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PROVING CONTRACT DAMAGES

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In commercial claims the balance of probabilities test has very little to say about the proof of what would have happened but for the breach, and so what loss was suffered. The fair-wind principle and presumptions such as that of breaking even mean that the claimant is given the benefit of the doubt. And the loss of chance principle holds much of the field, although its application to commercial disputes—especially where the market or trading is involved—requires careful unpacking.

I. Introduction

The legal principles governing damages—remoteness, legal causation, mitigation—are frequently explored and understood. But there has been very little consideration of the law's approach to proof of loss in contract and tort cases, despite its huge importance to practitioners and to the outcome of disputes, save for those thickets of the proof field apparently governed by a distinct legal principle (such as the *Lavarack* principle). A short section in Harvey McGregor's encyclopaedic work on damages is a rare exception.[1] If they thought about it, most people would probably assume that the burden falls on the claimant to prove all loss to the civil standard of the balance of probabilities in the usual way, subject only to a minor wrinkle of loss of chance. They would be wrong.

II. The Difficulties of Proving the Non-breach Position

* 3 Verulam Buildings. I would like to thank Andrew Dyson, Sarah Green, Sir George Leggatt and an anonymous reviewer for comments on a draft of this piece.

[1] Harvey McGregor, *McGregor on Damages* (19th edn, Sweet & Maxwell 2014) [10-001]–[10-007]. It would be impossible and wrong to write any paper on damages at this time without referring to Harvey's recent death, which is a sad loss to the damages field and all of us in it.

Once a claimant has proven that a contract has been breached or tort committed, attention turns to loss.[2] The claimant must then prove a difference between the position he is in ('the breach position') and the position he would have been in but for the breach ('the non-breach position'[3]).

The breach position is a question of historical and actual fact—what happened, what was spent, and what was received.[4] It can be established with precision and the claimant has the burden of doing so.[5] And proving it means proving that on the evidence it was more likely than not that the event did happen.[6] Probability here is used in the sense of 'you are probably right'. The uncertainty is only epistemic.

But the non-breach position is of its nature a hypothetical. Proof of it is a different type of exercise—proof of how the world would have operated in a counterfactual situation. It is necessarily more uncertain—or uncertain in a more profound way—than the breach position.

III. Resolving Uncertainty in the Claimant's Favour

The law is highly sympathetic to the difficulties the claimant faces in proving the non-breach position. It relaxes the burden on the claimant. And this approach appears to have started with the seventeenth century case of *Armory v Delamirie*,[7] in which the defendant to a claim for trover of a jewel refused to produce it, thwarting the claimant chimney sweep's attempt to prove its value. In the circumstances, the court gave the claimant the benefit of any uncertainty. The core of this principle is that where a party deliberately spoils[8] or withholds[9] relevant evidence, that party will not be allowed to

[2] Of course, some torts cannot be established until the necessary element of damage has been proven.
[3] See further Adam Kramer, *The Law of Contract Damages* (Hart 2014) 14–15**.**
[4] There is also the question of what will happen (see further ibid 246–7). This is uncertain in a similar way to the non-breach position, and although there is less authority on the point, it appears that the same approach as described below (giving the claimant a fair wind in relation to uncertainties) applies: *Wardle v Credit Agricole Corporate and Investment Bank* [2011] EWCA Civ 545, [2011] IRLR 604 , [50], [52].
[5] See *Parabola Investments Ltd v Browallia Cal Ltd* [2010] EWCA Civ 486, [2011] QB 477 (CA) [23] (Toulson LJ), contrasting this with the non-breach position as discussed below.
[6] Eg *Re H* [1996] AC 563, 586 (Lord Nicholls); *Re B* [2008] UKHL 35, [2009] 1 AC 11 [13] (Lord Hoffmann).
[7] (1722) 1 Strange 505, 93 ER 664. See more recently and with not dissimilar facts *Zabihi v Janzemini* [2009] EWCA Civ 851.
[8] The destruction principle is known by the maxim '*omnia preasumuntur contra spoliatorem*'- everything is presumed against the spoiler.
[9] Adverse inferences will be drawn where a party has relevant evidence but chooses not to call it: *British Railways Board v Herrington* [1972] AC 877 (HL); *Wisniewski v Central Manchester Health Authority* [1998] Lloyd's Rep Med 223 (CA).

benefit from the wrongdoing and the other party will get the benefit of the uncertainty.

The *Armory* principle has been extended to the situation where the defendant's breach meant that it had failed to keep records it should have kept and which would have helped the claimant to prove its case, even if this was not a deliberate attempt to thwart the process of proof in court.[10] It is said that it does not 'lie in the mouth' of the defendant to object to the lack of evidence in such a case,[11] even though the defendant did not deliberately hold back evidence. Likewise where the defendant's breach led to a mixing of the claimant's oil with the defendant's so that the claimant could not prove the quantity or quality of what had originally belonged to it.[12]

Whether or not this extension is justified—deliberately obstructing an opponent's ability to prove the case is very different to the wrong itself putting the claimant in difficulty in discharging the burden of proof—the extension is well-established. It has a huge impact on the burden of proof of the non-breach position. This is because in every case the defendant's breach means that the claimant faces the difficulty of having to prove what would have happened. And so the law holds that the fact of breach, without more, is (subject to the limitations discussed below) enough for the courts to lean towards the claimant and in effect err on the side of the claimant.

This policy of favouring the claimant has a very long history in US law at the highest level,[13] where it is explicitly founded on *Armory* and has been applied to contract cases among others: 'The defendant who has wrongfully broken a contract should not be permitted to reap advantage from his own wrong by insisting on proof which by reason of his breach is unobtainable.'[14] And as Chief Justice Learned Hand put it, 'It is often very hard to learn what the value of the performance would have been; and it is a common expedient, and a just one, in such situations to put the peril of the answer upon that party who by his wrong has made the issue relevant to the rights of another.'[15]

[10] *Keefe v Isle of Man Steam Packet Co Ltd* [2010] EWCA Civ 683.
[11] ibid [19] (Longmore LJ).
[12] *Indian Oil Corporation Ltd v Greenstone Shipping SA* [1988] QB 345 (Com Ct). More generally, this approach of visiting the burden of proof or similar consequences on the defendant as a result of their causing the claimant's evidential difficulties is close to the concept of evidential damage described in Ariel Porat and Alex Stein, *Tort Liability Under Uncertainty* (OUP 2001) ch 6.
[13] *Story Parchment Co v Paterson Parchment Paper Co* 51 S Ct 248 (1931); *Bigelow v RKO Radio Pictures Inc* 66 S Ct 574 (1946); *Locke v US* 283 F 2d 521 (US Court of Claims 1960); *Schonfeld v Hilliard* 218 F 3d 164 (2d Cir 2000) at 174-5; Restatement (Second) of Contracts (1981) comment a in §352.
[14] *Locke* (n 13) 524 (Jones CJ).
[15] *L Albert & Son v Armstrong Rubber* 178 F 2d 182 (2d Cir 1949).

It is also clearly established in English law. Many of the cases are professional negligence cases, where the defendant's negligence cost the claimant the chance of pursuing litigation against a third party[16] or pursuing an insurance claim against a third party insurer.[17] But the principle has been applied more generally to the questions of what profits would have been made but for a trademark infringement or breach of confidence,[18] or had a licence been continued as it should have been,[19] or had goods continued to be supplied under an exclusive distribution agreement,[20] and of whether a third party bidder would have proceeded with a deal if approached.[21]

Despite a few doubts as to its general applicability,[22] the principle, as Parker LJ put it:

> raises an evidential (i.e. rebuttable) presumption in favour of the claimant which gives him the benefit of any relevant doubt. The practical effect of that is to give the claimant a fair wind in establishing the value of what he has lost.[23]

Or in Leggatt J's words, 'The court is aided in this task by what may be called the principle of reasonable assumptions – namely, that it is fair to resolve uncertainties about what would have happened but for the defendant's wrongdoing by making reasonable assumptions which err if anything on the side of generosity to the claimant where it is the defendant's wrongdoing which has created those uncertainties.'[24]

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[16] *Allen v Sir Alfred MacAlpine & Sons Ltd* [1968] 2 QB 229 (CA); *Mount v Barker Austin* [1998] PNLR 493 (CA) obiter; *Sharif v Garrett & Co* [2001] EWCA Civ 1269, [2002] 1 WLR 3118; *Dixon v Clement Jones* [2004] EWCA Civ 1005, [2005] PNLR 6; *Feakins v Burstow* [2005] EWHC 1931 (QB); *Browing v Brachers* [2005] EWCA Civ 753, [2005] PNLR 44; *Pritchard Joyce & Hinds v Batcup* [2008] EWHC 20 (QB), [2008] PNLR 18 (appeal allowed [2009] EWCA Civ 369, [2009] PNLR 28); *McFaddens v Platford* [2009] EWHC 126 (TCC), [2009] PNLR 26; *Hirtenstein v Hill Dickinson LLP* [2014] EWHC 2711 (Comm).

[17] *Phillips v Whatley* [2007] UKPC 28, [2007] PNLR 27 [45]; *Ramco Ltd v Weller Russell & Laws Insurance Brokers Ltd* [2008] EWHC 2202 (QB), [2009] PNLR 14.

[18] *Fearns v Anglo-Dutch Paint & Chemical Co Ltd* [2010] EWHC 1708 (Ch); *Intercity Telecom Ltd v Solanki* [2015] EWHC B3 (Mercantile), [2015] 2 Costs LR 315.

[19] *Double G Communications Ltd v News Group International Limited* [2011] EWHC 961 (QB); *Gul Bottlers (PVT) Ltd v Nichols plc* [2014] EWHC 2173 (Comm) [86].

[20] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526 [188] (Leggatt J).

[21] *Rosserlane Consultants Ltd v Credit Suisse International* [2015] EWHC 384 (Ch).

[22] *Mathieson v Clintons* [2013] EWHC 3056 (Ch) [189] (Asplin J); *Porton Capital Technology Funds v 3M UK Holdings Ltd* [2011] EWHC 2895 (Comm) [244] (Hamblen J); *McGregor on Damages* (n 1) para 10-006.

[23] *Browing* (n 16) [210] (Parker LJ).

[24] *Yam Seng* (n 20) [188] (Leggatt J), quoting at [189] from *Wilson v Northampton and Banbury Junction Railway Co* (1873–74) LR 9 Ch App 279 (Court of Appeal in Chancery) 285–6 where Lord Selborne LC again tied this to the *Armory* principle. See also *Fearns* (n 18) [70] (Leggatt QC).

IV. The Scope of the Principle

The principle only applies where there is uncertainty—meaning here a difficulty of evidence—that is created by the defendant, ie where the uncertainty is a necessary characteristic of the claimant's having to prove the non-breach position. It does not apply where there is evidence available to the claimant which the claimant has not deployed. This means in practice that the principle is limited in a couple of ways:

First, plainly the *Armory* principle will have little or no application to the question of what choices the claimant would have made but for the breach, as to which the claimant will be able and so expected to lead substantial evidence largely unhampered by the breach. And when proving what the defendant would have done,[25] the claimant can rely on adverse inferences if the defendant does not lead evidence. In practice this means that the *Armory* principle is mainly applicable to the question of what third parties (including the market) would have done, which is the same field as is (thought to be) occupied by the loss of chance doctrine, discussed below.

Secondly, the principle does give the claimant a fair wind, but it does not give a free ride. The law still expects and requires the claimant to deploy the best evidence reasonably available to it.[26] It will not engage in 'pure guesswork'[27] and will only give as fair a wind as is justified by the evidence.[28] This latter qualification can mean that in a particular case the court is often slightly freer than usual in making reasonable assumptions about what would have happened, while not going so far as to actually operate a presumption in favour of the claimant.[29]

V. Where Does the Loss of Chance Principle Fit in?

Where commercial losses depend upon the decision of a particular third party person, as they did in *Allied Maples Group Ltd v Simmons & Simmons*[30] (would the negotiating counterparty have agreed to amend the draft clause if asked), the law is

[25] Subject to the *Lavarack* principle, to the extent there still is one: see Kramer (n 3) 256ff.
[26] *Ratcliffe v Evans* [1892] 2 QB 524 (CA) 532-3 (Bowen LJ); *Biggin v Permanite* [1951] 1 KB 422, 438 (Devlin J). Moore-Bick LJ counselled against a strict requirement that the claimant produce the absolutely best evidence in *Capita Alternative Fund Services (Guernsey) Ltd v Driver Jonas* [2012] EWCA Civ 1417, [2013] 1 EGLR 119 [80].
[27] *Double G Communications* (n 19) [15] (Eady J).
[28] *Porton Capital* (n 22) [349] (Hamblen J). See also *Double G Communications* (n 19) [97] (Eady J).
[29] Putting the emphasis not on the text quoted at the text to n 24 but rather the text that immediately preceded that quotation (*Yam Seng* (n 20) [189]): 'courts will do the best they can not to allow difficulty of estimation to deprive the claimant of a remedy, particularly where that difficulty is itself the result of the defendant's wrongdoing. ... Accordingly the court will attempt so far as it reasonably can to assess the claimant's loss even where precise calculation is impossible.'
[30] [1995] 1 WLR 1602 (CA).

clear (including from that case) that the loss of chance principle applies and the claimant can recover the size of the lost chance of gain (even if less than 50%) multiplied by the size of the gain.[31] In *Allied Maples* itself, the appeal was on a preliminary issue and the size of the percentage had to be decided at a later date,[32] but the principle was applied by the House of Lords in *Jackson v RBS*,[33] where the relevant lost chance was that the dog chew customer would have ended its supply arrangement with the claimant early even if the defendant bank had not prematurely revealed to the customer the mark-up that the claimant middle-man was taking.[34]

Even in these cases in which what would have happened depends upon the decision of one third person, the evaluation of the chance is not straightforward. In *Jackson* the contract counterparty would have either continued or ended the contract with the claimant, but in many or most cases the third party's decision is not a binary one, but involves many possible outcomes. Thus in *Allied Maples* Hobhouse LJ pointed out that:

> The judge will have to assess the plaintiffs' loss on the basis of the value of the chance they have lost to negotiate better terms. This involves two elements: what better terms might have been obtained — there may be more than one possibility — and what were the chances of obtaining them. Their chance of obtaining some greater improvement, although significant, may be less good than the chances of obtaining some other lesser improvement. It will be a question for the judge, on the basis of the evidence already adduced together with any further evidence which the parties place before him at the further trial to make his assessment of the value of what the plaintiffs lost.[35]

The court may wish to 'show its working' by adding up the different products of the chance and the possible loss, eg (10% chance * £50) + (40% chance * £60) + (10% chance * £70) + (40% chance * £0). Thus in one case where the question was whether the claimant investment banking headhunter would have secured a contract with a particular customer, the court found that there was 15% chance it would have secured the contract as sole service provider (on an exclusive mandate) and earned

[31] Sarah Green contends in her paper in this book that loss of chance applies wherever the matter is outside the claimant's control, not only whenever it depends upon third parties.
[32] See *Allied Maples* (n 30) 1614. (Millet LJ dissented. He thought the claimant had not proven a real chance that the counterparty would have agreed to adjust the draft wording.)
[33] [2005] UKHL 3, [2005] 1 WLR 377.
[34] The judge found a different percentage chance that the customer would have terminated the relationship after one year, two years, three year and four years, and applied that (increasing) percentage to the profits that would have been made each year if the relationship had continued: see ibid [28], [37]; also the Court of Appeal decision: [2000] CLC 1457 [16]. The judge's approach was approved in the House of Lords (allowing the appeal from the Court of Appeal's approach), although the figures were found to have been too generous (but that did not avail as it would have been too costly to remit the matter for reconsideration of the figures after all the time that had passed, so the judge's figures were upheld).
[35] *Allied Maples* (n 30) 1621.

£3.26m profit, 45% chance it would have secured the contract as partial provider (on a shared mandate with others) earning £1.26m profit, and 40% that it would not have secured the mandate at all.[36]

But in most cases, the court will instead prefer to take the most likely outcome (of the negotiations etc) and multiply the chance of loss by that one outcome.[37] Where the possible outcomes sit on a bell curve (as they appear to in the example I gave in the previous paragraph), this approach (eg 60% * £60) will yield the same result as the more nuanced calculation, because the chances of a lower figure are balanced by the chances of a higher figure.[38]

VI. Loss of Chance and the Market

But the situation is rather different where the question is not what an individual would have decided but what the market would have paid for something. The market is a collection of individuals with free choice, but aggregated together their behaviour can be assessed to give a clear individual outcome—the market price—usually with the assistance of expert evidence.

In *Owners of the 'Front ACE' v Owners of the 'Vicky 1'*,[39] a collision with a very large crude oil carrier put it out of action for a time. It was found that the vessel would certainly have been employed—the vessel already had a fixture for the first period, which was cancelled as a result of the collision, and would have had little problem obtaining fixtures thereafter, having a 96% utilisation rate historically and there being a ready market for chartering such a vessel.[40] In the circumstances, the Court of Appeal overturned the first instance Registrar's reduction of the lost profit figure by 20% for the chance that the vessel would not have been profitably employed or would have been employed at a lower price.[41]

This decision makes an important point. A market means that there would have been a customer and so a deal. The employment of the vessel is certain and it is only

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[36] *Wellesley Partners Ltd v Withers LLP* [2014] EWHC 556 (Ch), [2014] PNLR 22 [208], [233]; upheld by the Court of Appeal in *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146. Or see, eg *Langford v Hebron* [2001] EWCA Civ 361, [2001] PIQR Q13, a personal injury case.

[37] See especially *Browning* (n 16) [212]; *Earl of Malmesbury v Strutt & Parker* [2007] EWHC 999 (QB), [2007] PNLR 29 [149].

[38] This is because the most likely figure (the mode average) is the same as the weighted average figure (the mean) and the middle figure reached by measuring half of the area under the graph (the median). For a little further discussion, see Kramer (n 3) 276-8.

[39] [2008] EWCA Civ 101, [2008] 1 CLC 229.

[40] ibid [70].

[41] The Registrar's approach was summarised at ibid [5], [68] and the Court of Appeal's at ibid [71], [73].

the price which is uncertain. And once the market rate has been established (in this case by looking at the various voyage charter rates available at the time) that is the sum that would have been earned and, unless the costs that must be deducted to calculate the net profit lost were uncertain, there is no need for a further reduction for contingencies.

Hence the typical valuation case of the market price (for example in a property non-delivery or destruction case) does not involve the language of loss of a chance. The valuer identifies a single 'most probable' figure. And that is the end of it, at least assuming a bell curve, as Lord Hoffmann has explained:

> A forecaster who predicts that profits in a given period will be, say, $2,223,000, is not doing anything so silly as to say that in his opinion the profits will be precisely that figure. He is saying that $2,223,000 is in his opinion the most probable outcome, but that figures slightly higher or lower are almost equally probable and that on either side of them there is a range of possible figures which become increasingly less probable as they deviate from the mean… The same is true of a valuation of property, which is no more than an estimate of what a property would fetch on a given date, based upon induction from information about what similar property has fetched.[42]

However, the market will not always give such a clear answer. Where there is a volatile market or a limited access to it (due to a forced or urgent sale), it may not be realistic to merely fix on a single market price that would have been obtained and that provides a balance of all other possible prices. In *First Interstate Bank of California v Cohen Arnold & Co*,[43] it was proven on the balance of probabilities that if the defendant had properly advised as to a borrower's worth, the bank claimant would have taken the decision to put the security property on the market at a particular date (June 1990). At that date the market was undergoing a property crash. Accordingly, the Court of Appeal preferred the approach of identifying a ⅔ chance that a sale at £3m would have been achieved in September 1990,[44] leaving a ⅓ chance that the sale achieved would have been no better than the actual sale achieved at a price of £1.4m, after marketing that began in September 1990 (this actual sale taking place in lots between October 1990 and June 1992).

VII. Loss of Chance and Trading Losses

[42] *Lion Nathan Ltd v C-C Bottlers Ltd* [1996] 1 WLR 1438 (PC) 1445–47.
[43] [1996] PNLR 17 (CA).
[44] ibid 25, 31.

It is not easy to apply these lessons of how to determine what profit would have been made from selling or leasing/chartering valuable property to the more complicated situation of a trading business. With such a business there is no simple market price to help the court. Trading a business is an aggregate of many different transactions, and profitability is as much about the number of trades and their costs as it is about the market price (and so revenue) of each trade. The strongest evidence of what would have happened is usually the ability and pedigree of the trader (including historical trading figures), and a general discussion of the competitiveness and profitability of the market, without the court ever getting into the minutiae of how (from whom in what transactions) the profit would have been earned.

In *Parabola Investments Ltd v Browallia Cal Ltd*[45] the claimant was an equities trader with a very successful history. When establishing the loss that would have been suffered but for the defendant stockbroker's fraud, the court had the difficulty of knowing that the claimant had a gift for making very good choices that beat the stock market but not really knowing how he did it. Of course, each of these investment choices required a market upon which a trade could be performed, but the profit was not made by selling something for the market price at a profit against the costs of that thing or service (as in *Vicky 1* or *First Interstate Bank of California*), but rather by speculating on market movements by buying and selling. The market movements are the aggregate of the behaviour of various third parties—and so the sort of thing to which the loss of chance approach should apply—but here the court could not open the black box and investigate what would have happened following a particular choice by the claimant. From the court's point of view, this was akin to asking whether a gambler with a history of winning would continue winning.

Not being able to point to exactly how he made money or what decisions would have been made, one might have thought that the court would make some sort of deduction for the possibility that the claimant would have done worse than he did in the past. But, consistent with the fair wind principle mentioned earlier (although it was not mentioned in this case), the first instance judge and Court of Appeal were willing to accept without too much difficulty that the claimant would have done broadly as well as he had done in the past.

In quantifying the amount of loss, the Court of Appeal seemed to confirm that the loss of chance approach applied,[46] the establishment of a figure being a matter of

[45] n 5.

[46] ibid [23]. That the loss of chance approach was intended is fairly clear from the text of this paragraph but is also confirmed by the passages of *Davies v Taylor* [1974] AC 207 (HL) and *Gregg v Scott* [2005] UKHL 2, [2005] 2 AC 176 cited therein.

'reasonable assessment',[47] and upheld Flaux J's figure for loss which had been reached after taking (said that judge) 'sufficient account of the inherent risks in any trading'.[48]

In the course of reaching this result, the Court confirmed that the balance of probability approach does not apply to the measurement of loss,[49] and rejected the submission[50] that the claimant must prove on the balance of probabilities that at least the sum awarded would have been earned but for the breach. This decision of the Court is in principle right, because the loss of chance and not balance of probabilities approach applies and because the claimant has a fair wind, meaning that uncertainties are within reason resolved in the claimant's favour.

But it is important to realise that the loss of chance approach, subject to the fair wind principle, awards the mean of all possible outcomes. And where, as must be fairly common, the possible outcomes are distributed on a bell curve or any other symmetrical probability curve, the sum which it is more likely than not the claimant would have earned (the median, the figure with half the area under the curve to the left of it and half to the right) is the same as the mean.[51] In those situations the balance of probabilities approach is not wrong,[52] and indeed the balance of probabilities and loss of chance approaches are the same.[53]

With *Vasiliou v Hajigeorgiou*,[54] we turn to the rather different situation of a Greek-Cypriot restaurant, although it suffers from some of the same difficulties as the trader in *Parabola*. Although restaurant trading operates in a market, knowing the market value of a plate of moussaka and cost of a Greek waiter will not help the court to establish whether a Greek restaurant would have traded profitably. The claimant tenant had been deprived by the landlord's breaches of the ability to operate a new restaurant for eighteen months. The Court of Appeal confirmed that a discount should be made for uncertainty where the prospects of trading at profit are uncertain.[55] In this case, however, the judge had found that the claimant *definitely* (ie with a 100%

[47] *Parabola* (n 5) [24].
[48] See the quotation from Flaux J's judgment: ibid [11].
[49] ibid [22], [24].
[50] Made by a counsel team including this author. As to these submissions, see the note of argument: ibid 480D.
[51] And indeed where the curve is a bell curve, the mean and median are the top of the curve, the modal average.
[52] This is true of all symmetrical probability distributions – the weighted average is the mid-point of the graph.
[53] Provided we are not talking about proving on the balance of probabilities that the claimant would have earned a particular figure, but proving on the balance of probabilities that the claimant would have earned *at least* that figure.
[54] [2010] EWCA Civ 1475.
[55] ibid [47].

probability) would have made a profit,[56] so no discount was required.[57] It is still necessary to fix a figure for the lost profits, and this was done by the trial judge (and upheld on appeal) following evidence of Mr Vasiliou's competence and track record as a restaurateur, and allowing for the likely (on a balance of likelihoods) number of covers per week, the growth rate, and other factors.[58]

Accordingly, in most cases the calculating and reasoning is opaque and the court does the best it can to fix a figure.[59] This will frequently not involve a particular multiplier (probability) and multiplicand (gain). It will take into account the chances of things going well or badly, and the different possible outcomes. The judge may occasionally show some of the working by indicating a percentage deduction to apply where profits were not certain,[60] but usually the judge will just come up with a figure. This sort of approach is an evaluative task the result of which is quite properly very difficult to appeal.[61] So it is a loss of chance approach without the outward signs of one. And there is nothing wrong with any of that.

Trading cases have a key difference from the pure chance of gain case such as *Chaplin v Hicks*[62] or *Allied Maples*, namely that the worst that can happen is not merely that the claimant is left without a gain, but rather the claimant might make a loss. And the chance of making a loss must be set against the chance of making a gain.

That being the case, it is frequently worth working out firstly whether it is more likely than not that the claimant would have made a profit. If the probability graph is symmetrical, the median (the more likely than not figure) is also the mean (the loss of chance award figure), and so if it is more likely than not that the claimant would not have made a profit it follows that there will be no award, as on the weighted loss of chance approach the claimant would have been worse off but for the breach. And so, as the case law indicates,[63] and perfectly properly, in cases of bell or other

[56] ibid [44].
[57] ibid [39].
[58] See the discussion: ibid [16]–[18]. For more detail, see the first instance judgment, which is unreported but available on Lawtel.
[59] For an example from the 'figure in the air' end of the scale see *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) [410]–[412].
[60] *Salford City Council v Torkington* [2004] EWCA Civ 1646, [2004] 51 EG 89 (CS) [55] (Potter LJ in obiter) as discussed in the *Vasiliou* case.
[61] *Wellesley CA* (n 36) [125]–[126].
[62] [1911] 2 KB 786 (CA).
[63] *Parabola* (n 5) [23]; *Vasiliou* (n 54) [14] (the reference to balance of probability), [19], [24], [26], [28].

symmetrical probability curves, the court as a first stage frequently asks whether on the balance of probabilities the claimant would have made a profit.[64]

But no one should confuse this with there being some sort of separate hurdle of proving the fact of loss on the balance of probabilities before engaging with a second hurdle of proving the extent of the loss (on a loss of chance basis). Some of the language in the case law suggests this,[65] but it is misguided.[66] The short point is that, when it comes to third parties and lost profits, '[a]ll that remain[s] on the issue of causation was for [the claimant] to establish whether there was a real and substantial chance' that it would have made a profit, and '[t]hat was the beginning and end of its case on causation' and 'the evaluation of the chance' of obtaining the profit is then 'part of the process of the quantification of damages'.[67]

First, it is necessary to distinguish the fact from the extent of loss for some purposes, such as fixing the accrual of the cause of action in tort cases from which date the limitation period runs. But in loss of chance cases the actionable loss is (at least on one view, and if one looks at the effect of the law) the loss of an opportunity to make a gain (providing it is a more than *de minimis* opportunity[68]), and it is that loss (the opportunity) which must be proven on the balance of probabilities.[69] It matters not for those purposes that there was a less than 50% chance that the opportunity would have in fact yielded a gain. The loss of chance principle makes an award nevertheless, and the balance of probabilities test has nothing in practice to say.

Second, plainly it would be illogical and undesirable for the beauty contest candidate to have to show that on the balance of probabilities she would have won a prize as a prior hurdle to then having to show a substantial chance (which can be under 50%) that she would have won a prize, with damages then assessed as that latter chance multiplied by the amount of the prize. The loss of chance approach replaces the balance of probabilities test. In the beauty contest example the curve is not symmetrical (it has a heavy right-skew) and so the median figure is not the same

[64] Text to n 53.
[65] See the comments at first instance in *Wellesley*, discussed below at n 67. And see the US cases, which suggest that the *Armory* principle applies to the extent of the loss but not the fact of the loss: *Story Parchment* (n 13) 250; *Bigelow* (n 13) 581, 524; *Bagwell Coatings Inc v Midlle South Energy Inc* 797 F 2d 1298 (US C of A 5th Circuit 1986) 1308-9.
[66] See further Andrew Burrows, 'Uncertainty about Uncertainty: Damages for Loss of a Chance' (2008) JPI Law 31, 42-43.
[67] *Wellesley CA* (n 36) (Floyd LJ) [109]-[110]. The Court of Appeal did not repeat the muddled language of the first instance judge (*Wellesley HC* (n 36) [188(2), (5)-(7)] (Nugee J)), which seemed to support a balance of probabilities test.
[68] *Davies* (n 46) 212 (Lord Reid). This '*de minimis*' language evolved in *Allied Maples* and other cases into the language of 'real or substantial' and not 'merely speculative'. See more recently *Wellesley CA* (n 36) (Floyd LJ) [94].
[69] *Gregg v Scott* (n 46) [17] (Lord Nicholls). See further Sarah Green's discussion of the 'Access Question' in chapter 13.

as the mean. It may be more likely than not that the claimant would have earned zero (the median), but the weighted average allowing for the possible large gains (the mean) is a positive figure.

VIII. The Presumption that Everything is Worth What the Claimant was Willing to Pay for It

But even removing the usual requirements of the standard of proof and resolving uncertainties in favour of the claimant sometimes is not enough to reach a realistic conclusion as to the non-breach conclusion. This is especially true in cases where the claimant has expended money on a business venture, project or transaction. In such cases the court is mindful of the need to balance the unfairness to the defendant of awarding a speculative sum for lost profits, against the unfairness to the claimant of awarding nothing and therefore leaving the claimant not just having missed out on an opportunity to gain but nursing a monetary loss. Of course, this is only unfair if the claimant would but for the breach have recouped that expenditure in revenue, but the court tends to presume that it would.

Accordingly, what Leggatt J called in *Yam Seng* the court's 'attempt so far as it reasonably can to assess the claimant's loss even where precise calculation is impossible'[70] finds its most powerful expression in the presumptions the court makes as to the benefit that would have been obtained from the defendant's performance.[71]

And the most powerful of those presumptions, as Leggatt J explained, is the:

> (rebuttable) presumption that the claimant would have recouped expenditure incurred in reliance on the defendant's performance … in the expectation of making a profit. Where money has been spent in that expectation but the defendant's breach of contract has prevented that expectation from being put to the test, it is fair to assume that the claimant would at least have recouped its expenditure had the contract been performed unless and to the extent that the defendant can prove otherwise'.[72]

This is based on the presumption that the claimant was rational in its business and correct in its expectation, which is a fair starting point, although evidence can be led by the defendant to defeat these premises and the presumption.

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[70] *Yam Seng* (n 20) [189].

[71] See Leggatt J's quotation of Lord Selborne LC in *Yam Seng* referred to in n 24.

[72] *Yam Seng* (n 20) [190].

This presumption was not identified in England in this modern form until as recently as the 2010 decision of Teare J in *Omak Maritime Ltd v Mamola Challenger Shipping Co*,[73] explaining the well-known 'reliance damages'/'wasted expenditure' cases such as *Anglia Television v Reed*.[74] The leading decision of an ultimate court on the point is the High Court of Australia's *Commonwealth v Amann Aviation Pty Ltd* from 1991.[75]

This presumption that the claimant would have broken even provides a baseline recovery of lost revenue in a large variety of commercial cases, and proves determinative where (even with a fair wind) the claimant cannot demonstrate that it would have made a profit and the defendant cannot prove that the claimant would have made a loss.[76] I have explored this elsewhere,[77] and for the purposes of this chapter it suffices to summarise some of the situations in which the presumption operates:

A. Recouping the Cost of Diverted Time

Where the defendant's breach diverted the claimant's employees from work in the claimant's business, it will usually be next to impossible to show what contribution their ordinary work would have made to an amount of profits of the business. In the circumstances, the court sensibly presumes that the claimant's employees are worth—whether their contribution to revenue is direct or indirect—what they are paid. As Wilson LJ summarised in the leading case on such claims, *Aerospace Publishing v Thames Water Utilities Ltd*:

> [I]t is reasonable for the court to infer from the disruption that, had their time not been thus diverted, staff would have applied it to activities which would, directly or indirectly, have generated revenue for the claimant in an amount at least equal to the costs of employing them during that time.[78]

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[73] [2010] EWHC 2026 (Comm), [2011] 2 All ER (Comm) 155. See further David McLauchlan, 'The Redundant Reliance Interest in Contract Damages' (2011) 127 LQR 23.
[74] [1972] 1 QB 60 (CA).
[75] (1992) 174 CLR 64.
[76] This book on commercial damages is not the place to investigate non-commercial contracts, but in passing it is worth noting that it is at least as difficult in non-commercial cases to prove what would have been received but for the breach—the enjoyment or other non-financial equivalent of revenue. There, too, the costs expended on the price or otherwise provide an appropriate and useful starting point, via the presumption that the non-financial value to the claimant was at least what the claimant spent to get the performance and enjoyment of it, for measuring the claimant's non-breach position and so its loss. See further Kramer (n 3) 503-4, 511-3.
[77] ibid 29-34, 480-7.
[78] [2007] EWCA Civ 3, [2007] Bus LR 726 [86]. See further Kramer (n 3) 30-33.

Cases in which the costs of in-house lawyers and claims managers[79] are recoverable are probably explicable on the same basis.

B. Recouping the Cost of Property Put out of Use

Where property is kept out of use, a standard measure of damages is the 'standing charge' method, by which the court calculates the costs of running and maintaining the property, including overheads, on the 'assumption that this figure must represent approximately the value [to] the operators.'[80] Such an award should also include an allowance for depreciation, ie the relevant proportion of the capital cost of the property when divided by the life of the property, since that too is a cost attributable to having the property for the relevant period that would have to be recouped for the business or other venture to have broken even.[81]

C. Recouping the Price Paid to the Defendant

Sometimes the presumption operates simply to return to the claimant in damages the price (or relevant part of the price) paid to the defendant, on the assumption that the claimant would have recouped it in revenue but for the breach.

This is how the Court of Appeal fixed the damages for breach of a commercial landlord's covenant of repair that kept a tenant's business closed for two months in *Savva v Hussein*: it was presumed that the tenant would have earned enough to recoup the rent he had paid the defendant landlord.[82] And this was how the damages were calculated in *Playup Interactive Entertainment (UK) Pty Ltd v Givemefootball Ltd*,[83] where a football awards sponsor was not given a certain proportion of the fan contact details and other benefits promised in the sponsorship contract. The damages were measured by that proportion of the price paid on the assumption that what would have been received would have been worth what was paid for it. It is how the award in *Giedo van der Garde BV v Force India Formula One Team Ltd*[84] should have been explained, when the claimant was only given a certain proportion of the Formula One

[79] See eg *Portman Building Society v Bevan Ashford* [2000] 1 EGLR 81 (CA).
[80] *Birmingham Corp v Sowsbery* [1970] RTR 84 (QB), approved in *Beechwood Birmingham Ltd v Hoyer Group UK Ltd* [2010] EWCA Civ 647, [2011] QB 357; *Hunt v Optima (Cambridge) Ltd* [2013] EWHC 681 (TCC), 148 Con LR 27.
[81] *West Midlands Travel Ltd v Aviva Insurance Ltd* [2013] EWCA Civ 887, [2014] RTR 10.
[82] [1996] 2 EGLR 65 (CA) 67 (Staughton LJ).
[83] [2011] EWHC 1980 (Comm), [2011] Info TLR 289 [272].
[84] n 59.

track test laps he was promised, and the court awarded that proportion of the price he paid.[85]

In contrast with service cases, usually there is ample evidence as to the value of property that has not been supplied. But in *McRae v Commonwealth Disposals Commission*,[86] where the purchase was of an oil tanker wreck that did not exist (so could not be valued), the presumption of breaking even proved determinative: the claimant recovered the costs spent on the salvage expedition.

D. Recoupment of the Full Cost of the Venture

Where a venture has been abandoned it is often difficult to prove what the outcome would have been. Thus in *Anglia TV Ltd v Reed*[87] the claimant recovered all its expenditure on the unrebutted presumption that the planned film would have broken even. The same applied in *Yam Seng* to the costs that had been sunk into the distribution of Manchester United fragrances that had to be abandoned upon non-supply by the defendant.[88] Where the defendant failed properly to provide a car bodyshop trade show at which the claimant was to advertise in *Dataliner Ltd v Vehicle Builders & Repairers Association*,[89] the claimant was awarded its expenditure as it was presumed that it would have earned enough new business to recoup that expenditure.

In these cases the expenditure was wholly or partly spent on third parties. But if the claimant has paid the defendant for a service and that service has not been provided, but the claimant cannot recoup its money (for example because the claim in unjust enrichment fails on the grounds that there was only a partial failure of consideration), the claimant should also be able to rely on the presumption of breaking even to assist in proving that it lost revenue equal to the price it paid for the service that was not provided.

[85] Instead the presumption of breaking even was not mentioned. The court apparently concluded that the chance of profit the claimant received in return for the laps was well below the price paid (hence the small loss of chance award—although note that Mr van der Garde did in fact go on to a professional Formula One career). Nevertheless, the court correctly awarded a proportion of the price paid albeit on a legally unsound 'market value of the service' basis, or in the alternative a sounder *Wrotham Park* basis (discussed below). See further Kramer (n 3) 35-39.
[86] (1951) 84 CLR 377 (High Court of Australia).
[87] n 74.
[88] n 20.
[89] The Independent, 27 August 1995 (CA).

IX. Other Presumptions

As the structure of this chapter makes clear, the presumption of breaking even is merely one (although probably the most important) permissible presumption that the court can apply to resolve uncertainty or, where justifiable, give the wronged claimant a fair wind. One of the more interesting other presumptions is the presumption that the claimant would have received as much revenue (or non-financial benefit) from the performance as the amount it would have been willing to sell the performance for—ie the amount it would have been willing to accept to waive the right to performance—by a sanitised hypothetical bargain.[90] This is, in this author's opinion, the best explanation of the *Wrotham Park* measure, applied mainly in cases of negative promises (like *Wrotham Park* itself) where there is no easy apportionment of the price paid by the claimant that would allow the presumption of breaking even to assist.[91]

Another presumption that can apply in some cases is that the claimant would not only have broken even but made a certain return. This is most obviously applied to cases of loss of use of money, where the ease of quantifying what can be earned from employing money (especially by lending it to a bank by depositing it) means the courts are quick to presume that a certain return would have been made from money during a particular period.[92] But it can also apply in cases of loss of use of other property.[93]

X. Conclusion

Frequently when litigating or arbitrating disputes the most practically important questions for the parties—ie those that have the greatest impact on success or failure of the claim or on the amount of the recovery—are not the legal principles of remoteness, mitigation and legal causation, or even the application of those principles to the facts, but rather the messy and largely unappealable business of proving with evidence as a matter of fact what would have happened. But as this paper has sought to show, the law is not insensible to the difficulties claimants face in such cases. On the contrary, the court is willing to make certain presumptions or otherwise to stack the deck in the claimant's favour, making it much easier than a strict balance of probabilities test would entail to recover the expenditure incurred or revenues that

[90] There must be an assumption that the claimant would have agreed to waive, even if contrary to fact, in order to get the economic measure off the ground.
[91] Kramer (n 3) 554-6.
[92] *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561 and the statutory awards such as under section 35A of the Senior Courts Act 1981. In fact, the courts are usually willing to award the higher amount reflecting the cost to the claimant of borrowing a replacement sum.
[93] *British Columbia and Vancouver Island Spar, Lumber and Saw Mill Company Ltd v Nettleship* (1867-68) LR 3 CP 499 (Common Pleas).

merely might have been earned but for the breach. Before parties fire the arrows of their lengthy factual and expert evidence, and before judges look to see whether they have struck home, they should all make sure they are focussing on the right target. That target is often an easier one for claimants than all might have supposed.