. The preferable explanation for the decision is, instead, that international commodity sales justify a distinct approach to damages assessment from the approach taken in more typical cases where the plaintiff bargains for actual performance of the underlying promise. *Gill & Duffus SA* nevertheless highlights the possibility of a case where the parties' relevant unperformed obligations are not conditionally-related. It is trite to observe that, in such cases, the plaintiff's future

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60 *Gill & Duffus SA* (n 5) 395.

61 Ibid (emphasis added).

62 As Dixon J explained in a different context in *McDonald v Dennys Lascelles Ltd*, in such circumstances the sellers' entitlement to retain the price does not accrue unconditionally: (1933) 48 CLR 457, 476.

63 Paul Todd, 'Commodity Sales and the Compensatory Principle' [2017] (1) *Lloyd's Maritime and Commercial Law Quarterly* 122, 124.

ability to perform any of its remaining obligations is wholly irrelevant in assessing the damages to which it is entitled following the defendant's breach.

## B *Damages Claims Following the Actual Repudiatory Breach of a Concurrent Obligation*

Where damages are claimed following the defendant's actual non-performance of a concurrent obligation, the relationship between the parties' unperformed obligations again decisively determines what the plaintiff must prove in relation to its future ability to perform to recover substantial damages. But this is for the very different reason that the plaintiff's ability simply to establish a *cause of action* — a precondition to recovering damages of any kind — depends upon proving its readiness and willingness to perform its own concurrent obligation.[64] Accordingly, the plaintiff's entitlement to recover nominal or substantial damages also necessarily depends upon establishing its future ability to perform that concurrent obligation.

An illuminating example of judicial consideration of a *hypothetical* claim for substantial damages following an actual repudiatory breach of a concurrent obligation occurred in the High Court of Australia's leading decision in *Foran v Wight* ('*Foran*').[65] The parties there entered a contract for the sale of land. Two days before the essential completion date of 22 June 1983, the vendors informed the purchasers that they could not deliver good title by that time. The purchasers neither accepted this 'repudiation by anticipatory breach',[66] nor affirmed the contract, but ceased efforts to obtain finance. Neither party tendered performance on 22 June. Two days later the purchasers purported to terminate for the vendors' actual repudiatory breach and sought to recover the deposit. In response, the vendors argued that the purchasers' purported termination on 24 June was invalid due to a lack of readiness and willingness to perform on 22 June. The vendors further argued that they had subsequently validly terminated the contract following the purchasers' failure to comply with a valid notice to complete, with the effect that the deposit was forfeited. Importantly, it was later found that although the purchasers' chances of completing the sale by the essential date were slim, they were not 'substantially incapable' of doing so.[67]

By majority, the High Court held that the purchasers were entitled to recover the deposit.[68] Of greater present significance, however, is the fact that three of the five Justices also considered what, hypothetically, the purchasers would have needed to prove to recover substantial damages for an actual repudiatory breach.[69] Particularly noteworthy was Brennan J's careful examination of this question. After

64 See *Jones v Barkley* (n 17) 440, citing *Kingston v Preston* (n 17).
65 *Foran* (n 6).
66 Ibid 416 (Brennan J).
67 Ibid 427 (Brennan J). Compare the dissenting judgment of Mason CJ, in which his Honour stated that 'the evidence reveals that [the purchasers' chance of tendering the purchase price] would have come to nothing': at 413.
68 Ibid 432 (Brennan J), 437–8 (Deane J), 455 (Dawson J), 459 (Gaudron J).
69 Understandably, no attempt was made to distinguish the approach applicable to claims for loss of bargain damages from that applicable to claims for consequential loss.

observing that the position is identical regardless of 'whether the breach be anticipatory or actual',[70] his Honour relevantly held that

> the purchaser's entitlement to damages for the vendor's failure to complete [depended] on two related but distinct questions: first, whether the purchaser was at the time of the intimation substantially incapable of raising the finance and, second, whether it is more likely than not that the purchaser would have succeeded in raising the finance.[71]

Significantly, Brennan J also held that the purchaser bore the onus of establishing this second fact on the balance of probabilities.[72] At least in relation to any hypothetical claim for damages following the vendor's *actual* repudiatory breach, Deane J and Dawson J both agreed.[73] Thus, although technically obiter dicta, *Foran* stands as authority for the proposition that, at least in a contract for the sale of land containing concurrent promises, the purchaser's entitlement to substantial damages following acceptance of the vendor's actual repudiatory breach depends upon persuasively establishing an ability to perform its relevant concurrent obligation. Canadian courts have similarly recognised that, '[w]herever there are concurrent obligations, the party who seeks to recover against the other must show that he has always been ready and willing to perform the obligation upon him'.[74]

*Foran* thus apparently provides authoritative support for Teare J's conclusion in *The Glory Wealth*. It is nevertheless highly significant that the hypothetical claim for damages considered by three Justices of the High Court of Australia there arose in circumstances where the repudiating vendors' relevant unperformed obligation was subject to the purchasers' concurrent obligation to tender the balance of the purchase price on the essential completion date. Since the plaintiff's cause of action depended upon affirmatively establishing a capacity to perform the relevant concurrent obligation, the decision has limited broader significance for different scenarios in which the 'prospective inability' question arises.[75]

## IV Scenarios Where Additional Considerations Determine the Plaintiff's Proof Requirements

To recap, identification of the relationship between the parties' unperformed obligations may decisively determine whether the plaintiff's entitlement to recover substantial damages depends upon proving its future ability to perform. If not, the onus of proving this fact, if relevant to the plaintiff's damages, must be allocated. After outlining the considerations relevant to this task in Part IV(A), we consider how it should be done in various scenarios. In Part IV(B), we consider cases where the plaintiff's claim concerns the non-performance of one or more dependent obligations. We argue that the plaintiff here should be entitled to a rebuttable

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70 *Foran* (n 6) 430.
71 Ibid.
72 Ibid.
73 Ibid 438 (Deane J), 454–5 (Dawson J).
74 See *Stuart & Co v Clarke* (1917) 11 *Alberta Law Reports* 551, 559 (Beck J) (Alberta Court of Appeal), quoting *Forrest & Son Ltd v Aramayo* (1900) 83 LT 335, 338 (Lord Halsbury LC, Smith and Williams, LJJ concurring). See also *McKenzie v Dancey* (1885) 12 OAR 317 (Ontario Court of Appeal).
75 This description of the problem derives from Lloyd (n 32).

presumption that it would have performed any remaining obligations in the sense that the relevant fact in issue is presumed to be true unless the defendant raises sufficient evidence to show that it probably is not. Here, we also consider how damages should be assessed when an order for specific performance of a contract containing one or more dependent obligations is sought but refused. In Part IV(C) we consider cases where substantial damages are claimed following a contract's discharge following the anticipatory breach of a single concurrent (or dependent) obligation, arguing that the presumptive availability of specific performance to the plaintiff is highly relevant to determining whether the plaintiff's recovery of substantial damages depends upon proving its ability to have performed any outstanding obligation(s). Finally, in Part IV(D) we briefly consider damages claims arising from a contract containing multiple concurrent obligations, arguing that they should be dealt with similarly to cases involving ordinary dependent obligations.

## A *Considerations Relevant to Allocation of the Onus of Proof*

As noted above in Part II(B), the central justification for 'the one who asserts must prove' default rule is the necessity of justifying a coercive order against the defendant. But Stein has claimed that '[a]llocation of the risk of error in fact-finding ought to be the principal objective of evidence law'.[76] Importantly, these two perspectives may be reconcilable if the concept of error is interpreted sufficiently capaciously. In any event, as Stein explains, onus allocation can be done by reference to considerations of: (1) efficiency; (2) fairness; or (3) both fairness and efficiency.[77] Since critical engagement with the extensive literature concerning proper allocation of the onus of proof in civil fact finding is beyond the scope of this article,[78] we simply assume that considerations of both efficiency and fairness are relevant to this task, and explain how these considerations impact resolution of the specific problem addressed.

### 1 *Efficiency in the Form of Minimising the Expected Cost of Error*

Hamer has claimed that one important consideration relevant to allocating the onus of proof in relation to a particular fact in issue in a civil dispute is 'the probabilistic goal' of 'minimizing the expected cost of error'.[79] If so, the importance of reducing the prevalence of speculative claims and prioritising the resolution of meritorious claims in the context of a justice system with limited resources also supports adoption of the default rule that the plaintiff must prove all facts necessary to establish its legal claim rather than requiring the defendant to disprove some or all of the plaintiff's (possibly speculative) allegations.[80]

It might be asserted that this view supports the proposition that, in the context of a claim for substantial damages, the plaintiff should always bear the onus of

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[76] See Stein (n 10) 133.

[77] Ibid 214–19. See also *Armstead v Royal & Sun Alliance Insurance Co Ltd* [2025] AC 406, 429–30 [63] (Lord Leggatt and Lord Burrows JJSC).

[78] For analysis, see above n 10. See also Ronald J Allen, 'Burdens of Proof' (2014) 13(3–4) *Law, Probability and Risk* 195.

[79] Hamer (n 10) 221. Hamer defines the expected cost of a finding as 'the probability of it being erroneous, multiplied by the cost if it is erroneous': at 222. See also Hay (n 10); Stein (n 10) 214.

[80] Hay (n 10).

proving that it would have performed its remaining obligations. But this conclusion is premature because, before the possibility of awarding substantial damages even arises, the plaintiff must establish: (1) the existence of the contract; (2) a repudiatory breach; and (3) either that the allegedly lost performance was objectively valuable or that the plaintiff has suffered a sufficiently certain, non-remote adverse consequence. Moreover, as noted above in Part II(B), it is strongly arguable that the causal connection between breach and loss that is required to justify a private law claim is actually the sufficiency relation identified by the NESS test, rather than the necessity relation synonymous with the but-for test. The result would then be that the plaintiff has already done everything necessary to establish its prima facie entitlement to substantial damages. This entitlement is, of course, defeasible if the defendant establishes that legal *responsibility* for the loss it has factually caused is more appropriately attributed to some other event, which potentially includes the plaintiff's future inability to perform.

### 2 *Two Relevant Considerations of Fairness*

Invariably, to presume that the plaintiff would not have performed its remaining obligations also conflicts with an important countervailing, fairness-based, consideration of salience in the present context. Kramer has labelled that consideration 'the [extended] *Armory* principle'.[81] Leggatt J both explained and endorsed this principle in *Yam Seng Pte Ltd v International Trade Corp Ltd*,[82] when his Lordship observed that:

> [I]t is fair to resolve uncertainties about what would have happened but for the defendant's wrongdoing by making reasonable assumptions which err if anything on the side of generosity to the claimant where it is the defendant's wrongdoing which has created those uncertainties.[83]

So expressed, this principle is relatively uncontroversial,[84] though in certain contexts there is debate regarding whether the onus thereby cast upon the defendant is (or should be) legal or 'evidentiary'.[85] But regardless of the precise position one takes in these debates, we suggest that, following the defendant's proven repudiatory

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[81] Adam Kramer, 'Proving Contract Damages' in Graham Virgo and Sarah Worthington (eds), Commercial Remedies: Resolving Controversies (Cambridge University Press, 2017) 228, 229–33, referencing the famous case of *Armory v Delamarie* (1722) 1 Strange 505; 93 ER 664 and noting at 230 that this principle 'has a very long history in US law at the highest level'. Notably, in *Cessnock City Council v 123 259 932 Pty Ltd*, a majority of the High Court of Australia recently invoked this 'facilitation principle' approvingly as the 'rationale' for allowing the recovery of expenditure 'in anticipation of, or reliance on, the performance of the obligation that was breached': *Cessnock* (2024) 98 ALJR 719, 736–7 [67], 746–7 [127]–[130], 749 [139], 755–6 [168] (Edelman, Steward, Gleeson and Beech-Jones JJ) ('*Cessnock*').

[82] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] 1 All ER (Comm) 1321.

[83] Ibid [188]. The High Court of Australia also endorsed this principle in *Berry v CCL Secure Pty Ltd*, albeit when considering appropriate allocation of an *evidential* (rather than legal) onus: see *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151, 169–70 [29] (Bell, Keane and Nettle JJ).

[84] For acceptance of this principle in the context of a claim for medical negligence, see *Snell v Farrell* [1990] 2 SCR 311. For recent academic consideration of this idea in the context of a claim for medical negligence, see Sara M Peters, 'Shifting the Burden of Proof on Causation: The One Who Creates Uncertainty Should Bear its Burden' (2020) 13(2) *Journal of Tort Law* 237, 248–56.

[85] See, eg, the disagreement amongst the High Court of Australia as to the nature of the so-called 'presumption of recoupment' in *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 ('*Amann*'), now arguably rendered academic by the more recent decision in *Cessnock* (n 81).

breach, the *Armory* principle provides one (albeit, not necessarily decisive) reason to commence the damages analysis by adopting a rebuttable presumption that the plaintiff would have been able to perform any remaining obligations.

A second fairness-based consideration that arguably supports allocating to the defendant the onus of proof as regards the plaintiff's future ability (or inability) to perform is that doing so holds the parties to relevantly equivalent evidential standards in relation to their future capacity to perform and thereby adopts the starting assumption that neither party is a legal wrongdoer. Recognising that the plaintiff has already established both a cause of action and, at least prima facie, a compensable deprivation, it is at least arguable that the plaintiff should receive the benefit of the same assumption.

### 3 *The Presumptive Availability of Specific Performance to the Plaintiff*

A novel claim that we advance in this article is that whether an order for specific performance was presumptively available to the plaintiff is another consideration that bears upon proper allocation of the onus of proving the plaintiff's future ability (or inability) to perform in cases where allocation is required.[86] By 'presumptively available to the plaintiff' we denote circumstances where seeking specific performance and establishing readiness and willingness to perform any remaining essential obligations entitles the plaintiff to such relief *unless* the defendant establishes the existence of one or more sufficiently forceful 'countervailing reason[s]'[87] to justify denial of relief.

There is obviously some uncertainty regarding precisely when specific performance is presumptively available. But one uncontroversial example, at least in Australia and England,[88] is where an innocent purchaser seeks specific performance following the vendor's repudiation of a contract for the sale of land.[89] For reasons explained below, we contend that when loss of bargain damages are claimed in circumstances where specific performance was presumptively available to a plaintiff, considerations of both fairness and efficiency favour making the plaintiff's success conditional upon proof of its future ability to perform.

The fairness-based argument supporting this proposal is as follows. Orders for specific performance share a common objective with orders for loss of bargain damages: both legal responses attempt to put the plaintiff in the same position as if the contract had been performed, either by ordering the defendant to perform or to pay damages approximating the non-breach position. But specific performance is

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86 By specific performance we also include 'equitable relief approximate to specific performance' in the sense used in *Pakenham Upper Fruit Co Ltd v Crosby* (1924) 35 CLR 386, 394 (Isaacs and Rich JJ).

87 We adopt this terminology from Robert Stevens, *The Laws of Restitution* (Oxford University Press, 2023) pt VII.

88 Cf the Canadian position established in *Semelhago v Paramadevan* [1996] 2 SCR 415 ('*Semelhago*'), affd *Southcott Estates Inc v Toronto Catholic District School Board* [2012] 2 SCR 675.

89 It is less clear whether a vendor is (or should be) presumptively entitled to specific performance of a contract for the sale of land. For discussion on this, see Paul S Davies, 'Being Specific about Specific Performance' (2018) 4 *Conveyancer and Property Lawyer* 324, 328.

only ordered where damages are 'inadequate',[90] or where such an order will do 'more perfect and complete justice'.[91] Thus, where specific performance is presumptively available, this response necessarily constitutes a closer — and therefore, objectively better — substitute for performance than awarding loss of bargain damages.

Next, consider that a further requirement to obtain specific performance is that the plaintiff must plead and prove its readiness and willingness to perform any remaining essential obligations.[92] At least absent a compelling reason for why, from the plaintiff's perspective, damages are now preferable to performance, combining these two premises leads to the conclusion that where specific performance is presumptively available, a plaintiff capable of proving its readiness and willingness to perform any remaining essential obligations would be expected to seek specific performance rather than claim damages.[93] Accordingly, if damages are claimed in circumstances where any such monetary award is *not* conditioned on proof of readiness and willingness to perform, this may justifiably raise the suspicion that this party could not, in fact, have performed some of its remaining essential obligations.

We therefore contend both that: (i) it is justifiable to place the onus on the plaintiff to explain its choice to claim damages rather than seek specific performance in these circumstances; and (ii) the most reliable and fair way for the plaintiff to discharge this explanatory burden is by persuasively establishing its readiness and willingness to perform any remaining essential obligations. To explain this second proposition further, while the law could demand a direct explanation from the plaintiff as to why it is seeking damages rather than seeking specific performance, this conflicts with the general principle that damages are available as of right. Additionally, proof of readiness and willingness to perform may actually constitute a more 'honest signal'[94] — roughly speaking, a signal that cannot easily be faked — that the plaintiff has a legitimate reason (that is, a reason other than that it cannot perform some of its remaining obligations) to claim damages rather than seek specific performance. This is because it is easier for a plaintiff to successfully fabricate a convincing explanation for seeking damages than to successfully fabricate proof of its future capacity to perform. We therefore conclude that making the plaintiff's entitlement to damages conditional upon proof of its future ability to perform constitutes a reliable and fair mechanism to determine the legitimacy of the

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90 See *Harnett v Yielding* (1805) 2 Sch & Lef 549; *Adderley v Dixon* (1824) 1 Sim & St 607, 610; 57 ER 239, 240–1 (Leach VC); *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 (Lord Diplock).

91 See, eg, *Dougan v Ley* (1946) 71 CLR 142, 150 (Dixon J), quoting *Wilson v Northampton and Banbury Junction Railway Co* (1874) LR 9 Ch 279, 284 (Lord Selbourne).

92 See, eg, *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, 619–20 (Mason CJ and Dawson J), citing *Mehmet v Benson* (1965) 113 CLR 295, 307 (Barwick CJ), 314 (Windeyer J); ICF Spry, *Equitable Remedies* (Lawbook, 9th ed, 2013) 224.

93 One difficulty here is that, since the making of an order for specific performance always lies in the court's discretion, there is necessarily *some* uncertainty as to whether the order will be made. For present purposes, however, we note that in most cases it can be reliably predicted whether, subject to the availability of some equitable bar to relief, the order will be made. Our essential claim is that, at least where this is so, the plaintiff would be expected to seek such an order instead of claiming loss of bargain damages.

94 See Amotz Zahavi, 'Mate Selection: A Selection for a Handicap' (1975) 53(1) *Journal of Theoretical Biology* 205.

plaintiff's choice to claim damages rather than seek specific performance in circumstances where specific performance was presumptively available to the plaintiff.

The central point made here may be understood simply as imposing the same burden of proof on the plaintiff as regards its readiness and willingness to perform irrespective of whether it is claiming loss of bargain damages or seeking specific performance in cases where the latter is presumptively available. One justification for the law adopting this approach is that to do otherwise would allow plaintiffs who are not ready or willing to perform to bypass the proof requirements necessary to obtain specific performance by claiming damages designed to achieve the same (normative) objective of placing the plaintiff in the non-breach position. That is, plaintiffs lacking the capacity to perform some of their remaining obligations would be incentivised to claim damages precisely when specific performance is presumptively available.

This observation gives rise to an additional, efficiency-based (error-minimisation) reason for allocating the onus of proof to the plaintiff. If plaintiffs could circumvent the proof requirements imposed to obtain specific performance by claiming damages, more speculative damages claims would be brought, thereby increasing the risk of awarding substantial damages to plaintiffs where the defendant's breach was not, in fact, a necessary condition of the (alleged) loss of performance. Importantly, this conclusion holds even in cases where the plaintiff does indeed have a legitimate reason for pursuing damages instead.

Significantly, the preceding argument does not depend upon, or imply that, when the plaintiff could — and would normally be expected to — seek specific performance, but instead claims damages, it is more likely than not that the plaintiff could not have performed. While this may well be true, a conclusive determination cannot be made without reliable empirical evidence. However, if at least *some* plaintiffs would claim damages instead of seeking specific performance because they are unable to perform, it seems almost certain that the likelihood that the plaintiff could not have performed will be higher where specific performance is also presumptively available than in cases where only damages are available.

## B *Damages Claims When the Obligations are Dependent (but not Concurrent)*

As explained in Part II(A), for the purposes of damages assessment, dependent obligations should be understood as encompassing circumstances where the plaintiff's entitlement to receive or *retain* the defendant's counter-performance is conditional upon the plaintiff's ability to perform its corresponding dependent obligation.[95] Thus, at least if the breach must be necessary — rather than merely a necessary element of a set of antecedent conditions that was sufficient[96] — for the occurrence of the relevant loss, the plaintiff's future ability to perform cannot be

[95] As noted, although this is a more expansive definition of dependence than that articulated in *Kingston v Preston* (n 17), what presently matters is whether the parties' obligations are conditionally-related, rather than which party technically had to perform first.

[96] This is just a shorthand statement of the NESS test: see Wright (n 24) 1774–813.

disregarded.[97] Accordingly, the critical question when assessing damages is whether the starting assumption should be that the plaintiff was able (or unable) to perform its remaining obligation(s). We argue that the former assumption should be adopted.[98] On this rebuttable presumption approach, proof by the plaintiff that the defendant was in repudiatory breach and that the promised performance was objectively valuable generates a prima facie, but defeasible, entitlement to damages reflecting that value. For the avoidance of doubt, the defeat (or reduction) of that prima facie entitlement will depend upon the defendant proving *either* the occurrence of a post-termination event to which the relevant loss can be otherwise attributed *or* that the plaintiff would have been unable to perform all (or some) of its remaining obligations.

### 1 *Consideration of Relevant Authority*

Perhaps surprisingly, the question whether a plaintiff who accepts a defendant's repudiation of a contract containing multiple unperformed dependent obligations must prove its future ability to perform to recover substantial damages does not appear to have been authoritatively resolved in Australia, Canada, New Zealand or the United Kingdom.[99] One source of uncertainty is that the plaintiff's future ability to perform is typically simply assumed when substantial damages are claimed. This, for example, occurred in both *The Golden Victory* and *Globalia Business Travel SAU of Spain v Fulton Shipping Inc of Panama* ('*The New Flamenco*'),[100] each of which involved a claim for substantial damages following the charterer's repudiation of a time charter. Notably, in neither case was it suggested that the plaintiff's entitlement to recover substantial damages depended upon it affirmatively establishing a future capacity to perform any remaining obligations. Similarly, in *Commonwealth v Amann Aviation Pty Ltd*,[101] a case predominately concerned with the recovery of 'wasted expenditure' rather than loss of bargain damages, Amann's entitlement to recover was not regarded as dependent upon proof of its future ability to perform any outstanding obligations.[102]

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97 As explained, even if the factual causation inquiry is fundamentally concerned with sufficiency, rather than necessity, proof that the relevant loss would have been suffered anyway may constitute a defence to liability.

98 For more detailed examination of this specific scenario, see David Winterton, 'Prioritising Proof over Speculation: Resolving the Prospective Inability Problem in Contract Damages' (2023) 86(4) *Modern Law Review* 843.

99 Alongside the Australian and English authorities, which are our principal focus here, the question does not appear to have been settled in New Zealand, and was recently described as 'unresolved' in Canadian law in *Saramia Crescent General Partner Inc v Delco Wire and Cable Ltd* [2018] ONCA 519, [83] quoting *Webster Estate v Thomson* [2008] 241 OAC 360, [24] citing GHL Fridman, *The Law of Contract in Canada* (Carswell, 5th ed, 2006) 550–1.

100 *Globalia Business Travel SAU of Spain v Fulton Shipping Inc of Panama* [2017] 1 WLR 2581 ('*The New Flamenco*').

101 *Amann* (n 85).

102 The trial judge's conclusion that the possibility that Amann's breaches of its contractual obligations did not amount to a 'repudiation' was affirmed on appeal: see, eg, *Amann Aviation Pty Ltd v Commonwealth* (1990) 22 FCR 527, 535 (Davies J), 562 (Sheppard J).

By contrast, an important recent authority standing in opposition to the rebuttable presumption approach is *The Glory Wealth*.[103] The repudiating charterers there appealed an arbitration award in favour of the disponent owners who were 'to carry six cargoes of coal in bulk in each of the years 2009, 2010 and 2011'.[104] The owners claimed damages for an 'actual repudiatory breach'[105] of the contract of affreightment following the charterers' failure to declare laycans. Relevantly, the charterers argued that the effect of *The Golden Victory* (and other authorities)[106] was that recovery of substantial damages by the owners depended upon proof that, had laycans been declared, the owners would have been able to perform any remaining obligations. In response, relying upon *Gill & Duffus SA* and other authorities,[107] the owners argued that the plaintiff's ability to perform in the post-termination period was irrelevant.

Although observing that 'neither is a decision on the actual point which the court must determine',[108] Teare J viewed resolution of the appeal as turning upon whether the reasoning in *Gill & Duffus SA* or that favoured by *The Golden Victory* majority should be followed in the present circumstances. Having considered these authorities (and others), his Lordship viewed the charterers' argument as leading to a result that more appropriately conformed to the *Robinson v Harman* principle.[109] Notably, Teare J observed:

> The innocent party is claiming damages and therefore the burden lies on that party to prove its loss. That requires it to show that, had there been no repudiation, the innocent party would have been able to perform his obligations under the contract.[110]

Teare J's decision has been forcefully criticised by both Treitel and Peel, who each highlighted the onerous nature of the burden thereby imposed upon the plaintiff.[111] By contrast, McLauchlan defended Teare J's holding, albeit subject to the qualification that the repudiating party should bear an 'initial *evidential* burden'[112] to put the plaintiff's future inability to perform in issue. Significantly, only this interpretation of Teare J's statement is consistent with *The Golden Victory* and *The New Flamenco*, since in neither case was it suggested that the plaintiff's entitlement to substantial damages depended on it affirmatively establishing a future capacity to perform.

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[103] For support of Teare J's decision, see McLauchlan (n 59). For criticism, see Peel (n 4); Victor Goldberg, *Rethinking the Law of Contract Damages* (Edward Elgar Publishing, 2019) ch 2; Carter and Courtney (n 23) 270–1.

[104] Peel (n 4) 30.

[105] *The Glory Wealth* (n 3) 1083 [3] (Teare J).

[106] These included *The Mihalis Angelos* (n 8); *Esmail v Rosenthal & Sons Ltd* [1964] 2 Lloyd's Rep 447; *Fercometal SARL v Mediterranean Shipping Co SA* [1986] 1 Lloyd's Rep 171 ('*The Simona*'); *Acre 1127 Ltd (in liq) v De Montfort Fine Art Ltd* [2011] EWCA Civ 87.

[107] In particular, *Braithwaite* (n 7); *Taylor* (n 7); *Continental* (n 7); *British and Beningtons* (n 7); *Gill & Duffus SA* (n 5).

[108] *The Glory Wealth* (n 3) 1106 [84] (Teare J). As Peel has observed, *Gill & Duffus SA* was in fact directly on point: see Peel (n 4) 31.

[109] *The Glory Wealth* (n 3).

[110] Ibid 1106 [85] (Teare J).

[111] See, eg, Bridge, *Benjamin's Sale of Goods* (n 4) 1692–3 [19-169]–[19-170]; Peel (n 4).

[112] McLauchlan (n 59) 548 (emphasis in original).

In our view, Teare J's decision displays two critical errors. The first, and most fundamental, error was the assumption that establishing causation requires proving that the defendant's breach was a necessary condition of the loss claimed. As we have explained, the better view is that establishing causation, at least prima facie, merely requires proving that the defendant's breach was one necessary element of a set of antecedent conditions sufficient for occurrence of the relevant loss. Secondly, Teare J's reliance upon *Maredelanto Cia Naviera SA v Bergbau-Handel GmbH* ('*The Mihalis Angelos*')[113] and *The Golden Victory*[114] displayed a failure to recognise the important distinction between a case where an event has occurred subsequent to the breach that *certainly* would have enabled the contract's early termination, and cases where a defendant merely speculates that the plaintiff would not have been able to perform some or all of its remaining obligations. This resulted in an unjustifiable application of the *Robinson v Harman* principle that effectively requires the plaintiff to prove that it would not eventually have repudiated (or seriously breached) an already discharged contract.[115]

To elaborate, the question in *The Golden Victory* was whether the occurrence of a post-termination event that (it was assumed)[116] would have prevented the loss of some of the performance that the plaintiff alleged it had been deprived of by the defendant's breach[117] should reduce the damages otherwise payable.[118] By majority, the House of Lords held that it should.[119] In *Bunge SA v Nidera BV*, the UK Supreme Court unanimously affirmed this holding in the context of an anticipatory breach of a contract for a one-off sale of goods. Significantly, Lord Sumption JSC also observed that the same approach should apply if 'the defaulter would have been relieved of the obligation to perform by frustration',[120] or 'the injured party would have been unable to perform… when the time for performance arrived',[121] albeit apparently leaving open who bears the onus of proof in relation to this fact.

In *The Glory Wealth*, Teare J ultimately decided that the owners would have been able to perform their future obligations because the contract permitted their vicarious performance.[122] Accordingly, since the point was technically obiter dicta, *The Glory Wealth* has limited authoritative force, and the central question raised by that case remains unresolved.

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113 *The Mihalis Angelos* (n 8).

114 *The Glory Wealth* (n 3) 1105 [81] (Teare J).

115 See further, Winterton (n 98).

116 See, eg, *The Golden Victory* (n 8) 398 [82] (Lord Brown).

117 It was accepted that, upon the outbreak of the Iraq War, the charterer would have exercised its right to cancel the contract under clause 33 of the charterparty: ibid 369 [7] (Lord Bingham), 379 [28] (Lord Scott); 393 [69] (Lord Brown).

118 Assessed by reference to 'the difference between the charter rate and the (lower) market rate for the remaining four-year period' of the charter: see *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2005] 1 All ER (Comm) 467, 471 [10] (Langley J).

119 See *The Golden Victory* (n 8) 383–4 [37]–[38] (Lord Scott), 393 [68] (Lord Carswell), 398–9 [83] (Lord Brown).

120 *Bunge* (n 8) 1089–90 [16]. This, for example, is consistent with *Avery v Bowden*, where the closure of the Dardanelles overtook the charterers' earlier refusal to provide a cargo: *Avery v Bowden* (1855) 5 El & Bl 714; 119 ER 647.

121 *Bunge* (n 8) 1089–90 [16].

122 *The Glory Wealth* (n 3) 1108–9 [98]–[100]. It was therefore not strictly necessary for Teare J to express a concluded view as to the plaintiff's proof requirements.

More recently, the Court of Appeal of England and Wales considered a similar but distinct issue in *Classic Maritime Inc v Limbungan Makmur SDN BHD* ('*Limbungan (EWCA)*').[123] The question of liability arising there turned on the construction of an 'exceptions clause' purporting to exempt the charterer (Limbungan) from liability under a contract of affreightment with the ship owner (Classic), where the occurrence of a supervening event rendered future performance impossible. Distinguishing that clause from a contractual frustration clause,[124] Teare J held at trial that Limbungan could not claim the benefit of the clause's protection because it could not prove that it would have been ready and willing to perform had that supervening event not occurred.[125]

This finding was upheld by the Court of Appeal. Significantly, however, Teare J's further holding that Classic could not recover substantial damages was overturned.[126] While certain features of the reasoning to that conclusion may be disputed — in particular, the suggestion that a different approach to the treatment of 'later events' is justified in cases of anticipatory, as opposed to actual, repudiatory breach[127] — the Court's conclusion is arguably defensible on the alternative basis that the contract imposed 'an *absolute* obligation to ship'.[128] The decision in *Limbungan (EWCA)* is accordingly consistent with our central thesis that it is of critical importance to construe the nature of, and relationship between, the parties' unperformed obligations when determining precisely what the plaintiff must prove to recover substantial damages following an accepted repudiatory breach of contract.

## 2 *Assessment of Considerations Relevant to Allocation of the Onus of Proof*

How, then, should a case like *The Glory Wealth* be decided? When assessing damages for repudiatory breach, there will always be some speculation involved in determining what would have happened in the post-termination period. Where the plaintiff's future ability to perform is uncertain, it may therefore technically be impossible for the plaintiff to establish conclusively that the defendant's breach was a necessary condition for the occurrence of the loss claimed. '[T]he [extended] *Armory* principle'[129] accordingly suggests that where the breach has made proof of the 'non-breach position'[130] sufficiently difficult, the plaintiff should receive the benefit of any doubt regarding its future ability to perform, or a 'fair wind in establishing the value of what he lost',[131] at least when the claim is one for loss of

[123] *Classic Maritime Inc v Limbungan Makmur SDN BHD* [2019] 4 All ER 1145 ('*Limbungan (EWCA)*').
[124] *Classic Maritime Inc v Limbungan Makmur SDN BHD* [2019] 2 All ER 622, 640–1 [81]–[85].
[125] Ibid 652 [147].
[126] *Limbungan (EWCA)* (n 123) 1164 [82], 1166 [90], overturning Teare J's contrary obiter dicta.
[127] See ibid 1164 [83]. This proposition is persuasively criticised in MN Howard and John Knott, 'Force Majeure, Frustration and Exceptions Clauses: Damages in Hindsight' [2020] (2) *Lloyd's Maritime and Commercial Law Quarterly* 179, 188.
[128] Howard and Knott (n 127) 190 (emphasis added). See also Bridge observing that '[i]n causal terms, the dam burst overtook the absence of readiness and willingness on the part of Classic': Michael Bridge, 'Exceptions Clauses and Contractual Frustration Clauses' (2020) 136 (January) *Law Quarterly Review* 1, 6.
[129] Kramer, 'Proving Contract Damages' (n 81) 229–33.
[130] Kramer, *The Law of Contract Damages* (n 31) 14–15, chs 12–13.
[131] *Browning v Brachers* [2005] EWCA Civ 753, [210] (Parker LJ).

the promised performance rather than one for consequential loss. As noted in Part II(C) one plausible basis for distinguishing these two categories of claim is that only in relation to the former did the defendant have an *obligation* to provide the subject-matter of the claim. But the more fundamental point is that, if factual causation is essentially concerned with sufficiency rather than necessity, once the plaintiff has proven (1) the contract's existence; (2) the defendant's breach; and (3) the objective value of the performance not provided, it has established a (potentially defeasible) legal entitlement to substantial damages.

These observations alone provide good reason to adopt the rebuttable presumption view when assessing loss of bargain damages. But an additional consideration arguably supporting this view is that to do otherwise would conflict with the principle that parties to a civil dispute should be accorded equal treatment under the law.[132] Once the plaintiff has proven the existence of a contract as well as a sufficiently serious breach by the other party to justify it being discharged from further performance, the plaintiff, generally speaking, should receive the benefit of an assumption that it would not eventually have breached the contract. Teare J's approach in *The Glory Wealth* embodies the opposite assumption: namely, that the plaintiff would have repudiated an already-discharged contract.

A further, more practical, problem with placing the onus of proof on the plaintiff is that, as Treitel has also observed, 'it is far from clear what other conceivable obstacles … must be negatived by the innocent party, merely because they have been alleged by the party in breach'.[133] In a penetrating analysis of the relevant authorities, Carter and Courtney similarly observed that 'Teare J's criterion of "would have been able to perform" is ambiguous as to what the plaintiff has to prove',[134] going 'considerably further' than just addressing the difficulties created by 'actual [post-breach] events', and 'raising matters with which *The Golden Victory* did not deal'.[135]

The essential point here is that, given the distinctive tasks respectively confronting a judge in *The Golden Victory* and *The Glory Wealth*, the two scenarios are relevantly distinguishable. In the former case, because the Iraq War had commenced by the time of decision, the only matter for speculation was whether the charterers would have exercised their right to cancel upon the happening of this event; and notably, it was simply assumed that they would have.[136] By contrast, the nature of the adjudicative task in *The Glory Wealth* was more speculative because determining whether the plaintiff would have obtained the benefit of the contract requires consideration of hypothetical events beyond the plaintiff's control, possibly occurring over an extended period. Moreover, as Carter and Courtney explained, Teare J's preferred approach in *The Glory Wealth* effectively converts the plaintiff's claim for damages into one for a contingent, consequential, loss since it necessarily

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132 See Bridge, *Benjamin's Sale of Goods* (n 4) 1706–7 [19.180].

133 Ibid.

134 Carter and Courtney (n 23) 271.

135 Ibid.

136 An assumption that was arguably unjustified: see David McLauchlan, 'Expectation Damages, Avoided Loss, Offsetting Gains and Subsequent Events' in Djakhongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 349, 356–60.

> includes hypothetical events that *might* have occurred if the contract had continued, and actual events that would still have occurred and *might* have affected the plaintiff's ability to perform. Taking such matters into account must logically lead to discounting [damages awards] by reference to possibilities.[137]

As Reynolds has observed, such an analysis essentially converts the claim for damages into something akin to one for the loss of a chance to perform one's remaining promises.[138] Such an approach might be defended on the basis that, under conditions of uncertainty, it represents a more accurate estimation of the objective *value* of the lost performance.[139] But for the foregoing reasons, we suggest that the onus of proving that such discounting is necessary to estimate this value more accurately should be allocated to the defendant. This recommendation is fortified by the fact that simply defaulting to such discounting in the absence of proof by the defendant may invite the repudiation of long-term contracts that later turn out to be undesirable for one of the parties, thereby disincentivising contractual performance.[140]

### 3 *Damages Claims Where Specific Performance is Sought but Refused*

Given the preceding analysis, we now consider the position applicable in two different scenarios where damages are claimed after specific performance has been sought but refused. The first is a claim for damages for the loss of multiple unperformed dependent obligations. The second is a claim for damages in lieu of specific performance under *Lord Cairns' Act*.[141]

In determining what the plaintiff must prove to recover substantial damages in the first scenario, there appear to be two potentially relevant considerations. One is that there is a possible principled basis for distinguishing this scenario from a more typical scenario where damages for multiple unperformed obligations alone are claimed following the defendant's repudiatory breach. This basis is that, even though the plaintiff's entitlement to specific performance depends (at least) upon demonstrating its capacity to perform its upcoming dependent obligation, it is not obvious that proof of an *ongoing* ability to perform all of its remaining obligations should be necessary in the former scenario. This is because the defendant will simply be discharged if the plaintiff cannot perform one of its remaining essential dependent obligations.[142] On the other hand, the plaintiff's inability to perform future obligations arguably provides a good reason not to order specific performance, so the force of this observation should not be overstated.

Fortunately, however, there is a second, more forceful reason to distinguish the two scenarios, which is that it seems highly unlikely that specific performance would ever *presumptively* be available to a plaintiff in cases where multiple

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137 Carter and Courtney (n 23) 271 (emphasis in original). A similar point is made by Peel (n 4) 32.

138 Francis Reynolds, '*The Golden Victory*: A Misguided Decision' (2008) 38(2) *Hong Kong Law Journal* 333, 337.

139 See also Winterton (n 98) 870–1.

140 The undesirability of creating such incentives was recently recognised, albeit in a somewhat different context, by Gageler J in *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, 602 [90].

141 *Chancery Amendment Act 1858,* 21 & 22 Vict c 27, s 2 ('*Lord Cairns Act*').

142 See English, *Discharge of Contractual Obligations* (n 18) ch 2.

dependent obligations remain unperformed. This is because, at least according to present law, the defendant may argue that such relief should not be granted due to the need for the court's 'continued supervision'.[143] The precise scope of this bar to relief is contested and it is certainly possible that a plaintiff may legitimately seek specific performance in such circumstances even if ultimately unsuccessful, as occurred in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*.[144] The complex issues raised by that case have been explored elsewhere.[145] But given the significant risk that the damages ultimately recoverable by the plaintiff landlord there were under-compensatory, it is strongly arguable that in such cases the plaintiff should also receive the benefit of a rebuttable presumption that it would have performed its remaining obligations for essentially the same reasons outlined above in relation to the more standard case where damages alone are claimed.

The second scenario of present relevance is where damages are claimed in lieu of an order for specific performance following the refusal of such an order. Unlike a claim for loss of bargain damages, the purpose of this kind of award is not to substitute for the promised performance, but to substitute for the relevant coercive court *order*.[146] Accordingly, such awards should be subject to the same proof requirements that condition that order's availability. In the leading Canadian decision in *Semelhago v Paramadevan* ('*Semelhago*'), the defendant vendor repudiated the contract and conveyed the property to a third party.[147] The plaintiff's request for specific performance was refused, but the plaintiff successfully claimed damages in lieu, recovering the increase in value of the property between the date of breach and trial. Significantly, the Court refused to reduce this sum to reflect the increase in value of the plaintiff's own property during this period, which would otherwise have been sold to finance the transaction. While it might be argued that this result conferred a windfall on the plaintiff, we contend that the decision is justified by the (aforementioned) distinctive purpose of an award of damages in lieu of specific performance,[148] at least assuming that the plaintiff was ready and willing to perform its essential obligations. In *Semelhago* itself, it appears simply to have been assumed that this was so, presumably because the defendant did not assert otherwise.

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143 See, eg, *JC Williamson Ltd v Lukey* (1931) 45 CLR 282, 297–8 (Dixon J), cited with approval in *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, 12 ('*Argyll Stores*'). Cf David Pearce, 'Remedies for Breach of a Keep-Open Covenant' (2008) 24(3) *Journal of Contract Law* 199.

144 *Argyll Stores* (n 143).

145 See, eg, Daniel Friedmann, 'Economic Aspects of Damages and Specific Performance Compared' in Djakhongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 65; Pearce (n 143).

146 See *Semelhago* (n 88) [16]–[19] (Sopinka J for Gonthier, Cory, McLachlin, Iacobucci and Major JJ).

147 *Semelhago* (n 88).

148 See further, Robert Stevens, 'Damages and the Right to Performance: A *Golden Victory* or Not?' in Jason W Neyers, Richard Bronaugh, and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009) 171, 186.

## C *Damages Claims following the Anticipatory Breach of a Contract containing a Single Set of Concurrent (or Dependent) Obligations*

As explained above in Part III(B), when a defendant is in actual repudiatory breach of a concurrent obligation, the plaintiff must prove its ability to perform its own concurrent obligation just to establish a cause of action.[149] This simultaneously resolves the question whether the plaintiff's entitlement to substantial damages depends upon proof of its future ability to perform that obligation. But to establish a cause of action for an *anticipatory* breach of a concurrent obligation, the plaintiff need only demonstrate that it is not substantially incapacitated from, or definitively resolved against, performing its own concurrent obligation.[150] Whether there is anything further that the plaintiff must prove to recover substantial damages in these circumstances therefore remains open.

An additional source of difficulty here is the 'artificial'[151] nature of the concept of an 'anticipatory breach'. The conceptual difficulties attending that doctrine,[152] coupled with the fact that the requirements historically imposed upon a party seeking to maintain such an action were less onerous than those imposed upon one seeking to maintain an action for an actual repudiatory breach,[153] significantly complicate the assessment of damages in this context.[154] In *Foran*,[155] the vendors' anticipatory repudiation was not accepted so there was technically no anticipatory breach. But more recently, the question of what, if anything, the plaintiff must additionally prove to recover substantial damages following an accepted anticipatory repudiation arose more directly for consideration in the New South Wales Court of Appeal's decision in *Upside Property Group Pty Ltd v Tekin* ('*Upside Property Group (NSWCA)*').[156]

The plaintiff purchaser there brought alternative claims for 'loss of bargain damages'[157] or 'loss of profit from resale'[158] following the vendor's accepted anticipatory repudiation of a contract for the sale of land. At trial, it was held that the purchaser was precluded from recovering either award because it had failed to establish a cause of action for anticipatory breach,[159] and because it had suffered no

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149 *Foran* (n 6) 433 (Deane J); *Bahramitash v Kumar* [2006] 1 NZLR 577, 582 [16].

150 See, eg, *Psaltis v Shultz* (1948) 76 CLR 547, 560 (Dixon J); *Rawson v Hobbs* (1961) 107 CLR 466, 481 (Dixon CJ) ('*Rawson*'), relying upon *British and Beningtons* (n 7) 71 (Lord Sumner). See also *Upside Property Group (NSWCA)* (n 6) 38,140–41 [17] (Meagher JA).

151 For an insightful discussion, see *YP Barley Producers Ltd v EC Robertson Pty Ltd* [1927] VLR 194, 207 (McArthur J) ('*YP Barley*').

152 Ibid; Francis Dawson, 'Metaphors and Anticipatory Breach of Contract' (1981) 40(1) *Cambridge Law Journal* 83.

153 Lloyd described this as the 'ironic advantage' in resting one's claim for damages upon an *anticipatory*, rather than actual, breach: see Lloyd (n 32) 125. See also Francis Dawson, 'Waiver of Conditions Precedent on a Repudiation' (1980) 96 (April) *Law Quarterly Review* 239, 240.

154 For insights, see Michael Mustill, '*The Golden Victory*: Some Reflections' (2008) 124 (October) *Law Quarterly Review* 569.

155 *Foran* (n 6).

156 *Upside Property Group (NSWCA)* (n 6).

157 Ibid 38,138 [3].

158 Ibid 38,144 [36].

159 *Upside Property Group Ltd v Tekin* (2016) 18 BPR 36,191, 36,203–6 [59]–[85].

relevant loss.[160] These findings were unanimously upheld by the New South Wales Court of Appeal, with Meagher JA's reasons containing a lucid analysis of the legal principles applicable to establishing a cause of action for anticipatory breach and the recovery of substantial damages in this context.[161]

As to the cause of action for anticipatory breach, Meagher JA relevantly held that a plaintiff must prove its readiness and willingness 'to perform any obligation on which the defendant's obligation was conditioned'.[162] This meant that the purchaser was required to prove that, at the date of termination,[163] it 'was sufficiently on track to perform that there was a reasonable prospect of its being able to complete'.[164] This requirement was equated with that of the plaintiff being 'not presently incapacitated from future performance and … not indisposed to do, when the time comes, what the contract requires'.[165] If those requirements are satisfied, substantial damages may be *claimed*. But to *recover* substantial damages, Meagher JA held, a plaintiff must prove, on the balance of probabilities,[166] that it 'could have obtained the benefit of the contract at the time for performance of the respondent's concurrent and mutually dependent obligation to give title'.[167] In *Upside Property Group (NSWCA)*, the purchaser did not satisfy this requirement and accordingly received only nominal damages.[168]

### 1 *Cases Where Specific Performance is Presumptively Available*

It is notable that consideration of the proof requirements for the hypothetical and actual claims for damages for anticipatory breach that were brought in *Foran* and *Upside Property Group (NSWCA)* respectively arose in the context of the *purchaser's* acceptance of the vendor's anticipatory repudiation of a contract for the sale of land. As earlier observed, at least in Australia and England, in these circumstances an order for specific performance is presumptively available, even where the land is purchased in a commercial context.[169] Alongside the reasons outlined earlier in Part IV(A), two further considerations support making the plaintiff's entitlement to substantial damages following its acceptance of the defendant's actual or anticipatory repudiation of a contract containing a single concurrent or dependent obligation contingent upon proving its future ability to perform.

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160 This was because the value of the property did not exceed the contract price at the date of breach and the purchaser did not establish the likelihood of a profitable on-sale to a third party: see ibid 36,217–18 [147].

161 *Upside Property Group (NSWCA)* (n 6).

162 Ibid 38,140 [16] (Meagher JA), citing *Hensley v Reschke* (1914) 18 CLR 452, 460 (Barton J), 467 (Isaacs and Rich JJ); *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235, 253 (Kitto J); *Foran* (n 6) 402 (Mason CJ).

163 *Upside Property Group (NSWCA)* (n 6) 38,142 [25] (Meagher JA).

164 Ibid 38,141 [21] (Meagher JA).

165 Ibid 38,140 [17] (Meagher JA), quoting *Psaltis v Shultz* (n 150) 560 (Dixon J).

166 *Upside Property Group (NSWCA)* (n 6) 38,138 [3], 38,141 [21], 38,144 [36] (Meagher JA).

167 Ibid 38,142 [27] (Meagher JA), citing *Foran* (n 6) 430 (Brennan J). These findings were recently affirmed in *Interslice Pty Ltd v CCA Investments – Bass Hill Pty Ltd* [2025] NSWCA 175, [253]–[261] (McHugh JA).

168 *Upside Property Group (NSWCA)* (n 6) 38,144 [34], 38,147–8 [51]–[53] (Meagher JA).

169 See *Pianta v National Finance & Trustees Ltd* (1964) 180 CLR 146, 151 (Barwick CJ). Davies has observed that the same position 'has been assumed … in England': Davies (n 89) 328.

The first consideration is that the force of the *Armory* principle is largely diminished in such a case because the plaintiff can avoid any difficulties in proving its non-breach position by pursuing specific performance. The second consideration is that, following the defendant's repudiatory breach of a concurrent obligation (or a dependent obligation where the plaintiff must perform first),[170] the plaintiff cannot obtain the promised counter-performance merely by proving its readiness and willingness to perform that obligation; rather, the plaintiff must actually *perform*.

### 2 *Cases Where Specific Performance Is Not Presumptively Available*

In cases involving an anticipatory breach of a single concurrent obligation where an order for specific performance is not presumptively available, the considerations relevant to determining which party should bear the onus of proof in relation to the plaintiff's future ability to perform seem relatively finely balanced. As with cases involving the repudiation of a contract involving merely dependent obligations, these cases involve a claim for damages for the non-performance of an obligation where the time for performance of that obligation had not passed when the contract was terminated. Thus, the same problems that arise where the claim relates to an unperformed dependent obligation may also arise in cases involving an anticipatory breach of a concurrent obligation, which supports adopting the rebuttable presumption approach.

Conversely, where the parties' obligations are concurrent, the plaintiff's future ability to perform is relevant not just to its damages entitlement, but also to accrual of the underlying cause of action.[171] One might therefore propose that the approach in a case of an anticipatory breach of a concurrent obligation should mirror that taken where an actual repudiatory breach has occurred. It is true that establishing a cause of action for anticipatory breach does not require proof by the plaintiff of its future readiness and willingness to perform on the balance of probabilities.[172] However, we contend that the 'artificial'[173] nature of the anticipatory breach concept disfavours imposing more onerous proof requirements on a party claiming damages for an actual breach than those imposed upon a party claiming damages for a breach that is merely anticipated.

Having regard to the preceding analysis, a decision must ultimately be made regarding appropriate allocation of the onus of proof in such cases. In our view, once the defendant raises sufficient evidence to satisfy any *evidential* onus to put the plaintiff's future ability to perform in issue, the weight of relevant considerations narrowly favours allocating the *legal* onus of proof to the plaintiff.[174] This is principally because of the difficulty just outlined in justifying the imposition of

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[170] Obviously, this is not true when the obligations are dependent, but the *defendant* must perform first.

[171] Significantly, however, the relevant standard of readiness and willingness is lower in this context because it is sufficient that the plaintiff is not substantially incapacitated from (or definitively resolved against) performing the relevant concurrent obligation: see, eg, *Rawson* (n 150) 481 (Dixon CJ).

[172] And there is therefore no logical requirement that the same approach should be taken in anticipatory breach cases as in cases of actual breach.

[173] See *YP Barley* (n 151) 207 (McArthur J).

[174] We nevertheless again acknowledge the incommensurability problem that arises in assessing the 'balance of convenience' here: see further Sales and Wilmot-Smith (n 37).

harsher preconditions for recovery upon a plaintiff who proves that the defendant is in actual breach than those imposed upon a plaintiff who establishes the existence of a merely anticipated (and therefore, technically fictional) breach.[175] Nevertheless, recalling the relevance of the *Armory* principle, if the defendant's breach has made it especially difficult for the plaintiff to establish its future ability to perform, it seems appropriate that the plaintiff at least receive a 'fair wind'[176] in establishing its ability to perform so that precisely what must be demonstrated to satisfy the legal onus may vary depending on the circumstances. It is notable that such an approach is broadly consistent with certain judicial views expressed relatively recently in both Australia and the UK.[177]

### D *Damages Claims where the Contract Contains Multiple Concurrent Obligations*

Finally, in the (presumably rare) scenario where a repudiatory breach of a contract containing multiple sets of unperformed concurrent obligations occurs, proof by the plaintiff of its readiness and willingness to perform the upcoming concurrent obligation would obviously be necessary to establish a cause of action. However, at least in cases where specific performance is not presumptively available to the plaintiff, we suggest that the plaintiff should not have to prove its ability to perform any further concurrent obligations. This is because once the plaintiff has established a cause of action in relation to the defendant's repudiatory breach of the relevant concurrent promise, it does not have to establish further causes of action in respect of any subsequent unperformed promises. Accordingly, which party should be allocated the onus of proof in relation to the plaintiff's ability to perform the balance of the unperformed concurrent obligations should be determined by reference to the same considerations applicable to cases involving ordinary dependent obligations.

## V Conclusion

The extent to which a plaintiff's entitlement to substantial damages following the defendant's repudiatory breach of contract depends upon proving its future ability to perform any remaining obligations is a longstanding source of common law controversy. In this article, we proposed a two-stage model for resolving the problem across the full spectrum of scenarios where it may arise. Specifically, we argued that one must first distinguish between:

(1) cases where the relationship between the parties' unperformed obligations determines what the plaintiff must prove in relation to its future ability to perform; and

(2) cases where this relationship is not decisive.

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[175] To put the point conversely, it seems difficult to justify adopting presumptions that are more favourable to defendants in cases of actual breach than in cases of anticipatory breach.

[176] Kramer, 'Proving Contract Damages' (n 81) 231–2. See also *Cessnock* (n 81) 749 [139] (Edelman, Steward, Gleeson and Beech-Jones JJ).

[177] See *Cessnock* (n 81) 735–6 [61] (Edelman, Steward, Gleeson and Beech-Jones JJ); *Parabola Investments Ltd v Browallia Cal Ltd* [2011] QB 477, where the Court of Appeal unanimously held that a more generous application of the civil standard of proof should be adopted when dealing with future events: at 486, [23].

Within the second category, other features of the case must then be considered to determine proper allocation of the onus of proof in relation to the plaintiff's future ability (or inability) to perform. Perhaps most significantly, we also identified, within the second category of case, the presumptive availability of specific performance to the plaintiff as an important consideration that is relevant to onus allocation, and explained how recognising this assists in reconciling certain ostensible discrepancies between the leading English and Australian authorities.