THERE IS NO "BREACH DATE RULE": MITIGATION, DIFFERENCE IN VALUE AND DATE OF ASSESSMENT

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A. Introduction

When valuing goods, the cost of repairs, or assets purchased through negligent advice, it is common to ask "what is the date of assessment?" Judges usually start with the proposition that "as a general rule in English law damages for tort or for breach of contract are assessed as at the date of the breach".[1] This so-called "breach date rule"[2] is subject to the caveat that it will not be applied "mechanistically" and will be departed from where necessary to reflect the overriding compensatory principle.[3] Over time the rule has spawned a "growing list of exceptions".[4] It is still thought to be unclear how much of the breach date rule survives after *The Golden Victory*.[5]

We argue that most of the work supposedly done by the date of assessment rule is really done by mitigation. The law of damages does not require judges to pick a date on a timeline between breach and trial, but in order to understand why it can sometimes *look* like this, we need a better understanding of the mitigation rule. Mitigation requires damages to be assessed as if the claimant acted reasonably, if in fact it did not. Where there is an available market it is reasonable to expect the claimant to have resort to it, often shortly after the date of breach. However, this should not disguise the fact that the underlying rule is mitigation. The language of "date of assessment" is just convenient (and sometimes inconvenient) shorthand to describe the outcome once the mitigation rule has been applied.

The search for a unitary date of assessment rule is ultimately misguided because loss (in the legal sense) is not measured by reference to a single date, whether at

[1] *Miliangos v George Frank (Textiles) Ltd* [1976] A.C. 443 at 468 per Lord Wilberforce. See also *Johnson v Agnew* [1980] A.C. 367 at 401 per Lord Wilberforce; *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 W.L.R. 433 at 451 per Megaw L.J. and at 457 per Donaldson L.J.; *County Personnel (Employment Agency) Ltd v Alan R Pulver & Co* [1987] 1 W.L.R. 916 at 925–926 per Bingham L.J.; *Smith New Court Securities Ltd v Citibank NA* [1997] A.C. 254 at 265–266 per Lord Browne-Wilkinson; *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12; [2007] 2 A.C. 353 at [11] per Lord Bingham (citing a long list of authorities for the proposition); H. Beale, *Chitty on Contracts*, 31st edn (London: Sweet & Maxwell, 2012), at paras 26-014 and 26-086.

[2] *The Golden Victory* [2007] 2 A.C. 353 at [71] per Lord Brown.

[3] *County Personnel (Employment Agency) Ltd v Alan R Pulver & Co* [1987] 1 W.L.R. 916 at 925 per Bingham L.J., cited with approval in: *Smith New Court Securities Ltd v Citibank NA* [1997] A.C. 254 at 266 per Lord Browne-Wilkinson; *The Golden Victory* [2007] 2 A.C. 353 at [33] per Lord Scott; *Parabola Investments Ltd v Browallia Cal Ltd* [2010] EWCA Civ 486; [2011] Q.B. 477 at [33] per Toulson L.J. See further text to fnn.14–16 below.

[4] G. Treitel, "Assessment of Damages for Wrongful Repudiation" (2007) 123 L.Q.R. 9 at 15.

[5] *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 A.C. 353. See e.g. *Bunge SA v Nidera SA* [2013] EWHC 84 (Comm), but see also *Novasen SA v Alimenta SA* [2013] EWHC 345 (Comm) at [12] per Popplewell J.

breach, trial or anywhere in between.[6] In assessing loss, the judge starts with evidence of everything that has happened by the date of trial. However, various legal rules may require certain types of post-breach event to be ignored notwithstanding that the event was in fact caused by the defendant's breach or would in fact have occurred but for the breach. For present purposes, mitigation is the most important of these rules, because it is the one that most often underlies judicial references to date of assessment, and is most often responsible for the mistaken belief in the existence of a breach date rule. Other legal rules sometimes play a part,[7] but their exposition is a project for another day.

B. A New Framework

To some this article will be uncontroversial. The few serious treatments of date of assessment largely agree that the mitigation rule explains most of the relevant authorities.[8] However, the language of the date of breach, and of a date of assessment rule, doggedly persists. In this section we outline the prevailing date of assessment rule, in order to highlight its main deficiencies as a rule and as an explanation of what the law does. We then introduce a new framework that we suggest promotes a clearer understanding of the date of assessment problem.

1. The conventional approach: apply a date of assessment rule

In *The Golden Victory*, Lord Bingham articulated the conventional understanding of the date of assessment problem:

> "The compensatory principle … has been enunciated and applied times without number and is not in doubt. It does not, however, resolve the question whether the injured party's loss is to be assessed as of the date when he suffers the loss … or at a later date when the assessment happens to be made, in the light of such later events as may then be known."[9]

If we were not so accustomed to the language of date of assessment, we would realise quite how strange this question is. It relies upon notionally measuring loss "as of" a particular date, although (literally speaking) the assessment must obviously take place at the date of trial.[10] The notional date of assessment is said to be arrived at by restricting the information used by the judge, who must ignore all events that occurred after the selected date.[11] In other words, the judge situates himself at a single point in time and assesses damages exclusively from that perspective.

[6] Indeed, loss also involves making predictions at trial about how much worse off the claimant will be in the future, after trial.

[7] For instance, many of the legal rules commonly discussed under the headings of "legal causation", "remoteness" and "collateral benefits". See further text to fnn.22–26 below.

[8] See e.g. S. Waddams, "The Date for the Assessment of Damages" (1981) 97 L.Q.R. 445 esp. at 450 and 461; E. Peel (ed.), *Treitel, The Law of Contract*, 13th edn (London: Sweet & Maxwell, 2011), at para.20-072; H. Beale, *Chitty on Contracts*, 31st edn (2012), at paras 26-014 and 26-086.

[9] *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 A.C. 353 at [9].

[10] Further issues arise concerning the extent to which an appellate court may take account of events occurring after the date of trial, but these are essentially procedural/policy-related and do not raise any new issues of principle. See further A. Burrows, *Remedies for Torts and Breach of Contract*, 3rd edn (Oxford: Oxford University Press, 2004), at pp.184–185.

[11] In *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 A.C. 353, only Lord Scott and Lord Brown acknowledged this process explicitly (in order to reject it): at [31] and [83], respectively. See

The prevailing "general rule" for date of assessment is thought to be that damages are assessed as at the date of breach,[12] although it is openly acknowledged that numerous exceptions must be accommodated.[13] The formulae put forward for departing from the breach date rule are hopelessly vague. According to three leading House of Lords decisions, the breach date rule may be departed from "if to follow it would give rise to injustice",[14] "where it is necessary in order adequately to compensate the plaintiff",[15] or where it is "necessary or just to do so in order to give effect to the compensatory principle".[16] And so, on the conventional approach, judges are presented with an apparently unguided discretion which rests on unspecified concepts of justice and compensation.

2. Our approach: understanding mitigation (and other legal rules)

The key to resolving the date of assessment problem lies in understanding how the compensatory principle operates. The aim of compensatory damages is to award the "sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong".[17] This same principle applies whether the cause of action is a tort or breach of contract; only the nature of the relevant right differs.[18] The principle requires a comparison between two positions: the position that the claimant is and will be in as a result of the wrong (the "breach position"); and the position that it would have been in had the wrong not occurred (the "non-breach position").[19] The money-value of the difference between the breach and non-breach positions is the claimant's "loss", and forms the measure of damages mandated by the compensatory principle.[20]

The assessment of the breach and non-breach positions involves the application of legal rules; it is not an exclusively factual exercise. In other words, whilst the judge's starting point is factual (i.e. for the breach position: what in fact happened and will happen? for the non-breach position: what in fact would have happened?), legal rules may require the judge to displace certain aspects of the factual assessment when assessing the claimant's loss.[21] In particular, judges must sometimes assess the claimant's breach and non-breach positions *as if* a certain state of affairs existed or would have existed, even where these assumptions are contrary to fact. There are several clear examples of this phenomenon in the law of damages, of which mitigation is only one.

also *Seatbooker Sales Ltd v Southend United FC Ltd* [2008] EWHC 157 (QB) at [110] per H.H.J. Richard Seymour Q.C.; H. Street, "Supervening Events and the Quantum of Damages" (1962) 78 L.Q.R. 70 at 72.

[12] See fn.1.

[13] See fnn.3 and 4 above.

[14] *Johnson v Agnew* [1980] A.C. 367 at 401 per Lord Wilberforce.

[15] *Smith New Court Securities Ltd v Citibank NA* [1997] A.C. 254 at 265 per Lord Browne-Wilkinson.

[16] *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 A.C. 353 at [13] per Lord Bingham.

[17] *Livingstone v the Rawyards Coal Company* (1879–80) L.R. 5 App. Cas. 25 at 39, a tort case. The contract formulation is given in *Robinson v Harman* (1848) 154 E.R. 363 (Court of Exchequer) at 365.

[18] D. Friedmann, "The Performance Interest in Contract Damages" (1995) 111 L.Q.R. 628 at 638–643.

[19] For a clear recent statement to this effect, see Teare J. in *Flame SA v Glory Wealth Shipping PTE Ltd* [2013] EWHC 3153 (Comm) at [17].

[20] See e.g. *Stephenson Blake (Holdings) Ltd v Streets Heaver Ltd* [2001] Lloyd's Rep. P.N. 44 at [158] per Hicks Q.C.; Burrows, *Remedies for Torts and Breach of Contract* (2004), at p.156.

[21] We are here referring to "loss" in the legally relevant sense i.e. as a function of the compensatory principle as just explained. It is helpful to distinguish this from "factual loss", which takes into account any and every cost or benefit factually caused by the breach.

When assessing the claimant's *non-breach* position, the law sometimes departs from what actually would have happened but for breach. For instance, when assessing damages for breach of contract, the so-called "minimum obligations rule" requires that the judge "must assume that the defendant would not have acted outside the terms of the contract", even if it can be shown that as a matter of fact the defendant would (but for the breach) have conferred non-contractual benefits on the claimant.[22] Similarly, another rule (often expressed in terms of legal causation) requires the judge to ignore that but for the breach the claimant would have been harmed by the wrongful conduct of a third party,[23] or spent its money anyway (perhaps on extravagant living or charity).[24]

It is often assumed, however, that the assessment of the claimant's *breach* position is an exclusively factual exercise. For instance, it is common to talk about assessing the claimant's "actual position" after breach. However, here too, legal rules sometimes require the judge to assess the claimant's position using assumptions contrary to fact. To give one example, there is a rule that benevolent donations by third parties are ignored, even where the donation was in fact received by the claimant as an immediate and entirely foreseeable consequence of the defendant's breach (often expressed as a "collateral benefit").[25] Similarly (and just as with the non-breach position) the judge is often required to ignore the actual effects of wrongful post-breach conduct by third parties, even though the defendant's breach was a factual cause of the additional harm.[26]

Mitigation, the main legal rule discussed in this article, also affects the assessment of the claimant's breach position. As explained below,[27] mitigation requires the judge to assess the claimant's breach position as if the claimant acted reasonably, even where this assumption is contrary to fact. We aim to show that this understanding of mitigation, as applicable to situations involving an available market for goods or services, explains almost all of the cases usually cited in support of the breach date rule, and clarifies when departure from the breach date is justified.

[22] *Durham Tees Valley Airport Ltd v Bmibaby Ltd* [2010] EWCA Civ 485; [2011] 1 All E.R. (Comm) 731 at [79] per Patten L.J.

[23] See e.g. *Kuwait Airways Corp v Iraqi Airways Co (No.6)* [2002] UKHL 19; [2002] 2 A.C. 883; *Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos* [1905] A.C. 6 at 13.

[24] *Woods v Martins Bank Ltd* [1959] 1 Q.B. 255 at 73 per Salmon J.; *Parabola Investments Ltd v Browallia Cal Ltd* [2011] Q.B. 477 at [55] per Toulson L.J.

[25] See e.g. *Parry v Cleaver* [1970] A.C. 1 at 14–15 per Lord Reid; *Dimond v Lovell* [2000] UKHL 27; [2002] 1 A.C. 384 at 399–400 per Lord Hoffmann. The donation may be in kind (for example, care) rather than money: *Donnelly v Joyce* [1974] Q.B. 454. The rule only applies to donations by *third parties*, not by the defendant: *Hunt v Severs* [1994] 2 A.C. 350; *Hussain v New Taplow Paper Mills Ltd* [1988] A.C. 514.

[26] See e.g. *Wiseman v Virgin Atlantic Airways* [2006] EWHC 1566 (QB) at [22] per Eady J. Two exceptions to this rule are apparent: first, where the defendant had a duty to prevent the wrongful conduct of the third party; and secondly, where the wrongful conduct of the third party was very likely to result from breach: see Burrows, *Remedies for Torts and Breach of Contract* (2004), at pp.99–105.

[27] See text to fn.32 below.

C. Mitigation

1. Mitigation in outline

Mitigation is often said to comprise three rules,[28] but it is better expressed using just one: damages are assessed as if the claimant acted reasonably, if in fact it did not act reasonably.

If the claimant acted reasonably then all actual costs and benefits resulting from its conduct will be taken into account. In such cases the measure of damages does not depend upon the application of mitigation or any other legal rule; rather the claimant simply recovers its factual loss (the difference between the actual breach and actual non-breach positions evident at the date of trial) because no legal rule engages to provide otherwise.[29] This explains the so-called "second rule" of mitigation that the claimant can recover the costs of taking reasonable mitigating steps even if they turn out to increase its factual loss,[30] and it also explains why damages are denied where the claimant's factual loss is reduced or eliminated by the claimant's taking reasonable steps.[31]

If the claimant acted unreasonably then damages will nevertheless be assessed as if the claimant had acted reasonably. In *The Golden Victory*, Lord Bingham clarified that mitigation imposes an "assumption" that the claimant acted reasonably "whether in fact the injured party acts in that way or, for whatever reason, does not".[32] Thus the rule of mitigation displaces the factual assessment of the claimant's breach position and replaces it with the position that the claimant would have been in if it had acted reasonably. Any costs and benefits that would have arisen if the claimant had acted reasonably are taken into account; any other actual costs and benefits are ignored.

The question whether the claimant acted "reasonably" is closely related to legal causation.[33] In *Lagden v O'Connor*, Lord Walker explained that mitigation is "an aspect (or category) of the larger principle of causation".[34] Causation and mitigation have been described as "two sides of the same coin".[35] Of course, such references to causation are wider than just the factual "but for" test, because even where the

[28] See e.g. H. McGregor, *McGregor on Damages*, 18th edn (London: Sweet & Maxwell, 2009), at para.7-003.

[29] *Hooper v Oates* [2013] EWCA Civ 91 at [38] per Lloyd L.J.; *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2007] EWCA Civ 901; [2007] 2 Lloyd's Rep 555 at [109] per Rix L.J. (explaining that where there is no available market and so the mitigation rule is not engaged, the claimant can recover the "actual loss suffered, rather than the conventional market loss", subject to remoteness).

[30] H. McGregor, *McGregor on Damages* (2009), at para.7-005; *Owners of the Andros Springs v Owners of the World Beauty (The World Beauty)* [1970] P. 144 at 156 per Winn L.J. See also *Esso Petroleum Co v Mardon* [1976] Q.B. 801; *Lloyds and Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd* [1966] 1 Q.B. 764; *Koch Marine Inc v d'Amica Societa Di Navigazione Arl (The Elena d'Amico)* [1980] 1 Lloyd's Rep. 75 at 89 per Robert Goff J.; *Lagden v O'Connor* [2003] UKHL 64; [2004] 1 A.C. 1067 at [78].

[31] *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No.2)* [1912] A.C. 673; *Dimond v Lovell* [2002] 1 A.C. 384 at 401–402 per Lord Hoffmann. See further A. Dyson, "British Westinghouse Revisited" [2012] L.M.C.L.Q. 412.

[32] *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 A.C. 353 at [10]. See also: *Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd (The Kildare)* [2010] EWHC 903 (Comm); [2011] 2 Lloyd's Rep. 360 at [65] per Steel J.

[33] See e.g. *Koch Marine Inc v d'Amica Societa Di Navigazione Arl (The Elena d'Amico)* [1980] 1 Lloyd's Rep. 75 at 88 per Robert Goff J.; *Sotiros Shipping Inc v Sameiet Solholt (The Solholt)* [1983] 1 Lloyd's Rep. 605 at 608 per Lord Donaldson M.R.; and *McClelland v Climax Hosiery Mills* 252 N.Y. 347 (1930) at 359 per Cardozo C.J.

[34] *Lagden v O'Connor* [2004] 1 A.C. 1067 at [99]–[100].

[35] *Standard Chartered Bank v Pakistan National Shipping Corp* [2001] EWCA Civ 55 at [41] per Potter L.J. On the other hand, the utility of expressing mitigation in causal terms has sometimes been questioned: see e.g. *Uzinterimpex Jsc v Standard Bank Plc* [2008] EWCA Civ 819 at [56] per Moore-Bick L.J.; McGregor, *McGregor on Damages* (2009), at para.7-018.

claimant acts unreasonably, its loss remains factually caused by the defendant in the sense that it would not have occurred "but for" the breach.[36] Instead, we are concerned with what is often described as legal or proximate causation, akin to the rules on supervening causes.

Central to the concept of legal causation is the notion that a "cause" is "something which interferes with or intervenes in the course of events which would normally take place".[37] This is the context in which the reasonableness test in mitigation must be understood. If the claimant makes a voluntary choice to act in a way other than that which was ordinarily expected of it, then its conduct may be regarded as a new cause for which the defendant is not responsible.[38] Such conduct may be labelled as "unreasonable" for the purposes of the mitigation rule notwithstanding that the choice was supported by reasons and was not imprudent.[39]

2. Applying the mitigation rule and the relevance of the market measure

Judges have a number of tools to assist in the application of the reasonableness test. First, the judge begins with the presumption that the claimant's actual conduct was reasonable. The presumption is reflected in the evidential rule that the burden of proof is on the defendant to show that the claimant acted unreasonably.[40] There may be a spectrum of reasonable responses to breach. Provided that the claimant's actual conduct falls somewhere on the spectrum, it will be regarded as reasonable.[41]

Secondly, various norms of reasonable conduct have become settled. These norms have developed in circumstances where there is an available market for either substitute performance, or cure, or other extrication from the breach. For example, if the claimant receives patently defective goods, it is expected to resort to the market as soon as possible to sell the defective goods and to purchase goods that conform to the contractual specification.[42] If the claimant's car is negligently damaged, it is expected promptly to take it to the local garage for repair.[43] If the claimant's contract for sale of its house is wrongfully repudiated by the buyer, the claimant is expected to put the house back on the market as soon as possible.[44]

The courts have frequently articulated the link between causation, mitigation and the claimant's choice whether to resort to an available market.[45] In *SAAMCO*, Lord Hoffmann stated that "where there is an available market, any additional loss

[36] The view that the "but for" test is the *only* meaningful concept of causation has led some to question the utility of explaining mitigation in causal terms: see e.g. *Uzinterimpex Jsc v Standard Bank Plc* [2008] EWCA Civ 819 at [56] per Moore-Bick L.J.; McGregor, *McGregor on Damages* (2009), at para.7-018.

[37] H.L.A. Hart and A.M. Honoré, *Causation in the Law*, 2nd edn (Oxford: Clarendon Press, 1985), at p.29.

[38] See text to fnn.48 and 49 below.

[39] See e.g. *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co* [1954] 1 Lloyd's Rep. 65 at 70–71 per Romer L.J. See further Hart and Honoré, *Causation in the Law* (1985), at pp.136–162.

[40] *Roper v Johnson* (1873) L.R. 8 C.P. 167; *Geest Plc v Lansiquot* [2002] UKPC 48; [2002] 1 W.L.R. 3111 at [14].

[41] *Wilding v British Telecommunications Plc* [2002] EWCA Civ 349; [2002] I.C.R. 1079 at [55] per Potter L.J.: "if there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is where, and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that the defence will succeed".

[42] See e.g. *Slater v Hoyle & Smith Ltd* [1920] 2 K.B. 11.

[43] See e.g. *Coles v Hetherton* [2012] EWHC 1599 (Comm).

[44] See e.g. *Hooper v Oates* [2013] EWCA Civ 91.

[45] See e.g. *Koch Marine Inc v d'Amica Societa Di Navigazione Arl (The Elena d'Amico)* [1980] 1 Lloyd's Rep. 75 at 87–88 per Robert Goff J.; *Downs v Chappell* [1997] 1 W.L.R. 426 at 437 per Hobhouse L.J.; *Blue Circle Industries Plc v Ministry of Defence* [1999] Ch. 289 at 305–306 and 308 per Aldous L.J., at 317 per Chadwick L.J., and at 321–322 per Simon Brown L.J.

which the buyer suffers through not having immediately bought equivalent goods at the market price is prima facie caused by his own change of mind".[46] Similarly, Toulson J. has reasoned that "the option to stay out of the market arises from the breach, but it does not follow that there is a causal nexus between the breach and a choice by the innocent party to stay out of the market".[47]

The judicial reasoning strongly emphasises the fact that the claimant makes a *choice* by not resorting to the market in circumstances where it could have done so.[48] The consequences of the claimant's "speculation"[49] are ignored regardless of whether they turn out to be beneficial or detrimental to the claimant.[50] There is a "logical symmetry" to the rule.[51] If the claimant chooses not to resort promptly (or at all) to the market, then the consequences of that choice—for better or worse—will fall on the claimant.

There will often be a range of reasonable market substitutes to which the claimant could have resorted, i.e. the claimant could have dealt with different market counterparties at different times and prices within a reasonable range. If the claimant takes any of these options then the actual consequences of doing so are taken into account. If it does not, then (because of the rule of mitigation) the court must pick one and assess damages as if the claimant had taken it.[52] Thus, although it can matter in practice (as to the detail of the market price) whether the claimant actually did resort to the market, in general terms it is accurate to say that the court will assess damages as if the claimant had done so irrespective of the actual facts, which are "ordinarily irrelevant".[53]

It may sometimes seem like a stretch, in ordinary parlance, to describe the claimant's choice in not resorting to the market as "unreasonable". However, the question is not whether going to the market was the only sensible action, but rather whether not going to the market is properly treated as the claimant making a voluntary choice, the consequences of which (good or bad) must not be for the defendant's account. The common but slightly misleading language of what the claimant "should" have done or could be "expected" to do must be understood with this in mind.

[46] *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191 at 221.

[47] *Dampskibsselskabet Norden a/S v Andre & Cie SA* [2003] EWHC 84 (Comm); [2003] 1 Lloyd's Rep. 287 at [42].

[48] See e.g. *Blue Circle Industries Plc v Ministry of Defence* [1999] Ch. 289 at 317 per Chadwick L.J., and at 321 per Simon Brown L.J.; *Downs v Chappell* [1997] 1 W.L.R. 426 at 437 per Hobhouse L.J.; *Primavera v Allied Dunbar Assurance Plc* [2002] EWCA Civ 1327; [2003] Lloyd's Rep. PN 14 at [40] per Mance L.J., and at [52] per Latham L.J.; *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [186] per Leggatt J.

[49] *Blue Circle Industries Plc v Ministry of Defence* [1999] Ch. 289 at 322 per Simon Brown L.J.; *Akas Jamal v Moolla Dawood Sons & Co* [1916] 1 A.C. 175 at 179 per Lord Wrenbury; *Habton Farms v Nimmo* [2003] EWCA Civ 68; [2004] Q.B. 1 at [62] per Clarke L.J.

[50] See e.g. *Akas Jamal v Moolla Dawood Sons & Co* [1916] 1 A.C. 175 at 179 per Lord Wrenbury; *Slater v Hoyle & Smith Ltd* [1920] 2 K.B. 11 at 22–23 per Scrutton L.J.; *Koch Marine Inc v d'Amica Societa Di Navigazione Arl (The Elena d'Amico)* [1980] 1 Lloyd's Rep. 75 at 89 per Robert Goff J.; *Blue Circle Industries Plc v Ministry of Defence* [1999] Ch. 289 at 308 per Aldous L.J., at 317 per Chadwick L.J., and at 321 per Simon Brown L.J.; *Primavera v Allied Dunbar Assurance Plc* [2002] EWCA Civ 1327; [2003] Lloyd's Rep. PN 14 at [29] per Simon Brown L.J., and at [40] per Mance L.J.; *Habton Farms v Nimmo* [2003] EWCA Civ 68; [2004] Q.B. 1 at [62] per Clarke L.J.; *Dampskibsselskabet Norden a/S v Andre & Cie SA* [2003] EWHC 84 (Comm); [2003] 1 Lloyd's Rep. 287 at [42]; *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2007] 2 Lloyd's Rep 555 at [102] per Rix L.J.; *Hooper v Oates* [2013] EWCA Civ 91 at [31] per Lloyd L.J.

[51] *Blue Circle Industries Plc v Ministry of Defence* [1999] Ch. 289 at 317 per Chadwick L.J.

[52] The court is likely to pick an option in the middle of the range of reasonable responses. Cf. *Lion Nathan Ltd v C-C Bottlers Ltd* [1996] 1 W.L.R. 1438.

[53] *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 A.C. 353 at [10] per Lord Bingham. See also: *Kwei Tek Chao v British Traders & Shippers Ltd* [1954] 2 Q.B. 459 at 494 per Devlin J.

D. Explaining Difference in Value/The Market Measure

The greatest obstacle to seeing the importance of mitigation to the question of date of assessment is the misconception that "difference in value" exists as an abstract measure of damages to which the usual damages rules do not apply. This section identifies three problems with the abstract understanding of difference in value, and argues that the measure is really an application of mitigation, properly understood. Accordingly, the date for assessing difference in value, just like any other aspect of the measure (e.g. buying or selling price? retail or wholesale? what counts as a market?), is determined by applying the mitigation rule.

1. The abstract understanding of difference in value

Difference in value is often distinguished from other heads of compensatory damages. For instance, *McGregor on Damages* proposes the "useful and important division between normal and consequential losses", where "normal loss" is difference in value.[54] Judicial descriptions of difference in value include "the normal measure",[55] "direct loss",[56] "immediate loss"[57] and "capital account loss".[58] Professor Stevens has built upon this apparent distinction by arguing that there are two entirely separate types of damages: substitutive damages (which are equated with claims for difference in value) and damages for consequential loss. He contends that "questions of mitigation, like remoteness, only arise in relation to consequential losses" and not to difference in value.[59]

There are three main problems with the view that difference in value is a separate type or measure of damages:

i) Post-breach valuation

The first and most important problem is that if difference in value is just an abstract measure of damages, to which entitlement becomes fixed upon breach, then we have no satisfactory explanation for why it should ever be measured at a time other than the date of breach or acquisition.[60] Yet numerous cases exist in which difference in value is measured later, at various other dates between breach and trial. In some cases the post-breach valuation gives a higher measure than had the difference in value been measured at the date of breach, but it may also sometimes yield a lower measure. These cases, discussed in detail below,[61] are readily explicable in terms of mitigation, but they must be a curious and sizeable anomaly to those who regard difference in value as a freestanding head of damages.

[54] McGregor, *McGregor on Damages* (2009), at para.1-036.

[55] *Coles v Hetherton* [2012] EWHC 1599 (Comm) at [16] per Cooke J.; *Giedo Van Der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) at [438] per Stadlen J.

[56] *Burdis v Livsey* [2002] EWCA Civ 510; [2003] Q.B. 36 at [88] per Aldous L.J.

[57] *Burdis v Livsey* [2003] Q.B. 36 at [84] per Aldous L.J.; *Primavera v Allied Dunbar Assurance Plc* [2002] EWCA Civ 1327; [2003] Lloyd's Rep. PN 14 at [27] per Simon Brown L.J.

[58] *Dimond v Lovell* [2002] 1 A.C. 384 at 406 per Lord Hobhouse.

[59] R. Stevens, "Damages and the Right to Performance: A Golden Victory or Not?" in J. Neyers, R. Bronaugh and S. Pitel (eds), *Exploring Contract Law* (Oxford: Hart Publishing, 2009), at p.181; and see more generally R. Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007), Ch.4.

[60] Professor Stevens accepts that difference in value (a.k.a. substitutive damages) can only ever be measured at the date of breach. On his account the claimant can recover more than the difference in value at the date of breach by way of an award of consequential loss, but can never be awarded less than the difference in value at the date of breach.

[61] See Section E, "Explaining the Breach Date Rule and its Exceptions".

ii) Which market?

Secondly, if difference in value is an abstract measure of damages then it is unclear how one should determine precisely which market values are adopted. Is it the buying or selling price? The retail or wholesale price? Which geographical area? There seems to be no obvious yardstick for answering these questions if difference in value claims exist independently from the ordinary rules of damages. We argue that the answers depend upon identifying the kind of substitute transaction that the claimant could reasonably have been expected to make in response to breach, which involves the application of mitigation. In other words, the law does not merely treat an available market as an abstract measure of value; it looks at it through the lens of asking whether and when the claimant could reasonably have had recourse to a particular market.

For example, where there is a significant difference between the market buying and selling prices, the judge must determine whether the claimant was reasonably expected to have bought or reasonably expected to have sold in response to breach.[62] The selling price is awarded in non-acceptance cases because the claimant seller is reasonably expected to sell the unaccepted goods to an alternative buyer at the prevailing market rate. Conversely, in non-delivery cases the buying price will be awarded, provided that the claimant buyer could be reasonably expected to purchase replacement goods.[63] When assessing damages for delay, Devlin J. correctly rejected the defendant's argument in favour of the buying price:

> "In this case the buyer has received the goods, and a calculation which supposes … that he should go out and buy another quantity of the same goods, has nothing to do with the reality of the matter. What he wishes to do in those circumstances, in order to put himself in the same position, is to sell the goods, not to buy them … ."[64]

Furthermore the choice between retail and wholesale prices depends on to which type of market the claimant could reasonably have had access.[65] And where the market price varies geographically, the appropriate market is determined by a test of reasonableness in light of the time, expense and trouble involved on the part of the claimant.[66] Further, if there is no available local market then the claimant can recover the reasonable costs of shipping substitute goods from another location *as part of* its claim for difference in value.[67] None of this makes any sense if there

[62] M. Bridge (ed.), *Benjamin's Sale of Goods*, 8th edn (London: Sweet & Maxwell, 2010), at para.16-070.

[63] See e.g. *Stroms Bruks Ab v Hutchison* [1905] A.C. 515. The picture is more complicated where, for purposes of assessing the claimant's non-breach position, it is known that if the claimant had received the goods it would subsequently have sold them on the market; See e.g. *Jones v Just* (1867–68) L.R. 3 Q.B. 197; *Kliger v Sadwick* [1947] 1 All E.R. 840; *Attorney General of Ghana v Texaco Overseas Tankships Ltd (The Texaco Melbourne)* [1993] 1 Lloyd's Rep. 471. In these circumstances, in *Oxus Gold Plc v Templeton Insurance Ltd* [2007] EWHC 770 (Comm) at [79]–[83], Langley J. wrongly, but with appropriate reluctance, found that he was bound to apply the market buying price.

[64] *Kwei Tek Chao v British Traders & Shippers Ltd* [1954] 2 Q.B. 459 at 497–498.

[65] *Sony Computer Entertainment UK Ltd v Cinram Logistics UK Ltd* [2008] EWCA Civ 955; [2009] Bus. L.R. 529 at [50] per Rix L.J. See also, where the market price varies according to the quantity traded: *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd (No.2)* [1990] 3 All E.R. 723 at 732 per Webster J.

[66] Bridge (ed.), *Benjamin's Sale of Goods* (2010), at para.16-068, citing *Dunkirk Colliery Company v Lever* (1878) 9 Ch. D. 20 at 25.

[67] *Ali Reza-Delta Transport Co Ltd v United Arab Shipping Co* [2003] EWCA Civ 684 at [22] per Tuckey L.J. The Court of Appeal made it clear that, in accordance with the ordinary application of mitigation, these were recoverable whether or not the claimant actually sought such a replacement (at [14]). See also Bridge (ed.), *Benjamin's Sale of Goods* (2010), at para.16-087.

is merely an abstract "difference in value measure", but all is readily explicable as an application of mitigation.

Indeed, this objection reveals that there is nothing special about time. As well as a "date of assessment" rule we could equally have a "place of goods rule" that says that the difference is assessed according to the buyer's local market; or a "type of goods rule" that says that the difference is assessed by reference to goods of the same type (as far as reasonably possible). Whilst it may be convenient to separate these issues under contextual headings in a textbook, none of these "rules" are strictly necessary because they are all merely applications of the mitigation rule. The reason why a separate rule for date of assessment has developed is purely circumstantial. It is because time, rather than any of these other details of market value, tends to be of by far the greatest financial importance.

iii) Application of the same rules to other types of claim

Thirdly, whilst an abstract measure of difference in value might have superficial credibility in the easiest cases of defective delivery (if there is an immediately available market and an obvious need to go to it), as in such cases the recovery resembles the difference between the value of the goods promised and the value of the goods supplied, it cannot explain why materially similar rules and considerations apply to other types of claim.

Damages for non-acceptance and non-delivery under ss.50(3) and 51(3) of the Sale of Goods Act 1979 Act (respectively) do not simply measure the difference in value between what was promised and what was provided. In non-acceptance cases that would simply yield the value of the price promised (because no price was actually provided), and in non-delivery cases it would simply yield the value of the property promised (because no property was actually provided).[68] The true measure, of course, depends upon the application of the compensatory principle and not some abstract difference in value measure. It takes into account the goods (non-acceptance cases) and the money (non-delivery cases) that the claimant has been left with, not for their abstract value, but rather for what they can reasonably be used to procure by way of replacement in the market.[69]

Claims for the cost of repair are measured at the date when the claimant could reasonably have been expected to incur that cost,[70] just as difference in value is measured at the date when the claimant could reasonably have been expected to resort to the market. If the two are very different things and only the second is about difference in value, this makes little sense. Whilst it has been suggested that damages for cost of repair are merely a proxy for difference in value,[71] this seems rather implausible as a universal explanation of the coincidence between the two

[68] In delayed delivery cases it would be nil. Professor Stevens acknowledges this peculiar result—see Stevens, "Damages and the Right to Performance: A Golden Victory or Not?" in Neyers, Bronaugh and Pitel (eds), *Exploring Contract Law* (2009), at p.183.

[69] Thus where a defendant breaches by non-acceptance and supply exceeds demand, the fact that the claimant obtained a replacement buyer in the market at the same price as the contract price does not mean that the claimant has not suffered a loss of profit. See *WL Thompson Ltd v R Robinson (Gunmakers) Ltd* [1955] Ch. 177.

[70] *Radford v De Froberville* [1977] 1 W.L.R. 1262 at 1285–1286 per Oliver J.; *Johnson v Agnew* [1980] A.C. 367 at 401 per Lord Wilberforce; *Downs v Chappell* [1997] 1 W.L.R. 426 at 437 per Hobhouse L.J.; *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 A.C. 353 at [13] per Lord Bingham; *Deutsche Bank AG v Total Global Steel Ltd* [2012] EWHC 1201 (Comm) at [166] per Andrew Smith J.

[71] *Coles v Hetherton* [2012] EWHC 1599 (Comm).

measures because in many circumstances the cost of cure will be demonstrably more or less than the difference in market value.[72]

2. Difference in value as mitigation

We argue that the difference in value measure is an application of mitigation where there is an available market. This is not a controversial proposition to those who directly consider the point. McGregor acknowledges that "mitigation has become incorporated into the normal measure of damages", such that "mitigation loses its identity and does not expressly appear as a separate issue".[73] He refers to this as "built-in" mitigation.[74] Mustill L.J. has (in the negligent misstatement context) expressly identified mitigation as the underlying basis of the difference in value measure:

> "[T]hese conventional measures of damages depend on the fiction that the innocent party has gone into the market to sell against the defaulting buyer, or to buy-in against the defaulting seller. The loss is therefore 'crystallised,' not in terms of the immediate consequences of the breach, but of a deemed mitigation."[75]

Likewise the same rule of mitigation underlies difference in value where the relevant available market is not a market for property but a market for a service or hire. Thus as Lord Carswell explained in *The Golden Victory* (a case of repudiation, i.e. non-acceptance, of a charter):

> "The calculation is made on the basis that the injured party can mitigate his loss by going into the market and obtaining a replacement charter as soon as reasonably possible on the best terms available for the balance of the charter period."[76]

The statutory "market measures" of damages in s.50(3) (non-acceptance), s.51(3) (non-delivery) and s.53(3) (defective goods) of the Sale of Goods Act 1979 are also no more than applications of mitigation. These subsections record a presumption that where there is an available market it will be reasonable for the claimant to have resort to it at the date of breach, thereby avoiding any other losses associated with use of the goods. That the market measure is only presumptive and not the primary rule is made plain by the words prima facie in the market

[72] The explanation is also dubious as a matter of authority: whereas *Coles v Hetherton* concerned a claim for the cost of repairs, in *Bee v Jenson* [2007] EWCA Civ 923; [2007] 4 All E.R. 791, the Court of Appeal reached the same result in relation to a claim for the cost of hire, which surely cannot be a proxy for difference in value.

[73] H. McGregor, "The Role of Mitigation in the Assessment of Damages" in D. Saidov and R. Cunnington (eds.), *Contract Damages: Domestic and International Perspectives* (Oxford: Hart Publishing, 2008), at p.332. See also McGregor, *McGregor on Damages* (2009), at para.7-033 onwards.

[74] McGregor, "The Role of Mitigation in the Assessment of Damages" in Saidov and Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (2008), at p.332.

[75] *Hussey v Eels* [1990] 2 Q.B. 227 at 233 per Mustill L.J. See also *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 A.C. 353 at [79] per Lord Brown; Bridge (ed.), *Benjamin's Sale of Goods* (2010), at para.6-052.

[76] *The Golden Victory* [2007] 2 A.C. 353 at [57]. Lord Brown similarly noted that: "undoubtedly the rule can be applied in more complex situations, for example, to building or repairing contracts and, most relevantly for present purposes, to breached charterparties …" (at [80]). See also: *Smith New Court Securities Ltd v Citibank NA* [1997] A.C. 254 at 278–279 per Lord Steyn.

measure sub-sections of the Act.[77] The primary rule is that set out in ss.50(2), 51(2) and 53(2), and awards "the estimated loss directly and naturally resulting, in the ordinary course of events" from the defendant's breach of contract.

There is no mystery or difficulty to what the 1979 Act aims to achieve by combining the primary rule (subs.(2)) and the prima facie market measure (subs.(3)). The original Sale of Goods Act 1893 was expressly intended "to reproduce as exactly as possible the statutory and common law rules relating to the sale of goods".[78] The cases pre-dating codification clearly recognised that the market measure merely reflected the notional transaction entailed in mitigation.[79] In 1891 Lord M'Laren explained the common law position in terms that even if the injured party does not in fact resort to the market to obtain substitute performance, damages will be assessed as if he had done:

> "The principle seems to be this, that the first purchaser has a duty to do what is within his power to lessen the loss to the seller by replacing the goods at the current price of the day, and that if he fails in doing so he will only recover from the seller the same sum which the seller would have had to pay in case the purchaser had supplied himself elsewhere."[80]

Thus Mustill J. has described s.51(3) as "founded on a presumed mitigation".[81] Mance J. has explained in relation to ss.50(3) and 51(3) that "an available market is a means of mitigating any loss otherwise contemplated which has become incorporated into the general measure of recovery".[82] Similarly Lord Brown stated that the explanation for s.51(3) "is that the injured party should ordinarily go out into that market to make a substitute contract to mitigate (and generally thereby crystallise) his loss", and added that the same principle applied at common law outside the sale of goods context.[83]

[77] And is emphasised in the case law. Thus Robert Goff J. reminds us that s.51(2) "is the governing principle": *Koch Marine Inc v d'Amica Societa Di Navigazione Arl (The Elena d'Amico)* [1980] 1 Lloyd's Rep. 75 at 87; and Auld L.J. counsels against giving s.53(2) "a primacy in the code of section 53 that it does not deserve": *Bence Graphics International Ltd v Fasson UK Ltd* [1998] Q.B. 87 at 102. See also *R. Pagnan & Fratelli v Lorico (Lebanese Organisation for International Commerce) (The Caloric)* [1981] 2 Lloyd's Rep. 675 at 678 per Lloyd J.

[78] M. Chalmers, *The Sale of Goods, Including the Factors Act, 1889* (London: Clowes, 1890), at p.iv. The introductory text to the 1893 Act describes it as "an Act for codifying the Law relating to the Sale of Goods".

[79] See e.g. *Borries v Hutchinson* (1865) 144 E.R. 518 at 524 per Erle C.J.: "As a general rule, a vendor who fails to deliver goods according to his contract, must pay as damages to the vendee the difference between the value of the goods at the time of breach of contract as compared with the contract-price: or, in other words, if the vendee can go into the market and get the article contracted for, the vendor must reimburse him the difference between that which he has been compelled to pay for it and the price at which the vendor had contracted to deliver for it."

[80] *Duff & Company v the Iron and Steel Fencing and Buildings Company* (1891) 19 R. 199 at 204.

[81] *Empresa Exportadora De Azucar v Industria Azucarera Nacional Sa (The Playa Larga and Marble Islands)* Unreported February 29, 1980.

[82] *Coastal (Bermuda) Petroleum Ltd v Vtt Vulcan Petroleum SA (No.2) (The Marine Star)* [1994] 2 Lloyd's Rep. 629 at 635 per Mance J.; appeal allowed on other grounds—see [1996] 2 Lloyd's Rep 383. See further in relation to s.50(3): *Tharros Shipping Co Ltd v Bias Shipping Ltd (The Griparion) (No.2)* [1994] 1 Lloyd's Rep. 533 at 547 per Rix J.; *Bem Dis a Turk Ticaret S/A Tr v International Agri Trade Co Ltd (The Selda)* [1999] 1 Lloyd's Rep. 729 at 732 per Hirst L.J.; cf. *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co* [1954] 1 Lloyd's Rep. 65 at 70–71 per Romer L.J.

[83] *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 A.C. 353 at [79]. For further dicta also explaining the 1979 Act market measure as an application of mitigation, see *Melachrino v Nickoll* [1920] 1 K.B. 693 at 697 per Bailhache J.; *Lesters Leather & Skin Co Ltd v Home and Overseas Brokers Ltd* (1948–49) 82 Ll. L. Rep. 202 at 205 per Lord Goddard C.J.; *Radford v De Froberville* [1977] 1 W.L.R. 1262 at 1285 per Oliver J.; *Gardner v Marsh & Parsons* [1997] 1 W.L.R. 489 at 507 per Gibson L.J.; *BP Plc v Aon Ltd (No.2)* [2006] EWHC 424 (Comm); [2006] 1 All E.R. (Comm) 789 at [312] per Colman J.; *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2007] 2 Lloyd's Rep 555 at [102] per Rix L.J.; *Deutsche Bank AG v Total Global Steel Ltd* [2012] EWHC 1201 (Comm) at [155] per Andrew Smith J. See also M. Bridge (ed.), *Benjamin's Sale of Goods*, 8th edn (2010), at para.16-052; A. Tettenborn et al, *Contractual Duties: Performance, Breach, Termination and Remedies* (London: Sweet & Maxwell/Thomson Reuters, 2011), at para.1-088.

Nevertheless, there are some unfortunate instances where this insight has been forgotten. In *Shearson Lehman Hutton v Maclaine Watson (No.2)*, Webster J. asserted that "the requirements of reasonable mitigation, which would ordinarily apply to a claim for damages, do not apply when the measure of damages is governed by s.50(3)".[84] This sort of statement fails to see the wood for the trees, since the section is itself founded on the rule of mitigation, and the presumption in s.50(3) will be rebutted (in favour of the ordinary measure in s.50(2)), where the rule of mitigation requires. It is only when mitigation is obscured that ossification begins, with a lauding of the certainty provided by the market measure and a reluctance to depart from it,[85] despite its clear statutory status as a rebuttable presumption. In truth the market measure under subs.(3) applies only if and to the extent that mitigation provides.

E. Explaining the Breach Date Rule and its Exceptions

Once it is apparent that claims measured by difference in value reflect a "deemed mitigation" (to adopt Mustill L.J.'s terminology),[86] then most of the cases purporting to apply a particular date of assessment to difference in value claims, like those concerning the cost of repair or extrication, are shown to be straightforward applications of the mitigation rule. In *Radford v De Froberville*, Oliver J. expressly acknowledged this relationship between the breach date rule and mitigation:

> "It is sometimes said that the ordinary rule is that damages for breach of contract fall to be assessed at the date of the breach. That, however, is not a universal principle and the rationale behind it appears to me to lie in the inquiry—at what date could the plaintiff reasonably have been expected to mitigate the damages by seeking an alternative to performance of the contractual obligation?"[87]

Again, this proposition is not controversial to those who have considered the point; Oliver J.'s explanation has been affirmed on numerous occasions.[88] The same explanation has been given in relation to damages for the cost of repairs in tort,[89] and also in cases where the valuation relates not to property, but to the market for a replacement service or hire.[90] The so-called breach date rule just reflects the fact that most of the time, especially in commercial cases involving liquid markets, the claimant can be reasonably expected to resort to the market *immediately* in response to breach. However, a full appreciation of this point also means that mitigation

[84] *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd (No.2)* [1990] 3 All E.R. 723 at 726.

[85] See e.g. *Hill v Showell* (1918) 87 L.J.K.B. 1106 at 1114 per Lord Dunedin; *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 A.C. 353 at [20] per Lord Bingham; H. Street, "Supervening Events and the Quantum of Damages" (1962) 78 L.Q.R. 70 at 70.

[86] See text to fn.75.

[87] *Radford v De Froberville* [1977] 1 W.L.R. 1262 at 1285–1286.

[88] See e.g. *Johnson v Agnew* [1980] A.C. 367 at 401 per Lord Wilberforce; *Downs v Chappell* [1997] 1 W.L.R. 426 at 437 per Hobhouse L.J.; *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 A.C. 353 at [13] per Lord Bingham; *Deutsche Bank AG v Total Global Steel Ltd* [2012] EWHC 1201 (Comm) at [166] per Andrew Smith J.

[89] *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 W.L.R. 433 at 444 and 451 per Megaw L.J. See also *The Golden Victory* [2007] 2 A.C. 353 at [13] per Lord Bingham.

[90] *The Golden Victory* [2007] 2 A.C. 353 at [57] per Lord Carswell. See also *Koch Marine Inc v d'Amica Societa Di Navigazione Arl (The Elena d'Amico)* [1980] 1 Lloyd's Rep. 75.

can delineate the "exceptions" to the rule (which are not really exceptions at all, properly understood).

At this juncture it is worth explaining *why* the operation of mitigation (and in particular the mitigatory norm that the claimant is reasonably expected to resort to the market) seems to resemble a "breach date rule", at least at first sight. It is because recourse to the market (whether actual or deemed) will often allow a claimant to eliminate from that date forward the vast majority of ongoing costs. A buyer can do with replacement goods most things it could do with promised goods, and so all costs consequential upon not having the promised property can be avoided by recourse to the market.

However, it is often forgotten that recourse to the market will rarely eliminate *all* of the costs of breach. Usually by going to the market the claimant swaps its continuing costs arising from having or not having the property for continuing *losses of use of money*, typically the difference between the market and contract price (which extra amount the claimant would, but for the breach, still have had from the date of recourse to the market).[91] This loss of use of money will continue to be suffered after recourse to the market, at least up until trial, but the nature and implications of such an award for the so-called date of assessment usually go unnoticed by judges and commentators because it is usually treated simply as an arithmetical matter of a rate of interest.[92] This reinforces the false impression that all recoverable losses must end at the date of the access to the market.

It is for these perfectly understandable reasons that the availability of a market can make it seem as though there is a breach date rule, whereas in fact this is wrong because: (i) the available market greatly simplifies the measure of loss but rarely entirely eliminates all subsequent recoverable costs; (ii) the date for resort to the market is not always the date of breach; and (iii) there is not always an available market and, even where there is, the mitigation rule does not always provide that damages must be assessed by reference to it.

In the following section we describe how the case law applies the mitigation rule to determine the date on which the market price is taken (where it is taken at all), which can be at the date of breach or any subsequent date up until trial. For ease of exposition we have sub-categorised the relevant cases according to common factual circumstances, but these are not discrete categories and one should not lose sight of the key proposition that in each case the same rule of mitigation does all of the work. References to an abstract breach date rule and exceptions where the rule "would give rise to injustice",[93] have no place in the analysis.

[91] In sale of goods cases, the calculation is usually straightforward because the contract price is a fixed sum. However, in other contexts the calculation may be more complicated. In *The Golden Victory* [2007] 2 A.C. 353, it was not only necessary to examine how long the charter would have run (the outbreak of war issue), but, further, the replacement charter included a profit share clause such that the income under that charter depended upon the market movements after the date of breach. These movements had to be taken into account to calculate the loss up to the date of outbreak of war—see at [81] per Lord Brown, and see also the Court of Appeal decision [2005] EWCA Civ 1190; [2006] 1 W.L.R. 533 at [13] and [25] per Lord Mance.

[92] Nevertheless, in light of *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34; [2008] 1 A.C. 561, it is clear that such damages are recoverable under ordinary common law principles.

[93] See text to fn.14 above.

1. The claimant was unaware of the breach

One of the clearest illustrations of the mitigation rule at work concerns instances where the claimant does not learn of the defendant's breach, and the resulting need to have resort to the market, until sometime after the breach occurs. Plainly, in most cases a claimant cannot be expected to mitigate its loss by replacing defective property on the market (sale of goods cases) or extricating itself from a transaction (mis-advice and misstatement cases) until it knows that the property is defective or the transaction is not as it was believed to be.[94] If there were a rule that damages were assessed at the date of breach (by the difference in value or otherwise) then none of this would matter. However, the law is absolutely clear that a market price is only to be taken in such cases on the post-breach date on which the claimant could have been expected to resort to the market, in correct application of the mitigation rule.

Thus where as a result of a tort or breach of contract the claimant obtains latently defective property, and the claimant keeps the property for use or processing and it is within the parties' contemplation (i.e. not too remote) that it might do so,[95] the difference in value at the date of breach or delivery is irrelevant because the claimant could not be reasonably expected to have gone into the market at that date. The market price will be looked to only at the later date at which the claimant had the informed choice to sell the property, which will be after discovery of the defect.[96] Any factual loss resulting from the property or transaction after that date will be ignored even if the claimant did not go to the market, because it would not have been suffered if the claimant had done so,[97] although loss of use of money will still be recoverable to the extent that it was not avoided by the actual or deemed resort to the market.[98]

Further, if before discovering the defect the claimant has already sold the property (whether untouched, or after modification or incorporation into another product) then the market value will be wholly irrelevant and the claimant can recover the losses actually incurred on the sub-sale, subject to remoteness.[99] These losses may include liability to and the costs of any dispute with the sub-buyer,[100]

[94] See e.g. *Kwei Tek Chao v British Traders & Shippers Ltd* [1954] 2 Q.B. 459 at 494 per Devlin J.: "if one bears in mind the principle that the buyer is bound to mitigate his damage, then as soon as he knows of his rights he must sell the goods. He cannot do so before he does know his rights."

[95] Where retention of the property by the claimant buyer is too remote, then damages will be limited to the loss that would have been suffered if the property had not been retained—see *Waddell v Blockey* (1879) 4 Q.B.D. 678, cited with approval by Lord Hoffmann in *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191 at 221. See also the comments of Lord Browne-Wilkinson in *Smith New Court Securities Ltd v Citibank NA* [1997] A.C. 254 at 266.

[96] *Jones v Just* (1867–68) L.R. 3 Q.B. 197; *Van Den Hurk v R. Martens & Co Ltd* [1920] 1 K.B. 850; *Applegate v Moss* [1971] 1 Q.B. 406; *King v Victor Parsons & Co* [1972] 1 W.L.R. 801; *Naughton v O'Callaghan* [1990] 3 All E.R. 191; *Bominflot Bunkergesellschaft Fur Mineralole Mbh & Co v Petroplus Marketing AG* [2012] EWHC 3009 (Comm); [2013] 1 All E.R. (Comm) 610 at [59]–[60] per Hamblen J.

[97] See e.g. *Naughton v O'Callaghan* [1990] 3 All E.R. 191; *Salford City Council v Torkington* [2004] EWCA Civ 1646.

[98] See text to fn.91.

[99] For examples of on-sale without modification, see e.g. *Randall v Raper* (1858) 120 E.R. 438; *Hammond & Co v Bussey* (1887) 20 Q.B.D. 79; *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] A.C. 441; *Biggin & Co Ltd v Permanite Ltd* [1951] 1 K.B. 422 (appeal allowed on a different point but the general approach was upheld: [1951] 2 KB 314); *Mcsherry v Coopers Creek Vineyard Ltd* (2005) 8 N.Z.B.L.C. 101. For examples of on-sale with modification, see e.g. *Wagstaff v Short-Horn Dairy Co* (1884) C. & E. 324; *Kasler v Slavouski* [1928] 1 K.B. 78; *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 A.C. 31; *Gkn Centrax Gears Ltd v Matbro Ltd* [1976] 2 Lloyd's Rep. 555; *Bence Graphics International Ltd v Fasson UK Ltd* [1998] Q.B. 87.

[100] See e.g. *Bence Graphics* [1998] Q.B. 87.

or the costs of a product recall.[101] Alternatively, if the claimant has used the property instead of selling it on, then damages will be recoverable in respect of the claimant's personal injury or liability to others who have been injured,[102] or lost profits or damage to the claimant's own property during use.[103]

In these latent defect examples, the claimant's actual losses are recoverable because the claimant did not act unreasonably in failing to resort to the market (i.e. the claimant did not have a voluntary choice to cure the problem by going to the market). Accordingly in such cases the mitigation rule need not displace the factual assessment of the claimant's breach position, and so the market value at the date of breach is neither here nor there. The reader will struggle to find references in such cases to the market or other value of the defective goods at the date of delivery, because the court is rightly not interested in that value.[104] These decisions are entirely uncontroversial applications of the rule of mitigation (in the sense that the rule is not engaged and so factual loss is recoverable). They are also unexplained by and inconsistent with any breach date rule.

By contrast, where the defect is patent and accordingly the claimant is or should be aware of the breach, it is reasonably expected that it will resort to the market to obtain substitute performance, if possible. The mitigation rule will require that the claimant's breach position is assessed as if it had gone into the market, thus barring damages for all of the types of losses just described. The only exception is where, despite knowledge of the breach, the claimant is in some way "locked in" to the original transaction and so is unable to resort to the market. These cases are discussed below.[105]

The above analysis resolves the apparent inconsistency between the Court of Appeal decisions in *Slater v Hoyle* and *Bence Graphics*.[106] In *Slater* the defects were patent; the claimant knew that the cloth was defective *before* it employed it in the sub-sale.[107] The damages in *Slater* were correctly assessed as if the claimant had resorted to the market upon discovering the breach (even though in fact it did not), because its decision not to resort to the market amounted to a voluntary choice.[108] Scrutton L.J. held that the consequences of the choice to keep the patently defective cloth and supply it to the sub-buyer were "*res inter alios acta*: 'circumstances peculiar to the plaintiff,' which cannot affect his claim one way or the other."[109]

[101] See e.g. *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd* [2002] EWCA Civ 549; [2002] 2 Lloyd's Rep. 379 (affirming the decision of Tomlinson J.: [2002] 1 Lloyd's Rep. 62); *Britestone Pte Ltd v Smith & Associates Far East Ltd* [2007] S.G.C.A. 47.

[102] See e.g. *Wren v Holt* [1903] 1 K.B. 610; *Grant v Australian Knitting Mills Ltd* [1936] A.C. 85; *Wilson v Rickett Cockerell & Co Ltd* [1954] 1 Q.B. 598.

[103] See e.g. *Cullinane v British Rema Manufacturing Co Ltd* [1954] 1 Q.B. 292; *Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] Q.B. 791.

[104] See e.g. *Biggin & Co Ltd v Permanite Ltd* [1951] 1 K.B. 422 at 435–436 per Devlin J.: "If … a sub-sale is within the contemplation of the parties, I think that the damages must be assessed by reference to it, whether the plaintiff likes it or not." See also *Bence Graphics International Ltd v Fasson UK Ltd* [1998] Q.B. 87 and *Mcsherry v Coopers Creek Vineyard Ltd* (2005) 8 N.Z.B.L.C. 101, where the market value measure was quantified and rejected in favour of the lower factual loss.

[105] See Section E2 below.

[106] *Slater v Hoyle & Smith Ltd* [1920] 2 K.B. 11; *Bence Graphics International Ltd v Fasson UK Ltd* [1998] Q.B. 87.

[107] *Slater* [1920] 2 K.B. 11. The warranted qualities of the cloth were all externally observable and the claimants refused to accept the final batch of cloth on the basis that "the cloth already delivered had been persistently of a quality not in accordance with the contract" (at 16).

[108] See text to fn.48 and following, above.

[109] *Slater v Hoyle & Smith Ltd* [1920] 2 K.B. 11 at 23.

By contrast, in *Bence Graphics* the defects were latent; the claimant discovered the breach of warranty only *after* the vinyl films had been delivered to the sub-buyers.[110] Consequently the claimant could not have resorted to the market to buy replacement vinyl and sell the defective stock. Since the claimant had no choice whether to resort to the market, it had not acted unreasonably or unforeseeably in selling on the vinyl in ignorance of the defect, and any difference in value was irrelevant. The mitigation and remoteness rules were of no application and damages were therefore correctly assessed according to the claimant's factual loss, which turned out to be minimal.[111]

The same principles explain those cases involving transactions induced by mis-advice or misrepresentation. It is only on discovery of the mis-advice or misrepresentation that the claimant can "have an opportunity of cutting her losses".[112] Consequently the value before that date of the property the claimant has obtained through the transaction is completely irrelevant.[113] Of course, once the claimant does know about the defect, it can be reasonably expected to sell (unless it can easily repair) and the claimant's breach position will be assessed as if it had done so.[114]

Finally, the House of Lords' decision in the construction case of *East Ham Corp v Bernard Sunley & Sons Ltd*[115] makes it clear that the cost of curing a latent defect (which in some cases, particularly of buildings or other real property, may be a reasonable alternative to replacing the property on the market) is assessed not at the date of breach or delivery (six years earlier in that case) but at the date of discovery, when the claimant could be expected to procure the repair, unless the defect should have been discovered earlier.

[110] The vinyl contained insufficient stabiliser to protect against ultra-violet light and therefore degraded faster than promised. This defect did not become apparent until long into the life of the film, by which time it had already been supplied to the sub-buyers. As Thorpe L.J. put it: "the reality was that [the claimants] had had no conception that the material was defective until 1985 and had processed it to supply decals to manufacturers" (*Bence Graphics International Ltd v Fasson UK Ltd* [1998] Q.B. 87 at 108).

[111] The foregoing explanation is entirely consistent with much of the reasoning, although not the conclusion, in G. Treitel, "Damages for Breach of Warranty of Quality" (1997) 113 L.Q.R. 188. Professor Treitel correctly identified the key issue as whether the claimant had any choice as to disposal and replacement of the goods on the market, and explained that where there is a string contract the claimant is legally locked in and so has no choice (at 192). On the facts of *Bence Graphics* [1998] Q.B. 87, the claimant had no such choice: it was practically locked in to the sub-sale because the defect was latent.

[112] *Syrett v Carr and Neave* [1990] 48 E.G. 118 at 165 per H.H.J. Bowsher Q.C. This comment was doubted (obiter) by Gibson L.J. in *Watts v Morrow* [1991] 1 W.L.R. 1421 at 1434–1438, but it is clear from *Patel v Hooper & Jackson* [1999] 1 W.L.R. 1792 that Gibson L.J.'s approach in *Watts* that the date of acquisition was always the correct date is wrong. See also: *Hayes v Dodd* [1990] 2 All E.R. 815; *Reeves v Thrings & Long (No.1)* [1996] P.N.L.R. 265 (obiter) per Lord Bingham M.R.; *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191 at 222 per Lord Hoffmann; *Portman Building Society v Bevan Ashford* [2000] 1 E.G.L.R. 81 at 84 per Otton L.J.; *Joyce v Bowman Law Ltd* [2010] EWHC 251 (Ch) at [98] per Vos J.

[113] *Doyle v Olby (Ironmongers) Ltd* [1969] 2 Q.B. 158; *Esso Petroleum Co v Mardon* [1976] Q.B. 801 (also a breach of a warranty that took reasonable care); *Naughton v O'Callaghan* [1990] 3 All E.R. 191 (breach of warranty); *Downs v Chappell* [1997] 1 W.L.R. 426; *Smith New Court Securities Ltd v Citibank Na* [1997] A.C. 254; *Slough Estates Plc v Welwyn Hatfield DC* [1996] 2 E.G.L.R. 219 (deceit); *Dent v Davis Blank Furniss* [2001] Lloyd's Rep. P.N. 534 (solicitor misadvice); *Beary v Pall Mall Investments* [2004] EWHC 1608 (Ch) (financial adviser mis-advice).

[114] *Watts v Morrow* [1991] 1 W.L.R. 1421 at 1436–1438 per Gibson L.J., and at 1445 per Bingham L.J.; *Downs v Chappell* [1997] 1 W.L.R. 426 at 437 per Hobhouse L.J. This is also the simplest explanation for *Hussey v Eels* [1990] 2 Q.B. 227 (the claimants knew shortly after purchase).

[115] [1966] A.C. 406. Although the issue was expressed as one of remoteness rather than mitigation, what mattered was the reasonableness of the claimant's post-breach conduct in not seeking to cure earlier.

2. The claimant was "locked in"

Even where the claimant is aware of the defendant's breach, it may sometimes be impossible, or excessively difficult, for the claimant to do anything about it. It may usefully be said that in such cases the claimant is "locked in" to the consequences of breach, and the rule of mitigation will not prevent recovery of the factual losses during the "locked in" period because they are reasonably incurred. The reasons for the claimant's inability to respond to the breach—the "lock-in"—may be legal or practical.

i) Legally "locked in"

If the claimant is contractually obliged to use the defendant's defective goods in a sub-sale, it will be unable to sell the goods on the open market or to purchase compliant substitute goods. In such circumstances the claimant will have, as Professor Treitel put it, "(legally) no choice as to the disposal of the goods".[116] Where the claimant is "locked in" to a string contract of this sort, "the measure of loss of profit on re-sale is the right measure", subject to the remoteness limitation.[117] Whilst contractual obligations to third parties are likely to constitute the most common form of legal constraint, it is entirely possible that other legal obligations could restrict the claimant's response to breach, such as illegality or liability to third parties in tort.

ii) No market for substitute performance or extrication

Where there is no available market for substitute performance the claimant plainly cannot be reasonably expected to have resort to it. Thus, for instance, the difference in value measure (whether at the date of breach or any other time) will not apply to unique goods.[118] Similarly, in *Blue Circle Industries v MOD*, the defendant leaked radioactive material on to the claimant's land,[119] and the estate was simply unsaleable until it had been decontaminated.[120] Damages were therefore correctly assessed as if the claimant had put the estate on the market as soon as reasonably possible after the decontamination had been completed, almost five years after the breach and nearly two years after the claimant first became aware of the leak.[121] And in *Gestmin SGPS SA v Credit Suisse (UK) Ltd*, there was no reasonably efficient market on which the shares purchased as a result of the defendant's advice could have been sold at a price fairly reflecting their value, and so loss fell to be assessed at the date of trial.[122]

[116] G. Treitel, "Damages for Breach of Warranty of Quality" (1997) 113 L.Q.R. 188 at 192.

[117] *Kwei Tek Chao v British Traders & Shippers Ltd* [1954] 2 Q.B. 459 at 490 per Devlin J. The result in *Louis Dreyfus Trading Ltd v Reliance Trading Ltd* [2004] EWHC 525 (Comm); [2004] 2 Lloyd's Rep. 243, which involved displacement of the prima facie rule in s.53(3) Sale of Goods Act 1979, is also explained on this basis (see per Andrew Smith J. at [21]).

[118] See e.g. *Kwei Tek Chao v British Traders & Shippers Ltd* [1954] 2 Q.B. 459 at 489 per Devlin J.

[119] *Blue Circle Industries Plc v Ministry of Defence* [1999] Ch. 289.

[120] *Blue Circle Industries Plc v MOD* [1999] Ch. 289 at 305 per Aldous L.J.

[121] The Court of Appeal correctly ignored the fact that the claimant then waited a further two years after decontamination before finally selling, because by then it had the choice whether to sell or not.

[122] *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) per Leggatt J. at [190]. This was obiter as negligence was not found.

Sometimes, although there may exist an available market of sorts, the claimant cannot be reasonably expected to avail itself of it. In the most well-known "lock in" case of *Smith New Court Securities*,[123] the defendant's fraudulent misrepresentations induced the claimant to purchase shares. The claimant reasonably held the shares for a time after discovering the fraud because it had bought them at a price which made commercial sense only if the shares were held in the medium and not the short term. Since the claimant acted reasonably in gradually selling the shares (a process made more difficult as a result of an independent fraud affecting the company that came to light after the purchase), its factual losses were recoverable.

These three cases are textbook applications of the mitigation rule: factual losses are recoverable unless the mitigation rule requires that the factual assessment of the breach position be displaced by the assumption that the claimant acted reasonably. No "date of assessment" rule could explain them.

iii) Financially "locked in"

A claimant with limited financial resources may not be able to take steps to limit its loss. The classic example is *Dodd Properties (Kent) Ltd v Canterbury City Council*,[124] where the recoverable cost of repairs after tort damage to property was taken at the date of trial not the date of the damage, because the claimant could not afford to carry the repairs out earlier. The claimant is entitled to the "the cost of repair when the repairs can, having regard to all relevant circumstances, first reasonably be undertaken"[125] because "a plaintiff who is under a duty to mitigate is not obliged, in order to reduce the damages, to do that which he cannot afford to do".[126] Since the House of Lords' decision in *Lagden v O'Connor*, it is now crystal clear that the claimant's impecuniosity is a relevant factor in determining whether it acted reasonably in mitigation.[127]

3. Other examples of reasonable delay

There are other examples where the claimant has been held to have acted reasonably in delaying before obtaining substitute performance (or in some cases, not obtaining it all), or in extricating itself from the transaction induced by the defendant, notwithstanding that it is not "locked in" to the transaction.[128] The question, as ever, should be what was the reasonable conduct expected of the claimant in response to breach.

[123] *Smith New Court Securities Ltd v Citibank NA* [1997] A.C. 254.

[124] [1980] 1 W.L.R. 433. See also: *Syrett v Carr and Neave* [1990] 48 E.G. 118; *McGlinn v Waltham Contractors Ltd* [2007] EWHC 149 (TCC); [2008] Bus. L.R. 233.

[125] *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 W.L.R. 433 at 451 per Megaw L.J.

[126] *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 W.L.R. 433 at 453. Cf. S. Waddams, "The Date for the Assessment of Damages" (1981) 97 L.Q.R. 445 at 459–461: Professor Waddams would refine this principle but doubts its application to the facts of Dodd Properties. See also *Lagden v O'Connor* [2004] 1 A.C. 1067 at [51] per Lord Hope.

[127] *Lagden v O'Connor* [2004] 1 A.C. 1067 at [8] per Lord Nicholls, at [12] per Lord Slynn, at [61] per Lord Hope, at [82] per Lord Scott, and at [90] per Lord Walker, overruling *Owners of Dredger Liesbosch v Owners of Steamship Edison (The Liesbosch)* [1933] A.C. 449.

[128] The dividing line between these cases and those identified in the previous category is one of degree not kind. In truth, apart from in the most extreme cases, the claimant is very rarely "locked in" in any absolute sense; it is merely difficult (to varying degrees) for them to obtain substitute performance.

i) Time to think and find a buyer/seller

Even where it can loosely be said that the claimant could have resorted to the market at the date of breach, it is important to note that in many cases the market price is not taken at exactly the time of breach or delivery. Instead, it is taken shortly thereafter when the claimant could be reasonably expected to have gone to the market. Whether substitute performance can in fact be obtained immediately after breach will often depend on the type of market, as the Court of Appeal recently emphasised in *Hooper v Oates*, comparing readily alienable commodities, shares, freight forward agreements or charterparties, with land, the latter of which takes considerable time to sell or buy.[129]

In practice lawyers rarely take points about claimants going to the market hours or a few days after delivery because such delays rarely make a difference, but nevertheless it is clear that "it is [often] reasonable to allow the aggrieved party a little time to measure the impact of what has happened" but commercial parties can be expected to act with reasonable alacrity.[130] The question here, as always, is one of reasonableness in mitigation. However long it takes the claimant to resort to the market, providing the claimant acted reasonably the actual amount recovered will be used in measuring loss.[131] Conversely, if the claimant could have been expected to sell at a particular point in time but did not do so, then the sale price will be taken on that date, whatever the claimant in fact did.[132]

ii) Pressing for performance

It is also frequently reasonable not to resort to the market immediately upon discovery of breach when there is a chance that the defendant will still perform, albeit late. This typically arises in cases of non-delivery by a seller or non-acceptance by a buyer, where the innocent party then presses for performance and/or sues for specific performance. If it is reasonable to take these steps then the market price will be taken only at the date at which the claimant could be reasonably expected to give up on the defendant (which may be as late as trial or

[129] *Hooper v Oates* [2013] EWCA Civ 91 at [34] per Lloyd L.J.

[130] *Kaines (UK) v Oesterreichische Warenhandelsgesellschaft Austrowaren Gmbh* [1993] 2 Lloyd's Rep. 1 at 8 per Steyn J. See also in relation to non-delivery: *C Sharpe & Co Ltd v Nosawa & Co* [1917] 2 K.B. 814 at 821 per Atkin J.; *Asamera Oil Corporation Ltd v Sea Oil & General Corporation* [1979] 1 S.C.R. 633; UNIDROIT Principles of International Commercial Contracts art.7.4.5(1), which asks whether the buyer went to the market "within a reasonable time"; in relation to non-acceptance: *Techno Land Improvements v British Leyland (UK) Ltd* [1979] 2 E.G.L.R. 27; *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd (No.2)* [1990] 3 All E.R. 723; and, in relation to mis-statement: *Waddell v Blockey* (1879) 4 Q.B.D. 678 at 681 per Bramwell L.J.

[131] *Bominflot Bunkergesellschaft Fur Mineralole Mbh & Co v Petroplus Marketing AG* [2012] EWHC 3009 (Comm); [2013] 1 All E.R. (Comm) 610 at [59]–[60] per Hamblen J. (defective goods). In a fraud case, *East v Maurer* [1991] 1 W.L.R. 461, the business took three years to sell. See also *Standard Chartered Bank v Pakistan National Shipping Corp* [2001] EWCA Civ 55.

[132] *Downs v Chappell* [1997] 1 W.L.R. 426 (claimant went to the market too late); *Patel v Hooper & Jackson* [1999] 1 All E.R. 992 (claimant did not go to the market at all but could have done).

may be some time before),[133] or withdraws the claim for specific performance,[134] or is forced to give up because the order for specific performance is refused[135] or dissolved.[136]

For example, in *Patel v Hooper & Jackson*[137] the claimant acquired defective property in 1988, in reliance on the defendant's negligent survey. It was reasonable for the claimant not to have put the property up for auction until June 1993 when negotiations broke down. Consequently the claimant had to give credit for the market sale price of the property in September 1993 when it could have been sold, even though the claimant did not in fact sell the property at that time.

Whether or not the claimant acted reasonably in abstaining from the market may therefore turn on whether it was acting reasonably in pressing for specific performance. Where such a claim would have little or no hope of success then it will probably be unreasonable to press for it.[138] Conversely, provided that the claim has a good chance of success then it may be reasonable to press for it even if it ultimately turns out to be unsuccessful.[139] Whether or not the claimant acted reasonably is not the same question as whether specific performance is found by the court to be available; there may be a margin of difference between these two issues (i.e. it can be reasonable to pursue specific performance even if it is subsequently refused by the court) because of the uncertainty of litigation and the reluctance of the courts to find even unsuccessful responses to breach to be unreasonable.[140] As McLachlin C.J. correctly identified, this is "simply an application of the rule of mitigation requiring the plaintiff to act reasonably in the circumstances".[141]

[133] The relevant date was described in *Suleman v Shahsavari* [1988] 1 W.L.R. 1181 at 1184 per Park Q.C. as the date when the claimant "loses his purchase". See e.g. non-acceptance: *Johnson v Agnew* [1980] A.C. 367 at 401 per Lord Wilberforce; *E Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] A.C. 400; *Habton Farms v Nimmo* [2003] EWCA Civ 68; [2004] Q.B. 1; non-delivery: *Johnson Matthey Bankers Ltd v State Trading Corp of India Ltd* [1984] 1 Lloyd's Rep. 427 (although a force majeure clause provided for the damages calculation to be as at the date of notification of non-delivery); *Carbopego-Abastecimento De Combustiveis SA v Amci Export Corp* [2006] EWHC 72 (Comm); [2006] 1 Lloyd's Rep. 736; *Bear Stearns Bank Plc v Forum Global Equity Ltd* [2007] EWHC 1576 (Comm); professional negligence: *Patel v Hooper & Jackson* [1999] 1 W.L.R. 1792. See also cases in which the defendant requests more time: *Ogle v Earl Vane* (1866–67) L.R. 2 Q.B. 275; *Hickman v Haynes* (1874–75) L.R. 10 C.P. 598; *Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole Et Financiere SA* [1979] 2 Lloyd's Rep. 98.

[134] *Semelhago v Paramadevan* [1996] 2 S.C.R. 415 (non-delivery of land).

[135] *Wroth v Tyler* [1974] Ch. 30; *Asamera Oil Corporation Ltd v Sea Oil & General Corporation* [1979] 1 S.C.R. 633; *Malhotra v Choudhury* [1980] Ch. 52; *Kopec v Pyret* (1983) 146 D.L.R. (3d.) 242; *Suleman v Shahsavari* [1988] 1 W.L.R. 1181. These were all cases involving the non-delivery of land.

[136] *Johnson v Agnew* [1980] A.C. 367 (non-acceptance of land).

[137] [1999] 1 W.L.R. 1792.

[138] This formed the basis of the majority's decision in *Southcott Estates v Toronto Catholic District School Board* (2012) S.C.C. 51 at [41].

[139] See e.g. *Johnson v Agnew* [1980] A.C. 367 at 401 per Lord Wilberforce.

[140] An analogous issue may arise where a claimant is unsuccessful in recovering the agreed sum (either because it has no legitimate interest under *White & Carter (Councils) Ltd v McGregor* [1962] A.C. 413 and succeeding cases, or because it could not complete its performance without the defendant's co-operation and could not force that co-operation). In such circumstances the measure of *damages* would again be a question of mitigation. If the claimant acted unreasonably by pressing its own performance on the defendant (because recovery of the agreed sum was obviously hopeless) then damages may be assessed as if the claimant had sought substitute performance at the date when it was first reasonable to do so. But if recovery of the agreed sum remained a realistic possibility (albeit that it was eventually rejected), then the claimant may not be reasonably expected to have sought substitute performance earlier than trial.

[141] *Southcott Estates v Toronto Catholic District School Board* (2012) S.C.C. 51 at [92]. The Supreme Court of Canada unanimously agreed that their decision turned on mitigation, but McLachlin C.J. dissented on the basis that the trial judge's finding of reasonableness should have been conclusive (at [91]). At [36] the majority concurred that: "such a claim for specific performance informs what is reasonable behaviour for the plaintiff in mitigation".

iii) The claimant reasonably adopted the transaction

In mis-advice and misstatement cases, sometimes the claimant has already spent money on the property when it discovers that the transaction is not what it wanted. In such cases, even on discovery of the problem, it may be reasonable for the claimant not to resort to the market. For instance in the surveyor's negligence case of *Farley v Skinner* the House of Lords rejected the argument that the claimant should have sold his new home within a year and should be confined to the costs of so doing.[142] The claimant had expended in the region of £100,000[143] in modernising and renovating before moving in and learning of the defect (aircraft noise), and the expenses of selling and buying a new house would themselves have been considerable (over £10,000[144]). Accordingly it was held that it was reasonable not to sell the house and instead to continue to suffer the discomfort.[145] Reasonable adoption of the transaction may mean that the claimant is entitled to recover the costs of repairing the property, despite the existence of an available market.[146]

F. Conclusion

The majority of cases purporting to apply a breach date rule are really just applications of the rule of mitigation, properly understood. References to difference in value are no more than references to a settled mitigatory norm that where there is an available market, it is reasonable to expect the claimant to have prompt resort to it for substitute performance or extrication from the breach. If the claimant *chooses* not to resort to the market then mitigation will displace its actual breach position with the position that it would have been in if the claimant had acted reasonably. Accordingly most factual losses of use of property will be irrecoverable after the date at which the claimant could first have resorted to the market, replaced by a claim for loss of use of money. But if it is reasonable not to resort to the market, mitigation has no role to play and the claimant will simply recover its factual loss, for better or worse.

This thesis was recently confirmed in the clearest terms by the Court of Appeal in *Hooper v Oates*.[147] After consideration of many of the cases cited above, Lloyd L.J. explained that "the breach date is the right date for assessment of damages only where there is an immediately available market for the sale of the relevant asset or, in the converse case, for the purchase of an equivalent asset",[148] because on that date the claimant either *in fact* went to the market or "*decided* to retain the property".[149] By contrast, where there is no market, or the claimant cannot reasonably have been expected to resort to it, a later date will apply whether that

142 *Farley v Skinner (No.2)* [2001] UKHL 49; [2002] 2 A.C. 732.

143 See the judge's findings quoted *Farley v Skinner (No.2)* [2001] UKHL 49; [2002] 2 A.C. 732 at [11]. See further the decision of the Court of Appeal in *Farley v Skinner (No.2)* (2000) 73 Con. L.R. 70 at [43] pt.9.

144 *Farley v Skinner (No.2)* (2000) 73 Con. L.R. 70 at [69].

145 *Farley v Skinner (No.2)* [2001] UKHL 49; [2002] 2 A.C. 732 at [26] per Lord Steyn, at [55]–[56] per Lord Hutton, and at [108] per Lord Scott. A vivid example of a similar point arises in *Dent v Davis Blank Furniss* [2001] Lloyd's Rep. P.N. 534.

146 See e.g. *Hipkins v Jack Cotton Partnership* [1989] 45 E.G. 163; *Syrett v Carr and Neave* [1990] 48 E.G. 118; *Zeneca Ltd v King Sturges & Co* Unreported September 19, 1996. Similarly it may be reasonable to adopt a transaction where financial products are not readily saleable but if held will yield coupons and a maturity payment: *Cassa Di Risparmio Della Repubblica Di San Marino Spa v Barclays Bank Ltd* [2011] EWHC 484 (Comm) at [560]–[561].

147 [2013] EWCA Civ 91.

148 *Hooper v Oates* [2013] EWCA Civ 91 at [38].

149 *Hooper v Oates* [2013] EWCA Civ 91 at [37] and [39] (emphasis added).

favours the claimant or the defendant: "the principle should be the same, whichever way it may operate in the particular case".[150] All of these issues were correctly identified as questions of mitigation, and the apparent date of assessment problem was thereby straightforwardly resolved.

We do not suggest that *all* references to date of assessment can be resolved by mitigation. Legal rules other than mitigation may also require a judge to assess the claimant's breach and/or non-breach positions in a manner contrary to fact, and occasionally (though far less often), the discussion of such rules also lapses into the misleading language of date of assessment. It is beyond the scope of this article to explore and explain those other rules. However, our general thesis is that unless such a legal rule is engaged to displace the judge's factual assessment of the claimant's breach and non-breach positions—in the way mitigation can do, as we have sought to show—then the claimant's factual loss (evidenced at the date of trial) will be adopted as the measure of damages.

[150] *Hooper v Oates* [2013] EWCA Civ 91 at [31].

Breach of contract; Dates; Measure of damages; Mitigation; Torts

