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# British Westinghouse revisited

Andrew Dyson\*

*This article revisits the landmark decision of the House of Lords in British Westinghouse, one hundred years on. It highlights some of the uncertainties that still attend the doctrine of mitigation and situates the case among more recent decisions in the law of damages. It is argued that, contrary to conventional understanding, it is not necessary or plausible to explain British Westinghouse as an application of the rule that “claimants cannot recover for an avoided loss”. Instead, the case merely exemplifies the rule that benefits resulting from reasonable conduct in mitigation are taken into account in the assessment of damages.*

## I. INTRODUCTION

This year marks the one-hundredth anniversary of the House of Lords’ decision in *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No2)*.<sup>1</sup> The case is a leading authority in the law of damages for torts and breach of contract, in particular for the rules of mitigation. Voluminous recent litigation concerning the recovery of car hire charges has emphasised the decision’s modern importance,<sup>2</sup> but the underlying facts are also replete with historical interest. For instance, the Westinghouse machines—which formed the subject matter of the dispute—were purchased in order to provide the first ever electric power supply for what are now the Circle and District lines of the London Underground; at that time, they were the largest steam turbines ever built.<sup>3</sup>

Although *British Westinghouse* features pre-eminently in the main texts and authorities on mitigation,<sup>4</sup> the complex technical details of the case—of which the judgments form only a partial record—have resulted in a tendency to oversimplify the decision and to mischaracterise its legal significance. The purpose of this article is therefore to revisit the case one hundred years on, with the aid of the original Appeal Case records and other

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1. [1912] AC 673 (HL).

2. See, eg, *Sayce v TNT (UK) Ltd* [2011] EWCA Civ 1583, [30–31] (Moore-Bick LJ): “this appeal has brought to the surface some important questions about the current state of the law on mitigation which have implications beyond the confines of road traffic accident cases”. Although permission to appeal was refused, Moore-Bick LJ added that “it would be beneficial for these questions to be considered at the highest level as soon as a suitable opportunity arises”. For a list of other recent cases in the “saecular war” on car hire charges, see *Patni v First Leicester Buses Ltd* [2011] EWCA Civ 1384, [1], [29] (Aikens LJ).

3. See *post*, text to fn.13.

4. See, eg, Harvey McGregor, *McGregor on Damages*, 18th edn (Sweet & Maxwell, 2009), [7.014]; Andrew Burrows, *Remedies for Torts and Breach of Contract*, 3rd edn (OUP, 2004), 122–123, 158.

archival information, in order to clarify what the decision should stand for today. In so doing, the article aims to identify some of the remaining uncertainties in the law on mitigation, and to situate the House of Lords' decision within more recent developments.

## II. THE FACTS IN CONTEXT

### A. Turbines and traction

The capacity to convert steam power to electricity on a mass scale was a technological innovation of almost unparalleled social and economic significance. It was made possible by the invention of the steam turbine by Charles Parsons in 1884.<sup>5</sup> Parsons founded a company to begin the manufacture of turbines in Newcastle, and licensed his designs to the American manufacturing firm Westinghouse. George Westinghouse was the foremost proponent of alternating current in the United States, and a fierce rival of Thomas Edison, who favoured direct current.<sup>6</sup> Westinghouse saw an opportunity to expand his operations into Britain ahead of Edison's General Electric,<sup>7</sup> and so, in 1899, set up a subsidiary (named British Westinghouse) to begin the manufacture of turbines in Manchester.<sup>8</sup>

During their early development, the increase in efficiency of steam turbines was staggering. Efficiency was measured by the amount of steam that the turbine consumed for each kilowatt-hour of electricity produced. In 1884, Parsons' first turbine operated with a power of just 7.5kW and an efficiency of 130lbs/kWhr.<sup>9</sup> By 1900, the power of the leading designs had increased more than one hundred times to over 1,000kW, and yet steam consumption had been reduced to 20lbs/kWhr.<sup>10</sup> In 1913, a turbine later nicknamed "Old Reliability" was installed in Chicago with a power of 25,000kW, capable of achieving a steam consumption of less than 11lbs/kWhr.<sup>11</sup> The pace of these developments is crucial in understanding the findings of fact upon which the House of Lords in *British Westinghouse* relied.

Also around the turn of the twentieth century, the tube network in London began a process of rapid expansion. In 1902, the Underground Electric Railways Company of London ("London Underground") was formed with the aim of amalgamating the previously disparate companies that operated each of the main underground lines. One of these companies, the Metropolitan District Electric Traction Company, had already begun

5. A rudimentary version of the steam turbine was described by Hero of Alexandria in 130 BC, but Parson's 1884 patent is credited as the first modern design: Richard Hills, *Power from Steam: A History of the Stationary Steam Engine* (CUP 1989), 283.

6. Such was the ferocity of their rivalry, Edison secretly sponsored the development of the first electric chair in order to demonstrate the potential dangers of high voltage alternating current, and attempted (without success) to coin the term "Westinghoused" to describe early executions: Mark Essig, *Edison and the Electric Chair: A Story of Light and Death* (Sutton, 2003), 160–162; Tom McNichol, *AC/DC: The Savage Tale of the First Standards War* (Jossey-Bass, 2006), ch.8.

7. General Electric had earlier sent an engineer to England to study the Parsons turbine with a view to purchasing it, but thought the design too crude for development: Quentin Skrabec, *George Westinghouse: Gentle Genius* (Algora, 2006), 195.

8. Henry G Prout, *A Life of George Westinghouse* (C Scribner, 1922), 262–268.

9. R H Parsons, *The Development of the Parsons Steam Turbine* (Constable, 1936), 6.

10. *Ibid.*, 43.

11. *Ibid.*, 117.

building a new power station at Chelsea in order to supply electricity to replace the steam-powered trains on the Metropolitan District Railway (now the Circle and District lines). London Underground engaged British Westinghouse to provide the machinery for the new station.

*B. The facts of British Westinghouse*

The Metropolitan District Electric Traction Company (whose rights subsequently vested with London Underground) contracted with British Westinghouse to provide eight steam turbines and eight alternators for its Chelsea power station, at a total cost of £250,000. The specification (dated February 1903) required the turbines to operate at a power of 5,500kW, with a steam consumption of no more than 17.7lbs/kWhr.<sup>12</sup> These were very ambitious targets. Such was the rate of technological development at the time, turbine manufacturers frequently guaranteed a level of power and efficiency greater than they (or anyone else in the industry) had yet attained, with the aim of designing a new turbine to meet the specification by the deadline.<sup>13</sup> Accordingly, when the specification was concluded, no manufacturer had actually ever produced a turbine of the scale that British Westinghouse was promising.<sup>14</sup>

The Westinghouse machines began in service in 1905. However, they were said to be “defective in design, workmanship and materials”,<sup>15</sup> such that they failed to comply with several of the contractual terms contained in the specification. Numerous breaches of contract were alleged,<sup>16</sup> but the most important was that the turbines were less efficient than promised. British Westinghouse made several attempts to improve the turbines’ efficiency, but tests conducted in July and August 1908 showed that they consumed 14–24 per cent more steam than guaranteed.<sup>17</sup> Consequently they required extra coal to fuel them, thereby increasing London Underground’s running costs.

In October 1908, London Underground put out a tender to replace the Westinghouse turbines. They chose C A Parsons & Co, the company established by Charles Parsons when he invented the steam turbine. The cost of the Parsons machines was £78,226. This figure is sometimes juxtaposed with the much higher price of the original machines, but a direct comparison is inappropriate because the Westinghouse contract included both turbines and alternators, whereas the Parsons contract was for turbines only.<sup>18</sup> The Parsons turbines were guaranteed to operate at a power of 6,000kW, with a steam consumption of

12. Parliamentary Archives HL/PO/JU/4/3/610, Appendix 1—Contract between Appellants and Respondents, 12.

13. Parsons (fn.9), 96, 116.

14. At around the same time, Parsons accepted an order for a turbine of 3,500kW capacity which was “then more than double the capacity of any turbo-generating set constructed up to that time”: *ibid.*, 68. Meanwhile, British Westinghouse accepted another order for two 8,000kW turbines for the Clyde Valley Electrical Power Company in Scotland: Prout (fn.8), 268.

15. Parliamentary Archives HL/PO/JU/4/3/610, Appendix 4—Respondents’ Points of Defence and Counter-claim, 27.

16. For instance, the specification required that the parts for each of the eight turbines should be perfectly interchangeable, but British Westinghouse decided to split its manufacturing process between Manchester and its parent company in Pittsburgh, such that the turbine blades on three of its machines turned out to be a different length from the rest.

17. Parsons (fn.9), 33.

18. The Westinghouse alternators were largely satisfactory and were therefore retained by London Underground.

15.8lbs/kWhr.<sup>19</sup> This was around 2lbs/kWhr better than the Westinghouse turbines as specified, and almost 5lbs/kWhr better than the Westinghouse turbines had actually attained in testing.

### III. THE INITIAL PROCEEDINGS

#### A. *The parties' pleadings*

British Westinghouse claimed £85,398 as the unpaid balance of the contract price. London Underground counterclaimed for damages on the basis that the Westinghouse machines were defective. The first part of the counterclaim was for £43,260 as the cost of the extra coal required until the date at which the Parsons turbines came into service, plus £5,534 for replacement parts and labour costs. In the subsequent proceedings, no dispute arose as to these heads of damage.<sup>20</sup>

The focus of the dispute lay with the second part of London Underground's counterclaim. Initially, their pleadings comprised two alternatives. In the first alternative, it counterclaimed £237,728 as the cost of the extra coal that would have been required if it had not purchased the Parsons turbines and had instead continued to operate the Westinghouse turbines until the end of their mechanical lifetime (which was estimated to be 20 years in total).<sup>21</sup> In the second alternative, it counterclaimed the much smaller sum of £78,226 as the actual cost of purchasing and installing the Parsons machines, by use of which it avoided incurring the losses particularised under the first alternative.

The first alternative is an example of a claim for "avoided loss". In its broadest terms, an avoided loss is a loss which would be reasonably expected to occur as a result of the breach, but which for some reason (whether due to the post-breach conduct of the claimant or some other type of post-breach event) does not in fact eventuate. The second alternative is an example of a claim for reasonable expenses incurred in mitigation. In *McGregor on Damages*, these two types of claim are dealt with under the third and second rules of mitigation respectively.<sup>22</sup> McGregor's position is that avoided loss is almost always irrecoverable.<sup>23</sup> By contrast, reasonable expenses can be recovered, although it is implicit in his exposition that it is the net expense which is relevant.<sup>24</sup>

Without formally abandoning it, London Underground did not press its avoided loss claim in any of the proceedings.<sup>25</sup> No explanation for this change in tack is evident from the documents that passed between the parties or from the recordings of the proceedings themselves. However, it is submitted that such a claim would have been doomed to fail,

19. Parliamentary Archives HL/PO/JU/4/3/610, Appendix 5—Contract between the Respondents and the Honourable Charles Algernon Parsons, 60.

20. However, it is not entirely obvious that these sums should have been recoverable; see *post*, text to fn.101.

21. Parsons (fn.9), 36–40.

22. McGregor (fn.4), [7.005], [7.006].

23. *Ibid.*, [7.006]: "Put shortly, the claimant cannot recover for avoided loss".

24. *Ibid.*, [7.091–7.096].

25. *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railway Co of London Ltd (No.1)* [1911] 1 KB 575 (KB DC), 578.

for reasons explained below,<sup>26</sup> and so it may have been in realisation of the futility of its first pleading that London Underground decided to pursue the second alternative alone.

### *B. The arbitrator's findings*

The contract provided for the settlement of disputes by arbitration. The arbitrator found that the machines were “defective in design and efficiency and did not comply with the provisions of the contract and specification”.<sup>27</sup> In order to quantify damages for breach of contract, the arbitrator referred a question (known as a “Special Case”) to the Divisional Court, asking whether the argument of British Westinghouse that “no further damages of any kind were recoverable . . . after the date when Parson's machines were procurable”, was well founded.<sup>28</sup> He also made two important findings of fact.

First, the arbitrator found that “the purchase of the Parsons machines by the respondents was a reasonable and prudent course, and that it mitigated or prevented the loss and damage *which would have been recoverable* from the claimants if the respondents had continued to use the claimants' defective machines in the future”.<sup>29</sup> As will later be discussed, this finding seems highly dubious, given in particular the industrial background of the case, but since the first alternative was not pressed at the hearing it did not fall to be scrutinised directly, and it was subsequently assumed to be correct in the higher courts.

Second, the arbitrator noted that “the superiority of the Parsons machines in efficiency and economy over those supplied by the claimants was so great that even if the claimants had delivered to the respondents machines in all respects complying with the conditions of the contract it would yet have been to the pecuniary advantage of the respondents at their own cost to have replaced the machines”.<sup>30</sup> At the arbitration, London Underground's Chief Engineer estimated that the difference between the specified efficiencies of the Westinghouse and Parsons turbines was worth about £20,000 per year as a result of the reduced consumption of coal.<sup>31</sup> Accordingly, even ignoring the defects of the Westinghouse machines, the decision to replace the original turbines with the Parsons models paid for itself within four years.

### *C. Two decisions of the High Court*

The High Court considered the arbitrator's Special Case, and unanimously held that the argument of British Westinghouse was not well-founded; London Underground was entitled to recover the cost of the Parsons turbines. Lord Alverstone CJ, with whom Hamilton and Avery JJ agreed, justified this conclusion “on the ground that by their action they saved the claimants from a very much larger claim for damages”.<sup>32</sup> Accordingly, the

26. See *post*, text to fn.80.

27. The findings of the arbitrator are recorded in the Special Case, which was reported with the first decision of the Divisional Court: [1911] 1 KB 575 (KB DC), 576–579.

28. *Ibid.*, 579.

29. *Ibid.*, 578 (emphasis added).

30. *Ibid.*, 578–579.

31. Parliamentary Archives HL/PO/JU/4/3/610, Appendix 12—Affidavit of John Blair in Support of the Motion to Set Aside Award, 106.

32. [1911] 1 KB 575 (KB DC), 585.

court adopted the assumption of the arbitrator that a counterclaim for £237,728 would have been recoverable had London Underground chosen to continue using the Westinghouse machines for the remainder of their mechanical life.

Following the decision of the High Court, the case was returned to the arbitrator, who rejected British Westinghouse's claim for the unpaid balance of the contract price and awarded London Underground £15,394 in respect of their counterclaim.<sup>33</sup> British Westinghouse applied for an order that the award be set aside for an error in law, but their application was dismissed in a second round of High Court proceedings heard by Pickford and Lush JJ. The decision itself is unreported, but it is recorded elsewhere that the judges found themselves bound by the earlier decision of the High Court and dismissed the application without argument.<sup>34</sup>

#### *D. The decision of the Court of Appeal*

British Westinghouse appealed to the Court of Appeal, which upheld the arbitrator's award by a decision of two to one. Again, Kennedy LJ for the majority relied on the assumption that London Underground had saved British Westinghouse from "the far larger sum in damages which must have been charged to them if the reasonable course of purchasing and installing the Parsons machines had not been adopted".<sup>35</sup> Buckley LJ differed as to the construction of the arbitrator's findings and therefore dissented on the basis that the case should have been remitted to the arbitrator in order to establish further facts.

Disagreement focused on the arbitrator's finding that the purchase of the Parsons machines was a "reasonable and prudent course". Vaughan Williams LJ for the majority understood this finding to mean that "no cheaper model was available" for mitigation.<sup>36</sup> Buckley LJ thought that the phrase was ambiguous and sought to clarify whether London Underground could have bought replacement turbines of precisely the same specification as those under the Westinghouse contract, instead of larger and more efficient models.<sup>37</sup> Nevertheless, he agreed that the cost of the replacement turbines should be recoverable if it was found (as the majority had inferred) that there was no alternative but to purchase machines of a higher specification.<sup>38</sup>

Two points of interest arise from the Court of Appeal's discussion. First, Buckley LJ's concerns reflect what would today be referred to as a question of betterment.<sup>39</sup> He gave the following example:<sup>40</sup>

"If a man who has taken a third class ticket from London to the north by one of the great train companies is by the negligence of that company damaged by their breach of contract to convey him,

33. Details of the award are recorded in the judgment of Vaughan Williams LJ: *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No.2)* [1912] 3 KB 128 (CA), 141.

34. [1912] AC 673, 677.

35. [1912] 3 KB 128 (CA), 152.

36. *Ibid.*, 143. Kennedy LJ implicitly adopted the same understanding; 151.

37. In the House of Lords, Viscount Haldane thought it unnecessary to remit the case to the arbitrator on this point and adopted the construction preferred by the majority in the Court of Appeal: [1912] AC 673, 688.

38. [1912] 3 KB 128 (CA), 149.

39. Burrows (fn.4), 246–248.

40. [1912] 3 KB 128 (CA), 147.

and he, to reduce the damages, goes to another of the great train companies and takes a ticket by the next train on that line, and is thus enabled to reach his destination by the contract time, but cannot travel by that train unless he takes a first class ticket, his damages may well be the whole of the sum he has to pay for that ticket, although the result is that he has enjoyed a greater luxury of travel.”

Buckley LJ thought that damages should be reduced *only* where the party claiming recovery of the expenditure had a viable alternative to purchasing the superior replacement.<sup>41</sup> This was also the emphasis in the earliest cases on betterment, which concerned “new for old” claims when repairing damage to ships.<sup>42</sup> However, more recently, in *The Baltic Surveyor*<sup>43</sup> Rix LJ added that damages should *also* be reduced where the increased value of the replacement yielded a “real pecuniary advantage” to the claimant. Interestingly, the rail travel example is still consistent with this criterion; the man gained no real pecuniary advantage from his first class ticket since his concern was merely to arrive on time. The expanded modern understanding of betterment would however require a deduction on the facts of *British Westinghouse* itself; Rix LJ expressly cited the case as an example of a situation in which a real pecuniary advantage had been obtained.<sup>44</sup>

Second, the discussion provides a good example of the difficulties associated with the language of reasonableness in mitigation. A further linguistic ambiguity escaped the judges’ attention. The most direct meaning of “reasonable” is simply “in accordance with reason”.<sup>45</sup> How then should one describe conduct which is *better* than reasonable, in the sense that it reduces or avoids a loss that it would have been reasonable to incur? One might attempt to classify such conduct as “supra-reasonable”, but strictly speaking this does not make much sense because the act is still sensibly described as in accordance with reason.<sup>46</sup>

This latent ambiguity arises on the facts of *British Westinghouse* itself. If the arbitrator’s finding was correct,<sup>47</sup> then it would have been reasonable for London Underground to continue using the Westinghouse turbines at a loss of £237,728 in extra coal over their mechanical lifetime. There was therefore a sense in which London Underground’s purchase of the Parsons turbines—which cost at most £78,226 and arguably nothing once the extra advantages were taken into account—was *better* than reasonable. However, such a distinction would have been difficult to express using the language chosen by the arbitrator. Certainly the decision to replace the Westinghouse turbines was “reasonable and prudent”, but was it “better than reasonable and prudent”? The issue was never expressly considered, perhaps because the linguistic flexibility of reasonableness obscured the question.

41. *Ibid.*, 148.

42. *The Gazelle* (1844) 2 Wm Rob 279 (High Court of Admiralty), 281.

43. *Voaden v Champion (The Baltic Surveyor and the Timbaktu)* [2002] EWCA Civ 89; [2002] 1 Lloyd’s Rep 623, [85]. His comments appear to apply even where the claimant had no alternative but to purchase the superior replacement.

44. *Ibid.* See further *post*, text to fn.89.

45. Lesley Brown, *The New Shorter Oxford English Dictionary*, 4th edn (OUP, 1993).

46. It may be clearer to dispense with the language of reasonableness altogether by instead referring to the “ordinary course of events”. This would have the advantage of distinguishing between the nature of the claimant’s conduct and its effect on their factual loss.

47. It is submitted that the finding is not tenable: see *post*, text to fn.80.

## IV. THE DECISION OF THE HOUSE OF LORDS

## A. Three “well-established” propositions

The Lord Chancellor, Viscount Haldane, gave the only reasoned speech in the House of Lords.<sup>48</sup> He began by noting three propositions that he took to be “well-established”. First, “the quantum of damage is a question of fact, and the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases”.<sup>49</sup> Professor Burrows has recently referred to this comment as characteristic of an era in which the law of damages was under-theorised.<sup>50</sup> The emphasis on facts rather than legal rules was then understandable, given that the assessment of damages was originally a matter for the jury, for whom no guidance was provided.<sup>51</sup> By contrast, it is now frequently remarked that the law of damages is no longer a subject devoid of rules,<sup>52</sup> and the sheer number of modern cases in which the quantum of damages has been overturned on appeal would appear to bear this out.<sup>53</sup>

However, in relation to mitigation, the conventional understanding is that the reasonableness of the claimant’s post-breach conduct remains entirely a question of fact.<sup>54</sup> Very recently, the Court of Appeal added that “whether the claimant acted reasonably in response to a wrongful act may be a question of fact, but the answer involves an evaluation of the primary facts and, inevitably, an element of judgment”.<sup>55</sup> What this means for parties seeking to appeal a finding of reasonableness is not entirely clear. Nevertheless, it is evident that mitigation remains an area of damages in which—whatever the modern trend—the fact-centric, “under-theorised” approach has yet to be displaced.

Second, Viscount Haldane restated the compensatory principle in line with the well-known formulation of Parke B in *Robinson v Harman*,<sup>56</sup> adding that this principle was qualified by another, “which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent upon the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps”.<sup>57</sup> Although similar references had appeared in earlier cases,<sup>58</sup> it is this passage which is now regarded as the “classic statement” of mitigation.<sup>59</sup>

48. Lord Ashbourne, Lord Macnaghten and Lord Atkinson agreed.

49. [1912] AC 673, 688.

50. Andrew Burrows, “Damages and Rights”, in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart, 2011), 276. Variants of Viscount Haldane’s statement have persisted well into the twentieth century: see, eg, *Hussey v Eels* [1990] 2 QB 227 (CA), 241: “with so many disputes about damages, the issue is primarily one of fact”.

51. *Chaplin v Hicks* [1911] 2 KB 786 (CA), 792–793 (Vaughan Williams LJ).

52. See, eg, Edwin Peel, *Treitel on the Law of Contract*, 13th edn (Sweet & Maxwell, 2011), [20.003].

53. As would the sheer length of modern texts on damages.

54. *Sotiros Shipping Inc v Sameiet Solholt (The Solholt)* [1983] 1 Lloyd’s Rep 605 (CA), 608 (Sir John Donaldson MR); *Burdis v Livsey* [2002] EWCA Civ 510; [2003] QB 36, [148] (Aldous LJ).

55. [2011] EWCA Civ 1583, [18] (Moore-Bick LJ).

56. (1848) 154 ER 363 (Ct of Ex): “where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed”.

57. [1912] AC 673, 689.

58. See, eg, *Roper v Johnson* (1873) LR 8 CP 167, 181–182 (Brett J); *Dunkirk Colliery Co v Lever* (1878) 9 Ch D 20 (CA), 25 (James LJ).

59. *Koch Marine Inc v d’Amica Societa di Navigazione arl (The Elena d’Amico)* [1980] 1 Lloyd’s Rep 75 (Com Ct), 88 (Robert Goff J); *Burdis v Livsey* [2002] EWCA Civ 510; [2003] QB 36, [89] (Aldous LJ).

Viscount Haldane's exposition requires at least one modern refinement. Despite the language of the "duty" to mitigate, it is now acknowledged that there is no actual obligation on the claimant to act reasonably.<sup>60</sup> As Lord Bingham of Cornhill clarified in *The Golden Victory*,<sup>61</sup> damages are assessed on the *assumption* that the claimant acted reasonably "whether in fact the injured party acts in that way or, for whatever reason, does not"; in other words, "the actual facts are ordinarily irrelevant". In substance, mitigation therefore takes effect as a rule for the assessment of damages and not as a prescriptive guide to the claimant's post-breach conduct.

It is not at all clear that this was the way in which mitigation was understood in *British Westinghouse*. Both Lord Alverstone CJ in the High Court and Kennedy LJ in the Court of Appeal emphasised the need to avoid "confusion of the principles of law which govern the duty of the party who has been injured by a breach of contract and the legal principles which regulate the measure of damages".<sup>62</sup> Without explaining how these two sets of principles were supposed to be separate, they both thought that the distinction was dispositive in the case before them. Although their decisions were reversed in the House of Lords, it appears that Viscount Haldane similarly adopted a bifurcated understanding of the claimant's "duty" and the assessment of damages.

Third, Viscount Haldane gave what is generally taken to be the ratio of the *British Westinghouse* decision. He stated that, where a claimant's loss is reduced as a result of his action taken after the breach, "the effect in actual diminution of the loss he has suffered may be taken into account *even though there was no duty on him to act*".<sup>63</sup> This has subsequently become known as the "avoided loss rule".<sup>64</sup> However, the rule contains an important qualification which has often been obscured in modern expositions.<sup>65</sup> Viscount Haldane added that, in order to be taken into account, the claimant's act must be "one which a reasonable and prudent person might in the ordinary conduct of business properly have taken".<sup>66</sup> Otherwise, their conduct will be "*res inter alios acta*".<sup>67</sup> This means that they can recover for the loss that would reasonably have been expected to occur as a result of the breach, even though by the date of the trial it is evident that the loss has not in fact been incurred.

It is necessary to look closely at the language chosen by Viscount Haldane in expressing the duty to mitigate and the qualification of the avoided loss rule. On the one hand, he emphasised that the principle of mitigation "does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the

60. *Darbishire v Warran* [1963] 1 WLR 1067 (CA), 1075 (Pearson LJ).

61. *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12; [2007] 2 AC 353; [2007] 2 Lloyd's Rep 164, [10].

62. [1912] 3 KB 128 (CA), 152; see also [1911] 1 KB 575 (KB DC), 583.

63. [1912] AC 673, 689 (emphasis added).

64. McGregor (fn.4), [7.097–7.168]; see also *Dimond v Lovell* [2002] 1 AC 384 (HL), 406 (Lord Hobhouse of Woodborough): "compensation is not paid for an avoided loss".

65. For instance, McGregor omits to mention the qualification in his summary of the rule, although he does discuss it subsequently: McGregor (fn.4) [7.006], [7.097].

66. [1912] AC 673, 690. Unfortunately Viscount Haldane also gave a smorgasbord of subtly different formulations: "in the course of his business . . . arising out of the transaction" (689); "one arising out of the consequences of the breach and in the ordinary course of business" (690); "a reasonable and prudent course quite naturally arising out of the circumstances in which he was placed" (691); "part of a continuous dealing with the situation in which they found themselves . . . not an independent or disconnected transaction" (692). The quotation given in the main text is reflective of the general tenor of these alternatives.

67. *Ibid.*, 691.

course of his business”.<sup>68</sup> On the other, he also said that, in order for the avoided loss rule to apply, the claimant’s act must be “one which a reasonable and prudent person might in the ordinary conduct of business properly have taken”.<sup>69</sup> Read together, these statements arguably render the avoided loss rule self-defeating: the qualification eclipses the rule.

The self-defeating nature of the avoided loss rule may be restated in the following syllogism, derived from Viscount Haldane’s speech. The claimant has no duty to take steps that are outside the ordinary course of business. Whenever the claimant takes steps that are outside the ordinary course of business (ie, steps that he had no duty to take), the avoided loss rule does not apply. All that is left is the entirely uncontroversial proposition that when the claimant is acting *within* the ordinary course of business (conduct that we would now refer to as acting reasonably in accordance with the duty to mitigate), it is appropriate to “look at what actually happened, and to balance loss and gain”.<sup>70</sup>

Why then are we told that “the effect in actual diminution of the loss he has suffered may be taken into account *even though there was no duty on him to act*”?<sup>71</sup> The answer may lie in the dichotomy perceived between regulation of the claimant’s conduct and the assessment of damages.<sup>72</sup> In stressing that there could be a diminution of damages despite the absence of a “duty” to act, Viscount Haldane may have been referring only to regulation of the claimant’s conduct, reflecting the now commonly accepted proposition that the claimant “is completely free to act as he judges to be in his best interests”.<sup>73</sup> The phrase “even though there was no duty on him to act” has since been understood to mean conduct which is better than reasonable, in the sense that it avoids a loss which it would have been reasonable to incur.<sup>74</sup> However, read in context, it is not clear that this is what Viscount Haldane intended.<sup>75</sup>

### B. The result revisited

The House of Lords allowed British Westinghouse’s appeal, holding that London Underground could not recover the cost of the Parsons turbines. The arbitrator’s award was set aside and the case was remitted to the arbitrator for a second time. Viscount Haldane held that the act of purchasing the Parsons turbines “was not *res inter alios acta*, but one in which the person whose contract was broken took a reasonable and prudent course quite naturally arising out of the circumstances in which he was placed by the breach”.<sup>76</sup> It was right to assess damages on the basis of the loss actually suffered by London Underground, which involved balancing the cost of the Parsons turbines against the savings that were made through the improved efficiency of the new machines.<sup>77</sup>

68. *Ibid.*, 689.

69. *Ibid.*, 690.

70. *Ibid.*, 691. This is the proposition for which Lord Hoffmann cited *British Westinghouse* in *Dimond v Lovell* [2002] 1 AC 384, 401–402; see further *post*, text to fn.88.

71. [1912] AC 673, 689 (emphasis added).

72. See *ante*, text to fn.62.

73. *The Solholt* [1983] 1 Lloyd’s Rep 605 (CA), 608.

74. McGregor (fn.4), [7.006].

75. If Viscount Haldane did intend the meaning now commonly ascribed to him, then his decision seems inconsistent with that of the Privy Council in *AKAS Jamal v Moolla Dawood Sons & Co* [1916] 1 AC 175 (PC) just three years later, upon which he sat as a panel member.

76. [1912] AC 673, 691.

77. *Ibid.*

The conventional explanation of the result in *British Westinghouse* is that it entailed an application of the avoided loss rule.<sup>78</sup> Applying the rule, London Underground was under no duty to purchase the Parsons turbines, but, given that they did so, then the effect in actual diminution of their loss had to be taken into account. However, even putting to one side the arguably self-defeating nature of Viscount Haldane's exposition of the avoided loss rule, it is submitted that the rule provides neither a plausible nor necessary explanation of the result on its facts.

It is true that the arbitrator found that the purchase of the Parsons turbines "mitigated or prevented the loss and damage *which would have been recoverable* from the claimants if the respondents had continued to use the claimants' defective machines in the future".<sup>79</sup> The finding was assumed to be correct in the High Court and the Court of Appeal,<sup>80</sup> and does not appear to have been challenged in the House of Lords. Nevertheless, for several reasons it seems extremely implausible to think that it would have been reasonable for London Underground to continue using the Westinghouse turbines until they finally wore out.

First, one need only look at the figures themselves. The loss that would have been incurred as a result of keeping the Westinghouse turbines in service for the remainder of their mechanical lifetime was estimated to be £237,728. The replacement turbines cost only £78,226. It is now clearly established that a claimant will act unreasonably (provided they are not impecunious) if they refuse to incur modest capital costs in order to avoid escalating running costs.<sup>81</sup> Faced with a calculable running cost of over three times the amount required to avoid the cost entirely, it seems inconceivable that London Underground could actually have succeeded in a claim for the extra consumption of coal.

Second, it cannot be said that London Underground had to adopt any particularly unusual or onerous steps in order to procure the replacement machines. When the Parsons contract was concluded in 1908, there was a thriving available market for steam turbines. The minutes of a meeting of London Underground's Board of Directors show that within one month of resolving to replace the Westinghouse turbines, tenders had been received from four separate companies (including CA Parsons & Co), all at similar prices of £8,000–£10,000 per turbine.<sup>82</sup>

Third, one must appreciate the rate at which steam turbine efficiency was advancing in the early 1900s.<sup>83</sup> The pace of development may be likened to that of computer processors in the modern day. To think that London Underground could reasonably have continued working the defective Westinghouse turbines for 20 years, when the usual turnover of turbines due to obsolescence was in the region of five years, does not accord with common sense. Indeed, in 1913, just one year after the House of Lords' handed down its decision in *British Westinghouse*, London Underground decided to replace its turbines again,<sup>84</sup>

78. See, eg, McGregor (fn.4), [7.098 n.402]: "It is thought that the *British Westinghouse* principle is concerned with avoided loss and . . . ensuring that the claimant is not in a better position than before the wrong"; Harvey McGregor, "The Role of Mitigation in the Assessment of Damages", in D Saidov and R Cunningham (eds), *Contract Damages: Domestic and International Perspectives* (Hart, 2008), 338.

79. See *ante*, text to fn.29.

80. See *supra*, fnn 32 and 35.

81. *Wandsworth LBC v Railtrack Plc* [2001] 1 WLR 368 (QB), 386 (Gibbs J); affirmed *Wandsworth LBC v Railtrack Plc* [2001] EWCA Civ 1236; [2002] QB 756, [26] (Kennedy LJ).

82. London Metropolitan Archives ACC/1297/UER/01/002, 180.

83. See *ante*, text to fn.9.

84. Parsons (n.9), 122. The new turbines delivered 18,000kW at a steam consumption of 12lbs/kWhr.

despite the fact that the Parsons machines had met or even slightly improved upon their guaranteed efficiency.<sup>85</sup>

Contrary to the finding of the arbitrator, it is therefore submitted that London Underground did no more than it was reasonably expected to do by replacing the Westinghouse turbines. It is true to say that it had no duty to purchase the Parsons turbines in particular, but in the circumstances it was reasonable to expect that it would attempt to replace the defective machines with other non-defective machines. There was therefore no need to invoke the avoided loss rule (as conventionally understood) in order to justify the result that the House of Lords reached. It is trite law that expenses reasonably incurred in mitigation are recoverable,<sup>86</sup> and that this involves an assessment of the net expenses, taking into account the losses and gains that actually accrued to the claimant.

*British Westinghouse* is a good—albeit complicated—illustration of the reasonable expenses rule. However, it is not a good illustration of the avoided loss rule, for which it is currently best known. Lord Hoffmann adopted the correct understanding of the decision in *Diamond v Lovell*.<sup>87</sup> There, he described *British Westinghouse* as authority for “the rule that requires additional benefits obtained as a result of taking reasonable steps to mitigate loss to be brought into account in the calculation of damages”.<sup>88</sup> It is submitted that this is the only legal proposition for which the case should stand today.

#### A. Alternative explanations

Three alternative potential explanations of the result should be noted. First, it has already been suggested that the modern cases on betterment dictate that the value of the increased efficiency of the Parsons machines was correctly deducted from their purchase cost.<sup>89</sup> This explanation is not in conflict with the conclusion that the case entailed an application of the reasonable expenses rule. The suggestion by Rix LJ in *The Baltic Surveyor*,<sup>90</sup> that a deduction should be made whenever the replacement yields a “real pecuniary advantage” to the claimant, may be understood simply as a guide to the types of gain that are relevant in establishing the net expense actually incurred by the claimant (in circumstances where they acted reasonably to mitigate their loss). It need not bear upon the issue of whether a gain is *res inter alios acta* in circumstances where the claimant has acted better than reasonably. The betterment cases should be understood as an application of the established principles of mitigation, not as a supplement to them.

Secondly, it might be suggested that British Westinghouse’s breach of contract did not *cause* the purchase of the Parsons turbines. It is well established that losses must have been factually caused by the defendant’s breach in order to be recoverable.<sup>91</sup> Arguably, the cost of replacing the Westinghouse turbines would have been incurred even “but for” the fact that they were defective according to their contractual specification. Support for such

85. *Ibid.*, 84. There is some difficulty in ascertaining a precisely comparable figure, because steam consumption depended on various external factors which differed according to the test conditions, including: the exhaust vacuum; steam pressure; and a process known as “superheating”.

86. See *supra*, fn.24.

87. [2002] 1 AC 384.

88. *Ibid.*, 401–402.

89. See *ante*, text to fn.44.

90. [2002] EWCA Civ 89; [2002] 1 Lloyd’s Rep 623, [85].

91. *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428 (QB).

a conclusion is provided by the arbitrator's finding that "it would yet have been to the pecuniary advantage of the respondents at their own cost to have replaced the machines" even if they had been in full working order.<sup>92</sup> However, it appears that the defective state of the Westinghouse machines did provide the initial trigger to replace them,<sup>93</sup> and in the High Court, Hamilton J expressly rejected the contention that their replacement "must be attributed entirely to the progress of science".<sup>94</sup> Consequently the rules of factual causation alone do not dispose of the case.

Finally, Professor Stevens has sought to explain *British Westinghouse* on the basis that the claim was one for consequential loss and not for what he terms "substitutive damages".<sup>95</sup> According to Stevens, substitutive damages are always available in response to a tort or breach of contract. They are measured by the value of the infringement of the claimant's primary right and do not depend on any consequential loss having been suffered.<sup>96</sup> On the facts of *British Westinghouse*, a substitutive damages claim would have comprised "the difference in market value between the machines promised and those delivered".<sup>97</sup> In fact, London Underground did make precisely this argument in the House of Lords, albeit not in its original pleadings. Counsel is reported as arguing: "the respondent's position is that being defective the machines are worth so much less than the contract price, and that that is a proper consideration for the arbitrator".<sup>98</sup>

Stevens adds that any substitutive damages claim was bound to fail in *British Westinghouse* because London Underground was already seeking a significant award of consequential damages in respect of the extra coal consumed before the Parsons turbines were purchased.<sup>99</sup> He explains that the two types of award are not cumulative; by recovering substitutive damages a claimant's consequential loss is correspondingly reduced and so is not recoverable.<sup>100</sup> This raises an interesting general issue about the relationship between heads of damage. The House of Lords were content to accept London Underground's counterclaim for the cost of the extra coal consumed prior to the installation of the Parsons turbines.<sup>101</sup> But why was this claim (for consequential loss) not also reduced by the gain consequent upon the increased efficiency of the replacement machines? Counsel for British Westinghouse conceded the point,<sup>102</sup> but on both Stevens' analysis and on the explanation proposed here, there appears to be no good reason for compartmentalising London Underground's losses in this way.

92. See *ante*, text to fn.30.

93. This is apparent both from the way in which London Underground pled its case (Parsons (n.9), 36) and from the meetings of its Board of Directors (n.82).

94. [1911] 1 KB 575 (KB DC), 587.

95. Robert Stevens, "Damages and the Right to Performance: A Golden Victory or Not?", in J Neyers, R Bronaugh and S Pitel (eds), *Exploring Contract Law* (Hart, 2009), 181; Robert Stevens, "Rights and Other Things", in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart, 2011), 129–130.

96. Robert Stevens, *Torts and Rights* (OUP, 2007), ch.4.

97. Stevens, "Damages and the Right to Performance: A Golden Victory or Not?" (*supra*, fn.95), 181.

98. [1912] AC 673, 680.

99. Stevens, "Damages and the Right to Performance: A Golden Victory or Not?" (*supra*, fn.95), 181.

100. *Ibid.* For a flavour of the spirited debate generated by this argument, see James Edelman, "The Meaning of Loss and Enrichment", in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP, 2009), 220; Andrew Burrows, "Are 'Damages on the Wrotham Park Basis' Compensatory, Restitutionary or Neither?" in D Saidov and R Cunningham (eds), *Contract Damages: Domestic and International Perspectives* (Hart, 2007), 184; Stevens, "Rights and Other Things" (*supra*, fn.95), 128.

101. Stevens argues that any claim for substitutive damages was effectively subsumed in this award.

102. [1912] AC 673, 685–686.

## V. CONCLUSION

Although it is only through a full exploration of the background and context of *British Westinghouse* that the analysis proposed here can be substantiated, the argument itself is not novel. Fifty years ago, in *Principles of the Law of Damages*,<sup>103</sup> Professor Street wrote that:

“In the leading case, *British Westinghouse Electric Co v Underground Electric Railway* . . . the House of Lords dealt with the case on the assumption that the plaintiff was under a duty to take steps similar to the ones taken provided that they were reasonable. There is no authority for the proposition that where a claimant is under no duty to mitigate his loss by acting in a certain general way the gain which accrues to him from so acting is to be set off.”

Unfortunately, Street’s insight was lost in the ensuing barrage of authorities that focused myopically on what Viscount Haldane had meant by phrases such as “arising out of the consequences of the breach” and “in the ordinary course of business”.<sup>104</sup> These authorities have now served to compound—frequently in dicta though rarely in result—the modern impression that avoided loss is recoverable only in the most exceptional of circumstances.

Whether damages *should* be reduced when the claimant, through its own action, avoids a loss that it would have been reasonable for it to incur, is not a question upon which this article seeks to bear. However, it is submitted that the House of Lords’ decision in *British Westinghouse* has been widely mischaracterised in support of the so-called “avoided loss rule”, when neither Viscount Haldane’s speech nor the result clearly supports it. The case is a fascinating historical account of industrial rivalry and innovation at the turn of the twentieth century, but its pre-eminence in the law of damages is largely unwarranted.

103. Harry Street, *Principles of the Law of Damages* (Sweet & Maxwell, 1962), 182.

104. In McGregor, *McGregor on Damages* (fn.4) this is regarded as the “core of the problem”: [7.098]. See, eg, *Hussey v Eels* [1990] 2 QB 227 (CA); *Gardner v Marsh & Parsons* [1997] 1 WLR 489 (CA); *Mobil North Sea Ltd v PJ Pipe & Valve Co Ltd* [2001] EWCA Civ 741; [2001] 2 All ER (Comm) 289; *Needler Financial Services Ltd v Taber* [2002] 3 All ER 501; [2002] Lloyd’s Rep PN 32 (Ch).