

[Solène Rowan](#)

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COST OF CURE DAMAGES AND THE RELEVANCE OF THE INJURED PROMISEE'S INTENTION TO CURE

I. INTRODUCTION

The aim of compensatory damages for breach of contract – by far the most common measure of damages – is to provide the injured promisee with the sum of money necessary to put him in the position that he would have been in had the contract been performed.¹ Whilst this appears simple and has become trite law, the process of identifying and valuing the promisee's loss can be complex.

The focus of this article is on an aspect of this complexity that arises in relation to one of the two main measures of compensatory damages, cost of cure damages.² This measure compensates the additional expenditure incurred by the injured promisee in order to obtain the performance that he bargained for. The issue concerns the extent to which, when deciding whether or not to make a cost of cure damages award, the courts take account of, and should take account of, what the injured promisee does or intends to do with the award. Can the injured promisee do with the award as he pleases? Or must he use or at least intend to use it to remedy the breach? To what extent, if at all, should these factors be relevant in assessing his recoverable loss?

There are various ways in which the courts could tackle these questions. Possibilities include requiring that the breach be remedied or at least that the injured promisee intends to remedy the breach before making the award. It might even be that the award is made conditional upon the remedy being effected in the future. Alternatively, these enquiries could be dispensed with altogether and cost of cure damages made available regardless of whether the breach has been or will be remedied and of the promisee's intended use of the award.

This article surveys the cases in which these questions have arisen and been addressed. These cases are well-known in relation to a number of legal principles but here are explored and reconciled with a focus only on how the court has dealt with the way that the injured promisee uses, or intends to use, his damages award.

The first part of the article shows that, once an award of cost of cure damages is made, the courts have been steadfastly unwilling to monitor what becomes of it. However, this has not translated into a similar willingness, when considering whether or not to make the award, to disregard how the promisee intends to use it. On some occasions, the promisee's intended use of the award has been held to be relevant to whether the remedy should be available.

A careful review of these cases reveals that the courts do not speak with one voice on the exact relevance of the promisee's intention. In fact, there appears to be subtle divergence as to the extent to which it should be taken into account. It has been held in some cases to be one relevant factor amongst others; in other cases, it has been seen as a precondition to recovery. This divergence has the potential to confuse and raises questions as to the proper role of intention in this context, yet this has given rise to surprisingly little literature or comment.

The second part considers the implications of taking account of the promisee's intended use of a damages award. It shows that there are some advantages. More accurate compensation and avoiding the promisee obtaining an uncovenanted benefit are examples. However, the risk

* I would like to thank Gregg Rowan, the Editor of the *Cambridge Law Journal*, and the anonymous reviewers for their comments and suggestions on an earlier draft.

¹ *Robinson v Harmann* (1848) 1 Ex 850; 154 E.R. 363.

² The promisee's intention is irrelevant to the other main measure of compensatory damages, the 'difference in value measure', which compensates the difference between the value of the promised performance and the performance actually rendered.

of tension with other principles relating to damages is potentially problematic. Consideration is given to how this might be overcome and fair compensation still achieved.

II. THE ABSENCE OF ANY FETTER ON THE USE OF DAMAGES

The question of whether an injured promisee can dispose freely of a damages award, once made, gives rise to little disagreement. It is well-established that the courts will not interfere; the issue is *res inter alios acta*.³ The court does not monitor whether he spends the money in remedying the loss suffered or make awards that are conditional on him doing so.⁴

This has several consequences. For the injured promisee, he cannot be called to account for how he uses his award. He can do with it as he pleases. If he so wishes, he can spend it on something entirely unrelated to the compensatory purpose for which it was made. The corollary for the defaulting promisor is that he cannot return to court to challenge how the promisee has spent the money. There is no 'clawing back' of a damages award, regardless of how it might have been used.⁵

Several justifications for this approach have been advanced. One is that it brings resolution and certainty.⁶ Qualifying how an award can be used might sow the seeds for new disputes. No such problems attend awards made unconditionally and 'once and for all'.⁷ Another is simplicity: it avoids the possibility of further recourse to the court where the injured promisee disposes of his damages in a manner that is inconsistent with the terms of its judgment. Clawing back money that has already been spent could also give rise to practical problems. The principle is thus uncontroversial in England.

III. THE INJURED PROMISEE'S INTENTION TO CURE THE BREACH

Where damages are awarded on the cost of cure basis, the unwillingness of the courts to consider how the injured promisee disposes of his award does not extend to what, at the time the award is made, he intends to do with the money. His intention can be relevant to whether compensation is due and, if so, the amount. The effect is to put the subjective intention⁸ of the promisee at the time of the trial⁹ into issue. However, the precise extent of its relevance is not altogether clear.

A. *Intention to Cure as a Factor Relevant to Cost of Cure Damages Liability*

1. *Three cases: Tito, Radford and Ruxley*

³ *Ruxley Electronics & Construction Ltd v Forsyth* [1996] A.C. 344, 359 (Lord Jauncey); *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 W.L.R. 68 (CA) 80 (Steyn LJ).

⁴ Damages awards must be unconditional: *Banbury v Bank of Montreal* [1918] A.C. 626; *Patel v Hooper & Jackson* [1999] 1 W.L.R. 1792, 1800 (Nourse LJ); *Scullion v Bank of Scotland Plc* [2010] EWHC 2253 at [68]-[80]; N. Andrews, M. Clarke, A. Tettenborn and G. Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies* (London 2012) [21-103]-[21-105]. For inroads into this principle, mainly in personal injury and wrongful death cases, see H. McGregor, *McGregor on Damages* (19th ed London 2014) [38-004]-[38-012] and [50-046].

⁵ A. Burrows, *Remedies for Torts and Breach of Contract* (2nd edn. Oxford 2004) 222.

⁶ *Ibid.*, at 183.

⁷ *Patel v Hooper & Jackson* [1999] 1 W.L.R. 1792, 1800 (Nourse LJ).

⁸ It is the *subjective* intention of the promisee that is relevant: H. Beale (ed.) *Chitty on Contracts*, (32nd edn. London 2015) at [26-036]; *Latimer v Carney* [2006] EWCA Civ 1417 at [24] (Arden LJ).

⁹ *Dean v Ainley* [1987] 1 W.L.R. 1729, 1735 (Glidewell LJ); *Dodd Properties (Kent) v Canterbury City Council* [1980] 1 W.L.R. 433, 457 (Donaldson LJ).

The relevance of the injured promisee's intention to cure to the availability of cost of cure damages was considered, in varying levels of detail, in three well-known cases.¹⁰ A key issue in each was whether the promisee, who had not yet cured the breach, could recover the cost of doing so, despite this being much higher than the difference in value between the promised performance and the performance actually rendered. In resolving this issue, the courts examined and took account of his intention. If he intended to cure the breach, that weighed in favour of a cost of cure award. If he did not, this had the opposite effect.

The first case is *Tito v Waddell (No 2)*,¹¹ in which the defendant failed to comply with a contractual obligation to replant trees and shrubs on an island after completing mining operations. Megarry VC declined to award the cost of replanting or grant specific performance. The prohibitive cost and the absence of any material benefit to the promisees, who had moved to a different island and shown no intention of undertaking the work, meant that either remedy would be 'an order of futility and waste'.¹² Instead, the claimants were confined to difference in value damages. On whether the claimants had already cured or intended to cure the breach, he said: 'if the plaintiff ... has no intention of applying any damages towards carrying out the work contracted for, or its equivalent, I cannot see why he should recover the cost of doing the work which will never be done'.¹³

Radford v De Froberville,¹⁴ decided shortly after *Tito*, followed this approach and confirmed that the intention of the injured promisee to carry out remedial work is relevant in deciding the extent of his loss. The question was whether the promisee could obtain damages representing the cost of building the wall, which the promisor had failed to erect in breach of contract.

Oliver J thought the answer depended mainly on whether the promisee genuinely and seriously intended to undertake the work and, if so, the reasonableness of this course of action.¹⁵ On the facts, the judge was satisfied that the promisee did so intend and that this was reasonable. The promisee wanted the wall to preserve the privacy of his land. Nothing less than building a wall would give him the bargained-for performance.¹⁶ His loss was genuine and the breach was not being used to secure an uncovenanted benefit.¹⁷ Cost of cure damages were therefore awarded.

The relevance of the injured promisee's intention to cure was confirmed at the highest level in the leading case, *Ruxley Electronics v Forsyth*.¹⁸ In breach of a contractual provision that a swimming pool should have a maximum depth of 7 feet 6 inches, the promisor, a building contractor, built the pool to a maximum depth of 6 feet. The House of Lords refused to assess damages on the cost of cure basis. It found that demolishing the pool and building a new pool to the specified depth was out of proportion to the benefit that would accrue to the promisee. It would therefore be unreasonable.

Lord Lloyd and Lord Jauncey considered the significance of whether the promisee, Mr Forsyth, intended to cure the breach. This was in their view relevant to the reasonableness of the cost of cure measure. It went directly to the extent of the promisee's loss: if he did not intend to rebuild, then he had not actually suffered the cost of carrying out the work as loss. He was

¹⁰ For a more detailed review of these three cases and the issues that they raise in this context, see Burrows (n 5) at 222.

¹¹ [1977] Ch 106.

¹² *Ibid.*, at 327.

¹³ *Ibid.*, 332-333.

¹⁴ [1977] 1 W.L.R. 1262.

¹⁵ *Ibid.*, at 1283. See also *East Ham Corporation v Bernard Sunely & Sons* [1966] A.C. 406, 434.

¹⁶ *Ibid.*, at 1268 and 1284.

¹⁷ *Ibid.*, at 1270.

¹⁸ [1996] A.C. 344 (HL).

found not to intend to destroy and rebuild the pool. This meant that he had lost nothing except the difference in value.¹⁹ He was confined to a modest award of £2,500 for loss of amenity.

2. *Intention to cure as a stand-alone requirement or a factor going to reasonableness*

The thread running through these three cases is that the need for an intention to cure the breach and a more general requirement of reasonableness acted as limits upon the entitlement of the injured promisee to recover cost of cure damages. In *Tito and Radford*, an intention to cure was regarded as a stand-alone requirement separate from reasonableness.²⁰ It appears to have been a necessary ingredient for an award of cost of cure damages to be made. In *Ruxley*, both *Tito* and *Radford* were expressly approved but the role of intention appears to have been at least slightly reduced;²¹ it was said to be a factor amongst others going to the reasonableness of a cost of cure award, not a requirement in its own right.

This subtle departure from the approach in *Tito and Radford* was not recognised or explained by the House of Lords in *Ruxley* and the reason for it is unclear. The main focus was on the reasonableness of cost of cure damages and factors relevant to this issue other than whether the promisee intended to cure; the relevance of his intention was not discussed at any length.²² The two judges who did consider intention said little more than that it is a factor relevant to the reasonableness of the cost of cure measure.

A possible reason for the divergence is that these judges, Lord Jauncey and Lord Lloyd, were seeking to minimise the tension between the role of the promisee's intention to cure the breach and the principle that how he uses his award is *res inter alios acta*. Both noted this tension and tried to reconcile the two principles. Lord Jauncey said:

I should emphasise that in the normal case the court has no concern with the use to which a plaintiff puts an award of damages for a loss which has been established ... Intention, or lack of it, to reinstate can have relevance only to the reasonableness and hence to the extent of the loss which has been sustained. Once that loss has been established intention as to the subsequent use of the damages ceases to be relevant.²³

In this way, the principles were seen as co-existing without being contradictory.

Whatever the reason, the reduced significance given to whether the promisee intends to cure has been followed in subsequent cases. It is now well established that his intention is no more than a factor that goes to the reasonableness of a cost of cure award.²⁴

What is less clear is whether the relevance attributed to intention in *Ruxley* is in substance much different from its role in *Tito and Radford*. This is doubtful. Whether or not seen as part of a wider reasonableness test, an intention to cure still seems likely to be necessary to a cost of cure award being made. If the promisee does not intend to cure the breach, it would be surprising for a cost of cure award to be found to be reasonable. Regardless of any other

¹⁹ [1996] A.C. 344, 373 (Lord Lloyd).

²⁰ Staughton LJ in *Ruxley Electronics* [1994] 1 W.L.R. (CA) 650, 656 also considered intention as separate from the requirement of reasonableness.

²¹ J. O'Sullivan, 'Loss and Gain at Greater Depth: the Implications of the *Ruxley* Decision' in F. Rose (ed.), *Failure of Contracts, Contractual Restitutionary and Proprietary Consequences* (Oxford 1997) 1, 9.

²² See the judgments of Lord Bridge, Lord Keith, and Lord Mustill which focus only on reasonableness without any mention of the promisee's intention.

²³ At 359.

²⁴ Eg *Bovis Lend Lease Ltd (formerly Bovis Construction Limited) v RD Fire Protection Limited* 2003 WL 21917429; *Birse Construction Ltd v Eastern Telegraph Company Ltd* [2004] EWCH 2512; *London Fire and Emergency Planning Authority v Halcrow Gilbert Associates Ltd* [2007] EWHC 2546.

factors relevant to the reasonableness of awarding the cost of cure, it seems likely to be fatal. The reason is that, if there is no such intention, the promisee will not suffer the cost of curing the breach as a loss. Only when the promisee genuinely intends to cure the breach will he suffer this loss and do the other factors relevant to reasonableness come into play. An intention to cure is therefore a necessary requirement but not sufficient.

3. Justifications for taking account of the promisee's intention to cure

The rationale in these cases for taking account of whether or not the injured promisee intends to cure the breach for the purpose of assessing damages is to achieve more accurate compensation. His intention to cure serves to determine the extent of the loss suffered.

Where the injured promisee has not remedied the breach, the cost of cure is merely a possible future loss. If he does not intend to incur this cost, then it is not a loss that he will ever suffer. It would be a fiction to hold otherwise. Damages are therefore irrecoverable.²⁵ This idea can be found in the speech of Megarry VC in *Tito* where he said 'if the plaintiff ... has no intention of applying any damages towards carrying out the work contracted for, ... [i]t would be a mere pretence to say that this cost was a loss and so should be recoverable as damages...'.²⁶ Lord Lloyd in *Ruxley* agreed with and applied this passage. He said 'if ... Mr Forsyth had no intention of rebuilding the pool, he has lost nothing except the difference in value, if any'.²⁷

This contrasts with the situation where the cost of cure has been incurred or the promisee intends to remedy the breach. The loss is real and provable. This was expressed by Megarry VC in *Tito* as follows: 'if the plaintiff establishes that the contractual work has been or will be done, then in all normal circumstances it seems to me that he has shown that the cost of doing it is, or is part of, his loss, and is recoverable as damages'.²⁸ In this situation, the extent of the promisee's loss turns on whether expending the money to cure was reasonable applying standard mitigation principles.

In this way, taking account of the promisee's intention avoids him receiving an undeserved windfall. If he were allowed to recover substantial damages without curing the breach or intending to do so, he could make an unwarranted profit²⁹ and be overcompensated. In *Ruxley*, for example, the House of Lords was keen to avoid the promisee recovering over £21,000 in damages and keeping a perfectly functional swimming pool, albeit one which failed to meet the contractual specification as to maximum depth.³⁰

Taking account of intention also avoids undue hardship being visited on the defaulting promisor.³¹ Substantial cost of cure damages where the promisee does not intend to rectify the defective work could overburden and punish the defaulting promisor, but it is well-established that damages must be compensatory, not punitive.

4. Divergence from this approach

There is clearly room for divergent views as to the relevance of whether or not the promisee intends to cure. In *Ruxley* itself, the majority of the Court of Appeal awarded Mr Forsyth cost

²⁵ Unless the doctrine of mitigation requires the injured promisee to cure the breach.

²⁶ *Ibid.*, at 332-333.

²⁷ *Ruxley Electronics* [1996] A.C. 344, 373.

²⁸ *Ibid.*, at 332-333.

²⁹ *Radford v De Froberville* [1977] 1 W.L.R. 1262, 1270 (Oliver J); D. Harris, J. Phillips, and A. Ogus, 'Contract Remedies and the Consumer Surplus' (1979) 95 L.Q.R. 581, 586. For criticism of this argument, see B. Coote, 'Contract Damages, *Ruxley*, and the Performance Interest (1997) 56 C.L.J. 537, 548-549 and 561.

³⁰ eg see the judgment of Lord Jauncey.

³¹ *Ibid.*, at 353 (Lord Bridge) and 373 (Lord Lloyd); E. McKendrick, 'The Common Law at Work: the Saga of *Alfred McAlpine Construction Ltd v Panatown Ltd*' (2003) 3 O.U.C.L.J. 145, 174.

of cure damages. Staughton LJ held that intention to repair or reinstate is irrelevant. He reasoned that the courts are not concerned with what the claimant does with his damages.³² This view was also taken in two cases decided after the Court of Appeal decision but before the House of Lords decision in *Ruxley*.³³

To take account of the promisee's intention is also at odds with the approach adopted in other contexts, particularly sale of goods contracts, where intention is irrelevant.³⁴ In *Darlington Borough Council v Wiltshier Northern Ltd*,³⁵ Steyn LJ stated that there was much to learn as to the role of intention from the law on the sale of goods. He said 'for my part, I would hold that in the field of building contracts, like sale of goods, it is of no concern of the law what the plaintiff proposes to do with his damages... In this field English law adopts an objective approach to the ascertainment of damages for breach of contract'.³⁶

The objective approach to assessing damages in sale of goods cases generally does not involve considering the promisee's subjective intention.³⁷ For instance, where fungible and non-unique goods are not delivered in breach of contract, damages are assessed as the cost of obtaining substitute goods in the market.³⁸ This is known as the 'market rule'. However, the promisee is not required to buy or intend to buy a substitute in the market.³⁹ The damages claim crystallises regardless. What he does or intends to do following breach is irrelevant.⁴⁰

Practical and policy considerations, in particular simplicity of administration and certainty, have been said to justify this objective approach to damages.⁴¹ It is easy to apply and makes calculating the promisee's damages straightforward. This in turn simplifies and reduces the length of any trial of the issue.⁴² It is also said to facilitate and render more certain business transactions by ensuring that market players know where they stand in the conduct of their dealings.⁴³ True the promisee can end up obtaining a windfall in some circumstances but, it has been argued, this is outweighed by the advantages.⁴⁴

B. Intention to Cure as a Necessary Requirement: the Three Party Cases

The question of whether or not the promisee intends to cure the breach seems to have had even more significance in the context of contracts for the benefit of third parties. It has been said that the promisee's intention to cure is not just relevant to whether a cost of cure award will be made but is a necessary precondition. As such, its absence is fatal to the claim.

³² [1994] 1 W.L.R. 650, 656-657.

³³ *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 W.L.R. 68 (CA), 75-76 (Dillon LJ) and 80 (Steyn LJ); *Dean v Ainley* [1987] 1 W.L.R. 1729, 1737-1738 (Kerr LJ). See however Glidewell LJ at 1735, who thought that intention was necessary; Sir George Waller at 1738 was undecided on this issue.

³⁴ For other areas in which intention is not taken into account, see Coote (n 29) at 560-563.

³⁵ [1995] 1 W.L.R. 68.

³⁶ At 97.

³⁷ The courts have sometimes felt uneasy with the 'abstract' measure of damages that is the market rule and have declined to apply it: see *Sealace Shipping Co Ltd v Oceanvoice Ltd (The Alecos M)* [1991] 1 Lloyd's 120. See also the different approaches in *Bence Graphics International Ltd v Fason UK Ltd* [1998] QB 87 and *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11.

³⁸ See the Sale of Goods Act 1979, s 50(3), s 51(3) and s 53(3).

³⁹ M. Bridge, *The Sale of Goods*, (Oxford 2014) at [12.57].

⁴⁰ M. Bridge, 'The Market Rule of Damages Assessment' in D. Saidov and R. Cunnington (eds.), *Contract Damages: Domestic and International Perspectives* (Oxford 2008) 431, 433-434. Agreeing with this approach: D. Winterton, *Money Awards in Contract Law* (Oxford 2015) 196-197. See also M Bridge, 'Market and Damages in Sale of Goods Cases' (2016) 132 L.Q.R. 405 and his reply to the analysis in A. Dyson and A. Kramer, 'There is No 'Breach Date' Rule: Mitigation, Difference in Value and Date of Assessment' (2014) 130 L.Q.R. 259 .

⁴¹ Bridge (n 40).

⁴² *Ibid.*, at 436-439.

⁴³ *Ibid.*, at 454-455.

⁴⁴ *Ibid.*, at 448-455; Coote (n 29) at 562 shows that this rule enforces the performance interest.

1. Linden Gardens and the 'broader ground'

*Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd (Consolidated with St Martins Property Corp Ltd v Sir Robert McAlpine Ltd)*⁴⁵ is probably the high water mark for the relevance of the promisee's intention to cure to his entitlement to damages. The promisee, the lessee of a plot of land, engaged the promisor, a building contractor, to develop the land. For tax reasons, the promisee later assigned its interest in the land to a third party. It also purported to assign the full benefit of the construction contract but the assignment was invalid. Certain aspects of the work were discovered to be defective and the third party incurred remedial costs of around £800,000.

The fundamental difficulty was that, on the face of things, neither the promisee nor the third party had a remedy. Having parted with its interest in the property prior to the breach, the promisee did not suffer a pecuniary disadvantage. A claim by the third party that had suffered a disadvantage was precluded by the failure of the assignment and the resulting absence of any privity with the promisor.⁴⁶ The claim to damages had disappeared 'into some legal black hole'.⁴⁷

How to rescue the promisee from this black hole was the conundrum that came before the House of Lords. Its solution was to borrow an exception to the rule that the injured party can recover damages only in respect of his own loss from the context of carriage of goods contracts.⁴⁸ On this basis, the promisee was able to recover substantial damages from the promisor, albeit subject to an obligation to account to the third party. This reasoning came to be known as the 'narrower ground'.

It is to be distinguished from the explanation of Lord Griffiths, known as the 'broader ground'. For Lord Griffiths, there was no need to make an exception to the compensatory principle. Not receiving the promised performance was itself loss to the promisee, entitling him to claim substantial damages. On the facts, the failure to carry out the construction works in conformity with the contract was such a loss, for which damages should be quantified as the cost of remedying the defects.

In explaining the broader ground, Lord Griffiths appeared to give considerable weight to the intention of the promisee to cure the breach. His speech suggests that the award of substantial damages should depend on the remedial work having been done or the promisee intending to do the work subsequently. This is most clearly discernible from his statement that 'the court will of course wish to be satisfied that the repairs have been or are likely to be carried out'.⁴⁹ He also said that 'in cases such as the present the person who places the contract has suffered financial loss because he has to spend money to give him the benefit of the bargain which the defendant had promised but failed to deliver'.⁵⁰ This implies that, if the remedial work has not been undertaken already, the promisee must intend to cure the breach in order to be awarded damages. It makes the intention of the promisee to cure a necessary ingredient of the claim.⁵¹

⁴⁵ [1994] 1 AC 85.

⁴⁶ Nor could any tortious liability be established by reason of the rule that pure economic loss is generally irrecoverable in tort: *Murphy v Brentwood District Council* [1991] 1 AC 398.

⁴⁷ *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* 1982 SLT 533, 538 (Lord Keith).

⁴⁸ *Dunlop v Lambert* (1839) 6 CL & F 600; *The Albazero* [1977] AC 774.

⁴⁹ *Linden Gardens* [1994] 1 AC 85, 97.

⁵⁰ *Ibid.*, at 98.

⁵¹ This analysis seems to have been shared by Lord Keith in *Linden Gardens*. He said at 95: 'There is much force in the analysis that the party who contracted for the works to be done has suffered loss because he did not receive the performance he had bargained for and in order to remedy that has been required to pay for the defects to be put right by another builder.'

Lord Griffiths did not elaborate on why the right to substantial damages should depend on making good or intending to make good the breach. He seemed to assume that it was essential to the promisee's cause of action and entitlement to compensation.⁵² One explanation is that, if the remedial work has not and will not be carried out, then the promisee cannot have suffered any financial harm and does not deserve damages. There can be no loss and therefore no damages claim. To award damages in such circumstances would give the promisee an uncovenanted profit, enabling him to 'put the money in his own pocket'.⁵³

This was the view of Lord Clyde and Lord Jauncey, who were part of the majority in *Alfred McAlpine Construction Ltd v Panatown Ltd*,⁵⁴ another three party case. For them, the promisee cannot obtain substantial damages if he has not been financially impacted by the breach. Intention is therefore not only relevant to the reasonableness of awarding cost of cure damages but an essential requirement for the promisee to establish that he has suffered loss.⁵⁵

2. Criticism of the role of intention to cure in Linden Gardens

The apparent view of Lord Griffiths that the subjective intention of the promisee to cure the breach should be an essential ingredient of loss and a prerequisite to damages liability is controversial. It has been said to be at odds with the absence of any requirement of an intention to cure in the narrower ground, on which the promisee can recover losses suffered by a third party subject to a duty to account to him. As noted in *Chitty*, paradoxically, this makes the narrower ground broader than the broader ground.⁵⁶

It has also not been universally accepted, and in some later cases, it has been held to be unnecessary. For instance, in *Darlington Borough Council v Wiltshier Northern Ltd*,⁵⁷ in which similar issues to those in *St Martins* arose, Steyn LJ said that it is 'no pre-condition to the recovery of substantial damages that the plaintiff does propose to undertake the necessary repairs'.⁵⁸

This view was also shared by Lord Goff and Lord Millett in their dissenting speeches in *Alfred McAlpine Construction Ltd v Panatown Ltd*.⁵⁹ They drew upon Lord Griffiths' broader ground to conclude that not receiving the promised contractual performance constituted loss, without more and in itself.⁶⁰ Breach alone was therefore sufficient for a claim to substantial damages, irrespective of whether the promisee had incurred or intended to incur the cost of curing the breach.

Lord Goff and Lord Millett did not think that a fair reading of Lord Griffiths' opinion required that the claimant must carry out the work or intend to do so as essential to his cause of action. In their view, the correct interpretation is that the claimant suffered loss because he did not receive the contracted-for bargain.⁶¹ What the claimant intends to do with his damages is not determinative, and is no more relevant in three party cases than in two party cases. Citing *Ruxley*, they said that intention is relevant only to the reasonableness of the promisee's claim to

⁵² This is what Lord Clyde called the 'first formulation' of Lord Griffiths' approach: *Alfred McAlpine* [2001] 1 A.C. 518, 533.

⁵³ See the speeches of Lord Clyde and Lord Jauncey in *Alfred McAlpine* [2001] 1 A.C. 518; *Chitty on Contracts* (n 8) at [18-063], [18-066]-[18-067].

⁵⁴ [2001] 1 A.C. 518.

⁵⁵ *Ibid.*, at 533ff (Lord Clyde) and 571-574 (Lord Jauncey).

⁵⁶ *Chitty on Contracts* (n 8) at [18-063].

⁵⁷ [1995] 1 W.L.R. 68.

⁵⁸ *Ibid.*, at 97 (Steyn LJ).

⁵⁹ [2001] 1 A.C. 518.

⁶⁰ *Ibid.*, at 547-548 (Lord Goff) and 587-590 (Lord Millett).

⁶¹ *Ibid.*

cost of cure damages.⁶² They therefore disagreed with the view of Lord Clyde and Lord Jauncey that Lord Griffiths considered that the promisee can only recover where he has paid for alternative performance, intends to do so, or would account to the third party for any damages awarded.

3. *Divergent approaches and different conceptions of loss*

There is therefore judicial divergence on what role, if any, should be given to the intention to cure in these third party benefit cases. The divergence is borne out of and turns on a wider and more fundamental difference of view as to whether contractual performance has intrinsic value and what conception of 'loss' should be adopted. These issues have given rise to much debate in the literature⁶³ but the relevance of intention in this context has received less attention. Focusing on this specific aspect, what these cases show is that those who advocate that the cure should have been effected or be intended for compensatory liability to arise equate loss with pecuniary harm. A breach of contract can only give rise to damages if it has resulted or will result in pecuniary detriment to the promisee.⁶⁴

Those who do not regard intention as a necessary requirement see loss as going beyond pecuniary harm; it is more than detriment to the promisee's overall financial position.⁶⁵ Damages should not turn on proof of financial loss, which should cease to be the touchstone of compensatory liability. Instead, the promisee should be recognised as having a legitimate interest in performance, which is worthy of remedial protection. There is therefore no need for him to prove that he has incurred or will incur the cost of curing the breach.

4. *Possible implications for two party cases*

The conundrum of the legal black hole and the apparent requirement in three party cases for the promisee to intend to cure the breach as a necessary precondition to a claim for substantial damages came many years after the two party cases, *Tito, Radford* and *Ruxley*. However, the requirement has been argued on two relatively recent occasions also to apply in that context, where the consideration moving from the promisor is unambiguously for the benefit of the promisee and there are no complications from third party involvement.

The first such case is *Giedo van der Garde BV v Force India Formula One Team Ltd (formerly Spyker F1 Team Ltd (England))*.⁶⁶ The claimants were an aspiring Formula One racing driver and the company managing his interests. In return for payment of \$3 million, the defendant, a Formula One racing team, agreed, amongst other things, to permit the claimant driver to drive a Formula One car in testing, practising or racing for a minimum of 6,000km. The claimants paid the contract price but the claimant driver was given only 2,004km of driving.

One of the claims advanced by the claimants⁶⁷ was for damages reflecting the value of the promised but denied performance. The defendant relied on *Linden Gardens* and *Panatown*

⁶² *Ibid.*, at 546-547, 556 (Lord Goff) and 592 (Lord Millett). For a criticism of this approach, see *Chitty on Contracts* (n 8) at [18-066].

⁶³ For a discussion of the protection the performance interest, see for example Coote (n 29); C. Webb, 'Performance and Compensation: an Analysis of Contract Damages and Contractual Obligation' (2006) 26 O.J.L.S. 41. For a comparative perspective on this issue, see S Rowan, *Remedies for Breach of Contract – A Comparative Analysis of the Protection of Performance* (2012 OUP).

⁶⁴ See the judgments of Lord Clyde and Lord Jauncey in *Alfred McAlpine* [2001] 1 A.C. 518.

⁶⁵ See the judgments of Lord Goff and Lord Millett in *Alfred McAlpine* [2001] 1 A.C. 518.

⁶⁶ [2010] EWHC 2373.

⁶⁷ The claimants also sought the return of \$2 million on the basis of total failure of consideration and, in the alternative, 'Wrotham Park damages'.

to argue that, for the claim to succeed, the claimants must have purchased or intend to purchase equivalent services elsewhere.⁶⁸ This was said to be a necessary ingredient of a claim to recover substantial damages. No replacement purchase had been made and, so it was argued, damages should not be allowed.

Stadlen J rejected this argument, which in his view did not apply in two party cases. Instead, he awarded damages representing the value of the services wrongfully withheld. The rationale was that the claimants had suffered loss because they purchased the right to 3,996km of test driving and had been deprived of its value.⁶⁹ Although the judge did not expressly articulate or arguably even recognise this, it meant that the claimants did not seek cost of cure damages but rather damages for the value of the services wrongfully denied. The loss suffered by the claimants was not the cost of curing the breach but the value of the services that should have been provided by the promisor. It was therefore unsurprising that intention to remedy the breach was held to be irrelevant.

A similar conclusion was reached in *De Beers UK Ltd (formerly Diamond Trading Co Ltd) v Atos Origin IT Services UK Ltd*,⁷⁰ a case concerned with the non-delivery of a software system. The promisee sought, amongst other things, the cost of obtaining a new system. Unlike in *Giedo*, this was clearly the cost of cure measure and the promisee's intention therefore came into play. When the promisee failed to demonstrate an intention to obtain the system, it fell to be decided whether cost of cure damages could nonetheless be recovered.

Edwards-Stuart J cited but did not delve into *Ruxley*, *Radford* and *Panatown* and simply concurred with Stadlen J's approach to *Panatown* in *Giedo*: the promisee's intention to obtain substitute performance was not a precondition of recovery in the two party context.⁷¹ Rather, the important question was whether it would be reasonable for a person in the position of the promisee to obtain substitute performance. He concluded thus: 'provided that it would be reasonable for a person in the position of [the promisee] to purchase those services elsewhere, it does not matter whether [the promisee] has an actual intention of doing so...!'

De Beers therefore appears to proceed on the basis that the interpretation of Lord Griffiths' broader ground that intention to cure the breach is essential to damages liability has no application in two party cases. On one interpretation, *De Beers* goes further by doubting that intention has any relevance at all, even in two party cases. If so, this would be inconsistent with the approach in *Ruxley* that the promisee's intention to cure is one factor amongst others relevant to whether cost of cure damages are awarded.

C. Reconciling the Different Approaches to Intention to Cure

The picture to emerge from these cases is of apparently differing approaches. A number of questions arise. Why is it that the promisee's intention to cure has been approached in different ways, sometimes as necessary to damages liability but on other occasions as just one relevant factor amongst others? How do *Tito*, *Radford*, *Ruxley*, *Linden Gardens*, *Panatown*, and *De Beers* fit together? Can they be reconciled?

On one view, there is a fault line in the authorities between the two and three party cases. Intention to cure has an essential role in the three party context, at least on Lord Griffiths' broader ground as interpreted by Lord Clyde and Lord Jauncey. Yet in two party cases, it seems to have reduced significance; this is somewhere on a range between relevant as one factor amongst others, per *Ruxley*, to complete irrelevance on one interpretation of *De Beers*.

⁶⁸ At [457] ff.

⁶⁹ At [478].

⁷⁰ [2010] EWHC 3276 (TCC); [2011] B.L.R. 274; 134 Con. L.R. 151; [2010] Info. T.L.R. 448.

⁷¹ *Ibid.*, at [345].

Assuming for a moment that there really is a difference in approach between the two and three party cases, a possible explanation is that the promisee in three party cases is not as deserving of damages as in two party cases. After all, it is less obvious that he has suffered harm. A requirement that he has carried out or intends to carry out the repairs obliges the court to identify a substantial loss.

This was the explanation given by Stadlen J in *Giedo*. In his view, *Linden Gardens* and *Panatown* are not authority for the proposition that buying a replacement or intending to do so is a precondition to recovering substantial damages in all cases. This requirement is confined to three party cases and others in which there is a legal black hole. Unlike in three party cases, this problem does not arise in two party cases because there is contractual privity and the promisee benefits directly under the contract.⁷²

A similar distinction is drawn by commentators. In *Chitty*, for instance, it is said that, in two party cases, where the promisee has suffered harm to his person or property as a result of the breach, the presence of an intention to cure is only relevant to the choice between alternative claims to cost of cure and difference in value damages. It is not relevant to the existence of a claim. In three party cases, it has a more prominent role because there is no assumption that loss has been suffered by the promisee. It is intention that establishes the loss and ensures that damages are in fact destined for the benefit of the third party. As such, it is necessary to the very existence of the claim for substantial damages.⁷³

It is doubtful however that there is a sustainable basis for a distinction being drawn between the role of intention to cure in two and three party cases. The view expressed by Lord Goff and Lord Millett in *Panatown* that intention should have the same role in both contexts is to be preferred. The court has to answer the same basic question: what is the promisee's recoverable loss? This was the essence of the issue in *Tito*, *Radford*, *Ruxley*, *Linden Gardens* and *Panatown*. In each case, the court had to decide whether the cost of curing the breach was a loss to the promisee that he could recover.

If it is correct that all of these cases are in substance examining the same question, namely whether the promisee's loss was the cost of remedying the breach, it ought logically to follow that the relevance of his intention to cure is the same. It goes directly to the existence of a claim to cost of cure damages. It is therefore unhelpful that intention has been seen to have different roles: a factor relevant in some cases and a necessary requirement in others. This confusion stems in part from *Ruxley*, where the House of Lords seemed to depart from the approach to intention to cure taken in *Tito* and *Radford*, steering away from intention as a necessary requirement towards it simply being a relevant factor.

As already noted, it is doubtful that the role attributed to intention in *Ruxley* is materially much different from in *Tito* and *Radford*, or indeed the approach of Lord Clyde and Lord Jauncey in *Panatown*. A fly in the ointment of this analysis might seem to be the finding in *De Beers* that intention to cure is not necessary to a damages claim. However, it is a case that should be considered in context and with a degree of caution. Edwards-Stuart J followed the conclusion in *Giedo*, a difference in value case, even though the case before him concerned cost of cure and therefore was fundamentally different. It seems likely that he would have reached a different conclusion, if he had been guided by the cost of cure authorities, including *Ruxley*.⁷⁴

IV. THE IMPLICATIONS OF TAKING ACCOUNT OF THE PROMISEE'S INTENTION TO CURE

⁷² *Giedo* [2010] EWHC 2373 at [474]-[485].

⁷³ At [18-066]-[18-068].

⁷⁴ A. Kramer, *The Law of Contract Damages* (Oxford 2014) 133 criticises the decision for this very reason.

Whether or not the role of the injured promisee's intention to cure the breach in these various situations is in substance the same, as argued in the preceding paragraphs, the evident divergence of judicial views invites the more fundamental question: is it right in principle that weight is given to the promisee's intention to cure and, if so, to what extent? The apparent tendency of the courts to give greater weight to his intention in hard cases also raises the further related question of whether this is an effective tool for deciding whether the promisee is deserving of cost of cure damages. Alternatively, could these cases be resolved more effectively by other means and without reference to intention?

It will be shown that taking the promisee's intention to cure into account is a valuable tool in achieving more accurate compensation and the current approach has a number of advantages. However, it also has the potential to create tension with other principles relating to damages. The paper then moves to consider two alternative approaches that could avoid this tension and their potential strengths and failings.

A. A Valuable Device

The desire to compensate the injured promisee more accurately that is cited in the cases⁷⁵ to justify taking account of whether or not he intends to cure the breach is commendable. If the objective of cost of cure damages is to hold the promisee harmless against this cost, why should he recover on this basis where he does not intend to cure the breach and incur it? Such an outcome seems intuitively wrong and inherently unmeritorious. It has the potential to put him in a better position than if the contract had been performed.⁷⁶

This is illustrated by *London Fire and Emergency Planning Authority v Halcrow Gilbert Associates Ltd*.⁷⁷ A local fire authority contracted with an engineer to design a facility where firefighters could train in simulated conditions involving fire, heat and smoke. The facility caught fire several times as a result of the engineer's negligence, meaning that the fire authority had to conduct training elsewhere. It sought £4.74 million for amongst other things the cost of repairs. The award was refused partly on the basis that the fire authority had no intention to reinstate the facility. It had become apparent that, for technical reasons, the facility would never be suitable.⁷⁸ Awarding cost of cure damages in these circumstances would have been incongruous and overcompensatory.

The refusal of cost of cure damages in this situation is justifiable on the basis that compensation must reflect the true extent of the loss suffered. Where it is established that the award will not be used to obtain the bargained-for performance, no loss equating to the cost of curing the breach will ever be suffered. The rationale for an award that compensates the cost of cure therefore falls away. This is an illustration that the protection of contractual expectations, which is the purpose of awarding damages, is by no means absolute. It is limited by a requirement that the promisee intends to cure the breach, which is directly linked to the characterisation of loss.

⁷⁵ See earlier the paragraph entitled '*Justifications for taking account of the promisee's intention to cure*'.

⁷⁶ Some commentators have argued that cost of cure damages should not be seen as compensatory but rather substitutionary: eg S. Smith, 'Substitutionary damages' in C Rickett (ed.), *Justifying Private Law Remedies* (Oxford University Press, 2009) 93; Winterton (n 40). The currently prevailing position in English law is that financial loss is the touchstone of damages liability, and it is on that basis that the paper proceeds.

⁷⁷ [2007] EWHC 2546.

⁷⁸ See also *Nordic Holdings Ltd v Mott MacDonald Ltd* (2001) 77 Con. L.R. 88; *GW Atkins Ltd v Scott* (1991) 7 Const. L.J. 215; *Minscombe Properties Ltd v Sir Alfred McAlpine* (1986) [1986] 2 EGLR 15; *Wigsell v School for the Indigent Blind Corp* (1881-82) L.R. 8 QBD 357; *Imodco Ltd v Wimpey Major Projects Ltd Taylor Woodrow International Ltd* (1987) 40 B.L.R. 1.

Taking account of the injured promisee's intention in assessing damages also has great force in that it enables the court to give effect to his 'consumer surplus'.⁷⁹ This is the subjective value of the contract to him over and above its market price, reflecting the fact that contracts are not always entered into for profit. Consumers in particular often bargain for pleasure and utility. It achieves this by recognising the subjective value that he attaches to the promised performance. This is not necessarily reflected in the objective market value, where the focus is solely on the enhancement of his financial position.

In *Radford*, for instance, Oliver J recognised that the promisee subjectively valued the privacy that building a wall would bring, even though the market value of his land would remain the same. This subjective value would not be compensated by a difference in value award, which would be assessed objectively. Only a cost of cure award would give him full satisfaction.

B. Tension in the Approach as to How the Award is Used

Despite achieving more accurate compensation, one potential difficulty with having regard to the promisee's intention to cure the breach when assessing damages is that it creates tension with the principle that, once the award has been made, how the promisee spends it is *res inter alios acta*. It would arguably be more consistent if account was taken of the use to which damages are put either in all cases or none.

This tension has been raised by judges and commentators. It is often cited as a reason why intention should have no relevance at all.⁸⁰ As already explained, in *Ruxley*, Lord Jauncey attempted to reconcile the two principles, stating that 'intention, or lack of it, to reinstate can have relevance only to the reasonableness and hence to the extent of the loss which has been sustained. Once that loss has been established intention as to the subsequent use of the damages ceases to be relevant'.⁸¹ However, as Coote has noted, any reconciliation is apparent rather than real: the inability of the promisor to challenge the way that the award is spent should not be allowed to detract from the fact that an intention to reinstate must be present at the time of the trial.⁸²

Australian courts have recognised and sought to avoid this tension by consistently disregarding what becomes of any damages award. In Australia, it is generally irrelevant to the promisee's entitlement to damages. At least in defective building cases, when considering whether to award cost of cure or difference in value damages, the courts apply a test of reasonableness, as in England. The leading authority is *Bellgrove v Eldridge*,⁸³ in which the promisor, a builder, built a house with defective foundations that caused it to be unstable. The High Court held that, in such cases, the measure of damages is generally the cost of remedying the defects, provided that the remedial work is necessary to achieve conformity with the contract and reasonable. Whether the work is necessary and reasonable is a question of fact.

Unlike in England, the subjective intention of the promisee as to how he will use his damages is generally not taken into account. In *Bellgrove*, the High Court expressly stated that the promisee's intention to rebuild is irrelevant to the measure of damages. Dixon CJ, Webb and Taylor JJ, delivering the judgment of the court, said: 'it was suggested during the course of argument that if the respondent ... is satisfied, she may or may not demolish the existing house

⁷⁹ Burrows (n 5) 223; Harris, Phillips, and Ogus (n 29) at 582.

⁸⁰ eg *Dean v Ainley* [1987] 1 W.L.R. 1729, 1737-1738 (Kerr LJ); Coote (n 29) at 562. Not everyone accepts that this tension exists. For instance, Burrows (n 5) at 222 sees this as a misleading objection because the courts commonly have to assess the likely future costs of the claimant on the basis that damages will cover these costs.

⁸¹ *Ruxley Electronics* [1996] A.C. 344, 359.

⁸² Coote (n 29) at 563.

⁸³ (1954) 90 C.L.R. 613.

and re-erect another. If she does not, it is said, she will still have a house together with the cost of erecting another one. To our mind this circumstance is quite immaterial'. The immateriality of the promisee's intention was 'but one variation of a feature which so often presents itself in the assessment of damages in cases where they must be assessed once and for all'.⁸⁴

This approach has been reaffirmed by senior Australian courts on several occasions. An example is the decision of the Full Court of the Supreme Court of South Australia in *De Cesare v Deluxe Motors Pty Ltd*.⁸⁵ Doyle CJ said that 'the award of [damages for rectification of building defects] is not conditional upon the [claimant] having first done the necessary work, upon the [claimant] undertaking to the court to do so or upon the [claimant] proving that the [claimant] will do so'.⁸⁶ Similarly, in *Unique Building Property Ltd v Brown*,⁸⁷ another decision of the same court, Sulan J held that 'the measure of damages is the difference between the contract and the cost of making it conform to the contract with consideration of the reasonableness of what is necessary to conform to the contract. This does not require consideration to be given as to the future intention of the respondents as to whether they subsequently wish to continue with the contracted building, or even whether they wish to sell the site'.⁸⁸

The Australian decisions cite several other reasons for taking no account of how the promisee intends to spend his damages award, aside from the general principle that the courts are unconcerned with how damages are used. One is that the test of reasonableness is objective; it should not be affected by the subjective intention of the promisee or the likelihood of the work being done.⁸⁹ It has also been said to be no concern of the promisor what contracts the promisee makes after the breach.⁹⁰

C. Resolving the Tension

The tension between the approach in English law to what the injured promisee intends to do and what he actually does with his damages award could be addressed in two alternative ways: the first is for the court to disregard the promisee's intention altogether when assessing damages; the second is for the court not only to take account of how he intends to use his award but also to exercise jurisdiction over what he actually does with it.

1. Disregarding intention to cure

The first possibility is to follow the Australian approach. This would mean that the availability of cost of cure damages would be limited solely by a requirement of reasonableness. No weight would be given to whether or not the injured promisee intends to cure the breach. Reasonableness would be the main device to prevent the promisee from obtaining an undeserved windfall and the contract-breaker being punished. This would mirror the approach where the promisee has already cured the breach by the time of the trial. In that scenario, the court considers whether the steps taken to cure the breach were reasonable and the promisee

⁸⁴ *Ibid.*, at 616.

⁸⁵ (1996) 67 S.A.S.R. 28.

⁸⁶ *Ibid.*, at 30.

⁸⁷ [2010] S.A.S.C. 106.

⁸⁸ *Ibid.*, at [94]; However, it has been argued that, in very exceptional circumstances, *Bellgrove* will be displaced 'if there are supervening circumstances that show with substantial certainty' that the rectification will not happen: see *Scott Carver Pty Ltd v SAS Trustee Corp* [2005] NSWCA 462, [44] (Hodgson JA); *Central Coast Leagues Ltd v Gosford City Council* (unreported, Supreme Court, NSW, Giles CJ at CL, 9 June 1998); *Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] NSWCA 253.

⁸⁹ *De Cesare v Deluxe Motors Pty Ltd* (1996) 67 S.A.S.R. 28.

⁹⁰ *Director of War Service Homes v Harris* (1968) QR. 275.

has successfully discharged his duty to mitigate. Essentially the same enquiry would be made where the promisee has not already cured the breach.⁹¹

The reasonableness test, as applied in relation to cost of cure damages, is broad and encompasses many factors other than whether or not the injured promisee intends to cure the breach.⁹² They combine to verify that the loss is genuine and ensure that the promisee is not exploiting the breach to secure an 'unwarranted profit'.⁹³ The objective is to achieve the best possible balance between the interests of the promisee and those of the promisor, protecting the former without overburdening the latter.

The factors include the level of disproportion between the cost of the cure and its benefit to the injured promisee,⁹⁴ the extent and seriousness of the defect and its consequences,⁹⁵ and whether the remedial work is necessary to achieve the promised performance.⁹⁶ The more serious and extensive the defect, the more reasonable a cost of cure award will be.⁹⁷ On the other hand, the greater the disproportion between the cost of cure and the benefit to the promisee, the less reasonable it will be. The disproportion must be significant before a cost of cure award is found to be unreasonable. As Lord Mustill said in *Ruxley*, the cost of reinstatement must be 'wholly disproportionate'. This is because the courts try to honour and give effect to the bargain of the parties: 'pacta sunt servanda'.⁹⁸

Other factors relevant to the reasonableness test include the nature and purpose of the contract⁹⁹ and the injured promisee's own subjective preferences.¹⁰⁰ For instance, the courts have regard to whether the contract is commercial in nature or for a purpose which does not have economic value such as a recreation. The promisee's predilections and tastes are thereby taken into account, as is the consumer surplus.¹⁰¹ To that extent, account is taken of the promisee's intention, albeit this is measured at the time that the contract is formed rather than the time of the breach or the trial.

Applying these factors to *Ruxley* and *Radford*, the outcomes would most likely have been the same, even if no account had been taken of the injured promisee's subjective intention at the time of trial. In *Ruxley*, many factors pointed towards the cost of cure being unreasonable. The defect was minor in that the difference in depth was only slight. Mr Forsyth's main reason for specifying the depth in the contract was to enable him, as a tall man, to dive safely;¹⁰² it was not essential for any other purpose. However, the pool as built was found by the trial judge to be safe for diving, the contractor having adduced evidence that the depth was well within national safety recommendations. It was therefore found that there was a significant

⁹¹ Whether the test of reasonableness is the same as the test applied in the context of mitigation is a point of disagreement. Oliver J in *Radford* [1977] 1 W.L.R. 1262, at 1284 thought that whether it is reasonable for the promisee to incur the cost of reinstatement was '[a question] of mitigation'. This view is shared by a number of commentators: Kramer (n 74) at 119ff; Burrows (n 5) at 219ff. Contra *Ruxley Electronics* [1996] A.C. 344, 369-70 (Lord Lloyd). Regardless of whether the tests are identical, they share the same objective, which is not to overburden the defaulting promisor with losses that he has not caused.

⁹² G. McMeel, 'Common Sense on Cost of Cure' [1995] L.M.C.L.Q. 456, 458-459; A. Loke, 'Cost of Cure or Difference in Value – Towards a Sound Choice in the Basis for Quantifying Expectation Damages' (1996) 10 J.C.L. 189.

⁹³ *Radford* [1977] 1 W.L.R. 1262, 1270 (Oliver J).

⁹⁴ *Ruxley Electronics* [1996] A.C. 344, 353 (Lord Keith) and 367, 369 (Lord Lloyd).

⁹⁵ *Ruxley Electronics* [1996] A.C. 344, 357-358 (Lord Jauncey); *Imodco Ltd v Wimpey Major Projects Ltd Taylor Woodrow International Ltd* (1987) 40 BLR 1.

⁹⁶ *Dean v Ainley* [1987] 1 W.L.R. 1729, 1735 (Glidewell LJ).

⁹⁷ *Ruxley Electronics* [1996] A.C. 344, 358 (Lord Jauncey).

⁹⁸ *Ibid*, at 361-360.

⁹⁹ *Ibid*, at 358 (Lord Jauncey); *Radford* [1977] 1 W.L.R. 1262, 1270 (Oliver J).

¹⁰⁰ *Ibid*; see also *Channel Island Ferries Ltd v Cenargo Navigation Ltd* [1994] 2 Lloyd's Rep 161, 166-167 (Philips J); *GW Atkins Ltd v Scott* (1991) 7 Const. L.J. 215, 221-222 (Ackner LJ).

¹⁰¹ Coote (n 29) at 559.

¹⁰² *Ruxley Electronics* [1994] 1 W.L.R. (CA) 650, 652 (Staughton LJ).

disproportion between, on the one hand, the benefit to be achieved by curing the breach and rebuilding the pool, which would have been minor, and the cost, which was high. A reasonable man in Mr Forsyth's position would not have taken this course.

In *Radford*, the purpose of the boundary wall that the promisor had agreed to build was to protect the privacy of the injured promisee's land in an acceptable architectural style.¹⁰³ Although there was a significant disparity between the cost of cure and the difference in value measures of damages, the subjective benefit to the promisee of protecting the privacy of his land was not out of proportion to the cost of cure. Building a wall was the only means of achieving this purpose.

Apart from achieving consistency with the principle that the injured promisee's use of his damages is *res inter alios acta*, focusing on reasonableness without having regard to the promisee's intention would also have the advantage of avoiding potential evidential uncertainty. Trying to ascertain the subjective intention of the promisee can be speculative. In *Tito*, Megarry VC sought to alleviate the problem by holding that it was sufficient for the court to determine his probable intention,¹⁰⁴ but even this may be difficult and involve guesswork. A corollary is uncertainty for the defaulting promisor as to his potential exposure.

A multitude of evidential factors have been taken into account in determining whether the injured promisee actually intends to cure the breach. One is the amount of time that he has left the defect unremedied¹⁰⁵ and whether he could have afforded to pay for the cure during that time.¹⁰⁶ Another is whether he has taken steps or made plans to cure the breach, for example by seeking or better still obtaining tenders for the remedial work from alternative contractors or drawing up specifications.¹⁰⁷ Further relevant factors include whether the defective property has a special value to the promisee,¹⁰⁸ and whether curing the breach is necessary¹⁰⁹ and still achievable.¹¹⁰

It is possible that these evidential factors will have unsatisfactory implications in some cases. As an example, for the injured promisee's prospects of success to depend only on when his claim comes before the court and the steps that he has (or has not) taken in the intervening period would be unattractive. It might lead to different outcomes, depending on relatively arbitrary factors such as when he gets round to rectifying the breach or bringing his claim. Yet there could be many valid reasons for his delay. He might have needed or preferred to receive the damages payment before undertaking the work. Even if he was able to do the work immediately, he might have opted for perfectly legitimate reasons to spend his money in other ways or not at all. It may be that he delayed commencing proceedings to develop his evidential case or due to protracted pre-action correspondence or negotiations with the promisor. A further cause of delay that would hardly be unusual is that, when commenced, the proceedings progressed slowly. All or most of these issues should be surmountable with appropriate evidence from the promisee but they nonetheless present possible pitfalls for the unwary. Disregarding his intended use of his damages award should avoid many of them altogether.

2. Taking account of intention: conditional cost of cure awards and undertakings

¹⁰³ *Radford* [1977] 1 W.L.R. 1262, 1269.

¹⁰⁴ *Tito v Waddell (no. 2)* [1977] Ch 106, 333.

¹⁰⁵ *Nordic Holdings Ltd* (2001) 77 Con. L.R. 88, [106]; *London Fire and Emergency Planning Authority* [2007] EWHC 2546, [633]ff.

¹⁰⁶ *Ibid*; *Birse Construction Ltd* [2007] EWHC 2546, at [52].

¹⁰⁷ *London Fire and Emergency Planning Authority* [2007] EWHC 2546, [633]ff; *Nordic Holdings Ltd* (2001) 77 Con. L.R. 88, [107].

¹⁰⁸ *Ward v Cannock Chase District Council* [1986] Ch 546, 577 (tort).

¹⁰⁹ *Nordic Holdings Ltd* (2001) 77 Con. L.R. 88, [106].

¹¹⁰ *London Fire and Emergency Planning Authority* [2007] EWHC 2546 [633]ff.

Another possible way of avoiding tension between the approaches to what the injured promisee intends to do and what he actually does with his award would be for both to be relevant to his entitlement to damages. This would potentially achieve more accurate compensation not only at the time of trial when damages are assessed, but also after the award has been made.

In some cases, there is a risk that the damages award, once made, will be rendered over-compensatory by subsequent events. This is illustrated by the decision of the Irish Supreme Court in *Dublin Corp v Building and Allied Trade Union*,¹¹¹ which arose out of a compulsory purchase order rather than a breach of contract. Dublin Corporation was a road authority responsible for widening a road. To this end, it compulsorily purchased part of the site of a building known as the Bricklayers' Hall, which was owned by the Bricklayers' Guild and had a fine cut stone facade. One possible measure of compensation was the value of the entire building. The other was the much higher cost of purchasing only the part of the building needed to widen the road, together with the cost of removing the facade and reinstating it on the reduced site. The Guild wished to keep the facade and intended to reinstate it and, on this basis, was awarded the higher sum.

Following the award but before the conveyance took place, the Guild changed its mind. It demolished the hall and made no attempt to rebuild it or reinstate the facade. The Irish Supreme Court refused to reassess the compensation award in the light of the changed circumstances. Keane J, delivering the judgment of the court, held that the principle of *res judicata* gave the Guild a complete defence; the Corporation was estopped from revisiting the issue. He said that the 'interest of the public is that finality is given precedence by the law over the injustices which inevitably sometimes result'.¹¹² The Guild was able to keep the additional amount of damages and ended up making a substantial profit. This neatly demonstrates how a damages award that is reasonable when made can be rendered over-compensatory by subsequent events.

This outcome could have been avoided if the court had been able to exercise jurisdiction over how the money was spent. One way for this to be done would be for the court to order that the right to cost of cure damages is conditional upon the injured promisee using the award to remedy the breach. To the extent that the promisee does not do so, the condition would fail, entitling the promisor to demand repayment. If repayment was not forthcoming voluntarily, the promisor would be entitled to bring the matter back before the court and seek an order that the damages be repaid. This would prevent the promisee from obtaining a windfall, achieving a purer form of compensation which, at least for the defaulting party, would seem fairer.

This solution is not without problems. It has the potential to reopen disputes that have already been litigated to judgment and thereby create uncertainty for both parties. The precise grounds on which repayment could be sought would need to be established.¹¹³ Clawing back money that has already been spent may be difficult. For instance, the injured promisee might have dissipated the money and be impecunious. To ascertain or police what the promisee has done with it would in some situations put the defaulting promisor to considerable expense and inconvenience. A right to repayment would also turn him into the promisee's unsecured creditor¹¹⁴ and expose him to the risk of insolvency of the promisee.

A possible answer to the argument that conditional awards would bring uncertainty is that this would not arise where the injured promisee spends his award on curing the breach. Uncertainty could also be minimised by restricting conditional awards only to those cases in which the promisee's intention to use the award to cure the breach is taken into account by the

¹¹¹ [1996] 2 ILRM; E O'Dell, 'Restitution and *Res Judicata* in the Irish Supreme Court' (1997) 113 L.Q.R. 245.

¹¹² *Ibid*, at 556.

¹¹³ Possibly on the basis of unjust enrichment: *ibid*.

¹¹⁴ Unless the money is held on trust (eg a *quistclose* type of trust, see *Barclays Bank v Quistclose Investments Ltd* [1970] AC 567) or put into an escrow account pending the promisee curing the breach.

court at the assessment stage. Since the purpose of taking his intention into account is presumably to achieve more accurate compensation, there is an argument for staying true to this purpose after the award has been made and requiring that any damages not spent curing the breach be returned.

Another possibility would be for the courts to allow or even require the injured promisee to give an undertaking that he will spend the damages on curing the breach.¹¹⁵ Such an undertaking would most likely be given to the court. The defaulting promisor would therefore be unable to sue for repayment. Instead, as with any undertaking given to court, it would be enforceable by contempt of court proceedings.¹¹⁶ The seriousness of being in contempt and the solemnity of giving an undertaking should provide the court and the defaulting promisor some assurance that the promisee is serious about spending his damages on curing the breach.

That there is potentially a role for undertakings in this context has already been argued in the cases. In an attempt to demonstrate the genuineness of their intention to cure the breach, some claimants have offered to undertake that, if awarded cost of cure damages, they would spend their award on the cure. There has been inconsistency in the cases as to whether such an undertaking should be accepted. Both Megarry VC in *Tito* and Oliver J in *Radford* were receptive to the idea. Megarry VC thought that 'if the circumstances fail to indicate sufficiently that the work will be done, the court might accept an undertaking by the plaintiff to do the work; ... this... would surely "compel fixity of intention"'.¹¹⁷ In *Radford*, the promisee offered an undertaking. Oliver J thought that it was unnecessary as the promisee had clearly established an intention to cure the breach but it appeared to comfort him that the intention was genuine.¹¹⁸

However, in *Ruxley*, the House of Lords seemed less convinced. It declined to accept the undertaking that Mr Forsyth had offered that, if awarded cost of cure damages, he would rebuild the pool to the contractually agreed depth. The main reason was the prospect that, by giving the undertaking, he would effectively be inflating his damages award. Lord Lloyd said: 'does Mr Forsyth's undertaking to spend any damages which he may receive on rebuilding the pool make any difference? Clearly not. He cannot be allowed to create a loss, which does not exist, in order to punish the defendants for their breach of contract'.¹¹⁹

Allowing the injured promisee to undertake that he will spend his damages award curing the breach would most likely give rise to similar practical problems as conditional awards. It also has the potential to lead to enforcement problems and satellite litigation.¹²⁰ The defaulting promisor would have to police compliance with the undertaking, which could be difficult and put him to considerable inconvenience and expense. If the undertaking were breached, he would have to make an application to court¹²¹ and adduce evidence of the promisee's failure. This would need to be particularly convincing given that breach would potentially put the promisee in contempt of court. It may therefore be an unattractive solution in practice.

V. CONCLUSION

¹¹⁵ Proposed by Webb (n 63).

¹¹⁶ A. Zuckerman, *Civil Procedure* (London 2003) [22.74]-[22.91].

¹¹⁷ *Tito v Waddell* (no. 2) [1977] Ch 106, 333.

¹¹⁸ *Radford* [1977] 1 W.L.R. 1262, 1284 (Oliver J.); see also *Dean v Ainley* [1987] 1 W.L.R. 1729, 1735 (Glidewell LJ).

¹¹⁹ *Ruxley Electronics* [1996] A.C. 344, 373 (Lord Lloyd). See also *Scullion v Bank of Scotland (t/a Colleays)* [2010] EWHC 2253 at [68]-[80]: the courts have no jurisdiction to extract an undertaking from the promisee to compel him to spend his damages award in a particular way.

¹²⁰ Burrows (n 5) 220; E. McKendrick, 'Breach of Contract and the Meaning of Loss' [1999] C.L.P. 37 at 50; For arguments in favour of enforcing such undertakings, see A. Phang, 'Subjectivity, Objectivity and Policy – Contractual Damages in the House of Lords' [1996] J.B.L. 362.

¹²¹ Zuckerman (n 116) at [22.89].

The courts have avoided concerning themselves with the way that the injured promisee uses his damages award once it has been made. They have however taken account of how he intends to use it in deciding whether or not to order damages on the cost of cure basis. This has been perceived to facilitate fairer outcomes in hard cases such as those arising out of contracts for the benefit of third parties and where the choice of measure of damages is contentious.

Taking the subjective intention of the injured promisee into account in the assessment of damages has many advantages and is a rational solution. It can however lead to tension with other principles in the compensation process. At least in theory, this could be resolved by two alternative options: ceasing to take account of how the promisee intends to use his damages when determining the availability of cost of cure damages or, alternatively, extending the court's jurisdiction to making sure that he applies the award to cure the breach.

The former solution has been thought to be attractive in Australia and would merit consideration in England. It involves disregarding whether or not the injured promisee intends to cure the breach when assessing damages. The test of reasonableness would operate in the same way as at present but without any account being taken of the promisee's intention or otherwise to cure. As well as overcoming any perceived tension with the principle that the courts do not police how damages awards are used, it would avoid the potential for evidential uncertainty that could result from a need to prove the promisee's subjective intention. It would also have the advantage of still achieving fair compensation and at a same time putting an end to the divergence in approach as to the relevance of the promisee's intention to cure that can be discerned in the case law.