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NOT GETTING LOST IN THE "PARK": *WROTHAM PARK* DAMAGES DEMYSTIFIED

Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua

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Since its incarnation in *Wrotham Park Estate*, the precise conceptual foundation and contours of negotiating damages have over the years remained somewhat obscure. Following the lead of the UK Supreme Court in *One Step*, the Herculean tasks of furnishing a sound theoretical rationalisation for and delineating the boundaries of negotiating damages were undertaken by the Singapore Court of Appeal in *Turf Club*. This note unpacks the Singapore case, places it in comparative context, and investigates the extent to which its judicial treatment on negotiating damages has departed from the doctrinal route prescribed by its English counterpart. From a comparative law perspective, the juxtaposition of *Turf Club* alongside *One Step* also helpfully illustrates the level of intellectual and analytical rigour that is exemplary for any jurisdiction aspiring to build up an autochthonous legal system.

I. INTRODUCTION

Almost half a century has passed since negotiating damages were introduced—for the first time in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*[1]—into the landscape of the Anglo-common law world. Since its incarnation, negotiating damages have attracted sustained debates—both judicially and academically—over its many facets (its precise conceptual foundation and scope of operation) which have over the years remained somewhat obscure. By now, the time is ripe for clear judicial guidance on how this head of damages should be developed. The Singapore Court of

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1 [1974] 1 WLR 798 (Ch) [*Wrotham Park Estate*].

Appeal ("Court of Appeal") has—following the United Kingdom ("UK") Supreme Court's landmark decision in *Morris-Garner v One Step (Support) Ltd*[2]—expressed its authoritative view on the direction in which the law on negotiating damages is heading in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*.[3]

This note seeks to demystify negotiating damages and remove its obscurity by unpacking the Singapore case, placing it in comparative context, and investigating the extent to which its judicial treatment of *Wrotham Park* damages[4] has departed from the doctrinal route prescribed by its English counterpart in *One Step*. The note will be structured with reference to the three areas of divergence discernible from the judicial articulation regarding negotiating damages in *Turf Club* and *One Step*—namely, its theoretical rationalisation, its ambit of application and its relationship with damages awarded pursuant to the court's jurisdiction to substitute specific relief under the *Lord Cairns' Act* [*LCA*].[5] This note concludes by arguing that beyond its contribution to the substantive law governing negotiating damages, *Turf Club* is also valuable—from a comparative law perspective. The juxtaposition of *Turf Club* alongside *One Step* not only underscores the potential doctrinal inspiration injected by the Singapore decision into the wider Commonwealth, especially in jurisdictions where the final words on this controversial head of damages have yet to be articulated, it also helpfully illustrates—despite certain slippage in the Court of Appeal's reasoning identified in this note—the level of intellectual and analytical rigour that is exemplary for any jurisdiction aspiring to build up an autochthonous legal system.[6]

II. Facts

Turf Club involved the claimants and defendants entering into a joint venture, under which a site was leased from the state authority to a company controlled by the defendants which granted sub-tenancies to the Joint Venture ("JV") companies which further let out the site for generating revenue. As their relationship turned sour, the claimants commenced suits against the defendants. A settlement (recorded in a consent order) was reached which provided for a bidding exercise to effect a corporate divorce. The consent order mandated parties not to upset the *status quo* until the bidding exercise was completed. However, pending issuance of the valuation reports, the defendants renewed the state lease but refused to let it to the JV companies, leading to a very pessimistic outlook of the companies and frustrating the bidding exercise. The claimants sued and the one of the issues with which the court was confronted

2 [2018] 2 WLR 1353 (SC) [*One Step*]. Noted in Paul S Davies, "One Step Backwards: Restricting Negotiating Damages for Breach of Contract" [2018] LMCLQ 433; Andrew Burrows, "One Step forward?" (2018) 134 LQR 515; Caspar Bartscherer, "Two Steps Forward, One Step Back: *One Step (Support) Ltd v Morris-Garner and Another*" (2019) 82 MLR 367; Edwin Peel, "Negotiating Damages after *One Step*" (2019) 35 JCL 216.

3 [2018] 2 SLR 655 (CA) [*Turf Club*]. Noted in Man Yip & Alvin W-L See, "One Step away from *Morris-Garner*: *Wrotham Park* damages in Singapore" (2019) 135 LQR 36.

4 "*Wrotham Park* damages" and "negotiating damages" are used interchangeably, though the UK Supreme Court preferred the latter: *One Step*, *supra* note 2 at para 3. *Cf Turf Club, supra* note 3 at para 270.

5 Its predecessor is the *Senior Courts Act 1981*, s 50; now replaced by *Chancery Amendment Act 1858*, s 2.

6 Geoffrey Wilson Bartholomew, "The Singapore Legal Systems", in Riaz Hassan, ed. *Singapore – Society in Transition* (Kuala Lumpur and New York: Oxford University Press, 1976).

was whether *Wrotham Park* damages could be granted to the claimant in respect of the defendant's breach of the consent order.

III. Theoretical Rationalisation Of Negotiating Damages

A. *Overview of the Court of Appeal's Theoretical Framework*

Turf Club gives the occasion for the apex court of Singapore to weigh in on the enduring battle fought since the inception of negotiating damages over whether such damages should be characterised as compensatory or restitutionary.[7] As the Court of Appeal rightly noted at the outset of the judgement, the developmental trajectory of authorities following *Wrotham Park Estate*—consisting of damages awards which deprived the defendant of (part of) his profits which he had pocketed by reason of his breach—poses a "*challenge* to [the] long established principle of the law of contractual damages"[8] that "the general aim of damages for breach of contract is to *compensate*".[9] The obvious restitutionary slant of *Wrotham Park* damages strains and calls into question the validity and relevance of the orthodox compensatory paradigm as a descriptive and normative template for conceptualising negotiating damages. Against such a backdrop, the pendulum has swung—unequivocally—to the compensatory side in both *One Step* and *Turf Club*.

In *One Step*, Lord Reed, delivering the majority judgement of the UK Supreme Court, predicated negotiating damages on "the loss of a valuable asset created or protected by the right which was infringed".[10] The theoretical rationalisation of negotiating damages in *Turf Club* took a somewhat different turn. Though both courts repudiated a restitutionary account of negotiating damages, the Court of Appeal held that such an award compensates for "the loss of the performance interest itself".[11] In arriving at a compensatory rationalisation, Andrew Phang JA, delivering the judgement for the Court of Appeal, relied on what the author would term the "Descriptive-Normative Framework" ("DNF"). The analytical function of the DNF mandates a treatment of the *descriptive* account of the damages award separate from its *normative (or legal) nature*. Thus, on top of the compensation-restitution bifurcation, a further nuance can be drawn in 'restitution' such that a distinction can be made between 'descriptive restitution' and 'normative restitution': while the former is only depictive of the gain-stripping effect of the award, the latter posits a nexus between the literal fact that the illicit profit reaped from the breach needs to be surrendered and its normative *justification*, which is to "punish as well as deter the defendant's wrongdoing".[12] Within such a conceptual framework, negotiating damages were characterised as 'normatively compensatory' as they were galvanised for compensating the claimant's "loss of the performance interest"[13] *per se* rather

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7 *Turf Club, supra* note 3 at para 178.
8 *Ibid* at para 2 [emphasis in original].
9 *Ibid* at para 1 [emphasis in original].
10 *One Step*, *supra* note 2 at para 95.
11 *Turf Club*, *supra* note 3 at para 205 [emphasis and bold omitted].
12 *Ibid* at para 185.
13 *Ibid* at para 205 [emphasis and bold omitted].

than penalising and deterring the contract-breaker; meanwhile they also manifest a 'descriptive restitutionary' character—given that what negotiating damages practically achieve is to strip the defendant of part of his profit gained as a result of the contractual breach. Framed thus, the DNF approach resonates with the hybrid "Gain and Loss" strategy identified by Barker[14] and advocated by Virgo[15] and Brennan,[16] and the objective compensatory analysis flagged by Burrows[17]—as negotiating damages, being "***objective compensatory awards*** aimed at restoring the value of the lost right *per se*", can be awarded "***regardless of*** any consequential loss suffered by the plaintiff".[18]

B. *Merits of the DNF Approach*

This subtle taxonomy of 'restitution' is something more than a matter of nomenclature for it addresses two conceptual problems attending *Wrotham Park* damages. First, the significance underlying what would otherwise be merely a painstaking semantic exercise is the need to keep the *rationale* of the award and its *practical effect* as distinct inquiries.[19] It goes to the heart of the conceptual inquiry—whether it is theoretically permissible to identify negotiating damages as a compensatory remedial response, while what it does practically is to deprive the defendant of the fruits of his contractual breach.[20] A severance between the descriptive account of such an award and its normative basis answers in the affirmative. Second, this classification further clarifies the relationship between *Wrotham Park* damages and an award of account of profits in *Attorney General v Blake*.[21] While the two apex courts shared the same sentiment that the proposition positing both heads of damages to be restitutionary could not be maintained,[22] Lord Reed did not suggest *how* the two can be disentangled, save to repudiate the notion that the two awards are "similar remedies (partial and total disgorgement of profits, respectively)" occupying "different positions along the same sliding scale".[23] The DNF, on the other hand, highlighted that the differentiation lies in the impetus motivating their awards—one is premised on making good the loss sustained by the innocent party (putting aside first the question whether the Court of Appeal's characterisation of 'loss' is a satisfactory one) while the other has its eyes firmly set on censuring and discouraging the behaviour of the contract-breaker.

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14 Kit Barker, "'Damages Without Loss': Can Hohfeld Help?" (2014) 34:4 OJLS 631.

15 Graham Virgo, "Gain-based Remedies", in Graham Virgo & Sarah Worthington, eds. *Commercial Remedies: Resolving Controversies* (Cambridge: Cambridge University Press, 2017) ch 3.

16 David Brennan, "The Beautiful Restitutionary Heresy of a Larrikin" (2011) 33 Sydney L Rev 209.

17 Andrew Burrows, "Are 'Damages on the *Wrotham Park* Basis' Compensatory, Restitutionary or Neither?" in Djakhongir Saidov & Ralph Cunnington, eds. *Contract Damages: Domestic and International Perspectives* (UK: Hart Publishing, 2008) ch 7.

18 *Turf Club*, *supra* note 3 at para 205 [emphasis and bold in original].

19 Charles Mitchell, "Remedial Inadequacy in Contract" (1999) 15 JCL 133 at 141.

20 Paul S Davies, "*One Step* Forwards: The Availability of *Wrotham Park* Damages for Breach of Contract" [2017] LMCLQ 201 at 202.

21 [2001] 1 AC 268 (HL) [*Blake*].

22 *Turf Club*, *supra* note 3 at para 199; *One Step*, *supra* note 2 at para 81.

23 *Experience Hendrix LLC v PPX Enterprises Inc* [2003] 1 All ER (Comm) 830 at paras 36, 37 and 44 (CA).

C. *Critiques*

While the DNF maybe touted as a stroke of genius for fitting negotiating damages with ostensible restitutionary features into the compensatory framework, its underlying premise that such damages are 'normatively compensatory' which compensates for the plaintiff's loss of performance interest does not, on closer examination, appear to be able to stand up to scrutiny for a number of reasons.

First, every breach of contract would—at least on a conceptual level—entail a loss of performance interest on the part of the promisee. Attributing the label 'loss of performance interest' to negotiating damages does not illuminate. As such, the recognition of loss of performance interest raises the question of whether the claimant who has suffered consequential loss ought to be compensated twice for both the loss sustained consequent upon the defendant's breach *and* loss of performance interest.[24] A possible response is that the notion of loss of performance interest is only meaningful as a theoretical construct in rationalising negotiating damages as compensatory; rather, whether one would obtain substantial damages would turn on the ability of the claimant to satisfy the court that the threshold requirements laid down by the Court of Appeal are satisfied. The limited relevance of loss as a mere conceptual peg on which a compensatory account of negotiating damages is hung and its irrelevance in determining its availability and quantification, however, reveal yet another problem of conceptual misfit—for it is difficult to square it with the inherent onus placed on the claimant to *prove* that he is, by virtue of the defendant's breach, placed on the trajectory which culminates in his *loss*, only a successful plea of which would afford him substantial damages.[25] The loss as characterised by the Court of Appeal is a *presumed* one (upon the satisfaction of the threshold requirements) rather than one which needs to be *proved* by the claimant. Hence, such response is fundamentally flawed in its assumption that the notion of 'loss' has no significant role to play in shaping the outcome of the litigation concerning whether the aggrieved party should be given substantial damages and how such damages (if any) should be quantified. The relegation of loss to a mere theoretical tool and the failure of the Court of Appeal to come up with a plausible conception of loss which is *capable of proof* would appear to undermine, rather than bolster, its principal claim that negotiating damages are compensatory.

More significantly, the notion of loss of performance interest as *presumptive* loss is problematic at a more fundamental level in perilously conflating two distinct concepts—'wrong' and 'loss'.[26] The precise relationship between the two conceptions—which lies at the very heart of the analytical and normative structure of the law of obligations—have been conceptualised by two competing models, namely, the 'bipolar' and 'unipolar' frameworks.[27] At its core, the bipolar model perceives wrong as being 'transparent' insofar as it only serves as a mere conceptual peg for making the ensuing loss wrongful; but ultimately, it is the detriment flowing from

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24 Burrows, *supra* note 17 at 184.

25 *Teacher v Calder* (1889) 1 F (HL) 39; *Surrey CC v Bredero Homes Ltd* [1993] 1 WLR 1361 (CA).

26 Charlie Webb, "Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation" (2006) 26 OJLS 41 at 45.

27 Eric Descheemaeker, "Unravelling Harms in Tort Law" (2016) 132 LQR 595.

the commission of a legal wrong which forms the basis of compensation. Reduced to its essence, the bipolar framework is 'bipolar' because it entails two distinct inquiries which may attract distinct answers: (1) Has the claimant been wronged? (2) Has the claimant suffered a loss? The unipolar model, on the contrary, perceives the notion of loss as being *intrinsic to* and *inherent in* the wrong such that a right infringement is—*in and of itself*—an independent ground for triggering an award of substantial damages.

Adopting the bipolar framework in a contractual context, the proposition can be stated very succinctly by borrowing Lord Clyde's words: "[a] breach of contract may cause a loss, but it is not itself a loss in any meaningful sense".[28] It is one thing to say that for the law to take a promisee's contractual right seriously the construction of recoverable loss should go beyond an inquiry into the mere economic outcome advanced by the due performance of the contract; it is however another thing to say that a breach of contract—in and of itself—*is* a loss. To adopt the latter interpretation is stretching the meaning of the term beyond its legitimate bounds. Indeed, the Court of Appeal's assertion that the loss towards which an award of negotiating damages is directed can be rationalised as "the ***loss of the performance interest itself*** (*ie, the primary right* to performance of the defendant's obligations)"[29] has driven itself towards the right-based thesis advanced by Robert Stevens, who argues that damages awarded in response to a commission of civil wrong should be analysed as neither compensatory nor restitutionary, but *substitutive* of the *right* which has been infringed.[30] In distancing itself from Stevens's right-based theory, the court argued that while Stevens's 'broad thesis' would bring about a substantial overhaul to the orthodox compensatory principle applicable to "*all* damages in the law of contract", its "loss of performance interest" reasoning is only "premised on a *limited* rationalisation of *Wrotham Park* damages".[31] The retort mounted by the Court of Appeal however does not address the crux of the problem—for it only tackles the *scope* within which the loss of performance interest analysis operates (that it is restricted to negotiating damages but not to other types of damages), rather than its *substantive merits* which impinge materially on the conceptual soundness upon which the 'normative compensatory' account of negotiating damages is constructed. In other words, that the Court of Appeal did not purport its loss of performance interest analysis to be of general application does not justify it in obliterating the dividing line between 'breach' and 'loss', however limited the application of such obliteration might be—there is a clear distinction between the two and conceptual clarity requires them to be so distinguished. All that Andrew Phang JA's retort conveys is that *if* Stevens's thesis is problematic, then the Court of Appeal's analysis is only *less* problematic.

To be sure, a right-centred approach to damages awards is largely if not entirely antithetical to the well-established loss-focused orthodoxy in both English and Singapore common law—evinced by the categorical rejection of 'vindicatory damages' for the tort of false imprisonment by the UK Supreme Court in *Regina (Lumba) v*

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28 *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) at 534.
29 *Turf Club*, *supra* note 3 at para 205 [emphasis and bold in original].
30 Robert Stevens, *Torts and Rights* (UK: Oxford University Press, 2007) ch 4 at 67, 68.
31 *Turf Club*, *supra* note 3 at para 208 [emphasis in original].

Secretary of State for the Home Department,[32] and the repudiation of 'loss of autonomy' as a cause of action by the Court of Appeal in *ACB v Thomson Medical Pte Ltd*[33] which involved a fertility clinic negligently fertilising the claimant's egg with the sperm of an unknown third-party donor but not that of her husband. Having rejected the claim for upkeep costs, the court proceeded to examine the alternative claim of 'loss of autonomy' as the claimant was deprived of her 'decisional autonomy' in pursuing her own reproductive life, namely, to have a child *of her own with her husband*. Andrew Phang JA, delivering the judgement, rejected such an argument as recognition of such loss—being "more compatible with a *right*-based vindicatory model" (where "damages are awarded not as compensation for consequential losses, but to mark the infringement of a person's right")—sits uncomfortably with the structure of the common law and the tort of negligence which requires 'damage' in terms of objective detriment to be proved.[34] The learned judge's disapproval of 'loss of autonomy' in *ACB* is therefore fundamentally incongruent and irreconcilable at a normative level with the adoption of the loss of performance interest analysis in *Turf Club*—as both concepts are divorced from the loss or damage analysis central to the remedial regime of the law of obligations. Therefore, as a matter of precedential compulsion and inexorability, the Court of Appeal's conceptualisation of negotiating damages as compensatory through the loss of performance interest analysis is ultimately one which is plagued by inherent and self-defeating contradiction.

From the foregoing, the DNF approach is untenable because of three reasons. First, the inability of Court of Appeal to locate a practically *provable* loss would seem to suggest that there is no loss to be compensated for in the first place—and secondly, it is unsatisfactory for the court to put the cart before the horse by unduly expanding the ambit of loss so as to equate it with infringement of contractual right *viz* performance interest just for the sake for making negotiating damages 'compensatory'. Moreover, a concept of loss underpinned by the notion of loss of performance interest in *Turf Club* is one which is at variance with the rejection of 'loss of autonomy' by the same court (and in fact, by the same judge) in *ACB*. The DNF approach is therefore fundamentally unsustainable and unjustifiable from the perspectives of doctrinal, theoretical and precedential coherence.

Given the formidable, if not insurmountable, hurdle in advancing a compensatory rationalisation of negotiating damages, one cannot help but ask what drives the Court of Appeal to embark on such intractable task?

The Court of Appeal's urge to place negotiating damages in the realm of compensation is motivated by the imperative to avoid the alleged "***mismatch or disconnect*** between the plaintiff-focussed rationale of *Wrotham Park* damages and the conceptual nature of gain-based remedies, which are centred on the defendant instead".[35] This argument proceeds from the presupposition that the overarching aim of *Wrotham Park* damages is the protection of plaintiff's performance interest[36]—this is uncontroversial. The problem lies in the Court of Appeal's proposition that "the very concept

[32] [2012] 1 AC 245 (SC).
[33] [2017] 1 SLR 918 (CA) [*ACB*].
[34] *Ibid* at para 121.
[35] *Turf Club*, *supra* note 3 at para 196 [emphasis and bold in original].
[36] *Ibid.*

of the performance interest focuses on the loss suffered by the ***plaintiff*** ", while "[r]estitutionary (or gain-based) damages… focus on *the defendant*'s gain…".[37] The remark positing performance interest to be a plaintiff-centred concept *to the exclusion of defendant* is, with respect, both normatively and descriptively inaccurate. As Campbell pointed out, "[t]he underlying concept in *Blake* is a recognition of a '*performance interest*"'.[38] The doctrinal import of *Blake* lies in the fact that "it goes some way to remedying ['the insufficient ranking given to *performance interest*'] because a money payment on the basis set out in *Blake* obviously amounts to '*restitutionary* damages to *deter* breach of contract"'.[39] Campbell's proposition is totally consistent with the Court of Appeal's rationalisation of restitutionary damages on grounds of punishment and deterrence. Even taking an instrumentalist perspective, if the quantum of such damages is capable of reflecting its punitive and deterrent rationales, it would—*ex hypothesi*—be able to disincentivise the defendant from committing a breach of contract and thus fashion robust vindication to the claimant's performance interest. The alignment of restitutionary damages with the notion of performance interest could be accomplished without the need to conceptualise an account of profits in *Blake* as compensatory,[40] nor does it require one to engage in an exercise of accommodating an award of disgorgement of profits for breach of contract within the corrective justice paradigm.[41] There is no principled basis to characterise performance interest as a normative concept exclusive to compensatory damages and inimical to restitutionary damages.

IV. Scope of Application of Negotiating Damages

Apart from the different rationalisations of negotiating damages, it is in the manner by which the courts charted the permissible boundaries for negotiating damages that one can locate the second point of divergence. While negotiating damages will be awarded in the UK where the contractual right infringed is an economically valuable asset, in *Turf Club* the Court of Appeal propounded three rigorous requirements to circumscribe an award of negotiating damages:[42] (1) unavailability of orthodox compensatory damages and specific relief; (2) breach of a negative covenant; and (3) hypothetical bargain between the parties for the release of the relevant bargain must not be irrational or incredible. When seen against the intolerably open-textured nature of the loss of valuable asset threshold posited by the UK Supreme Court in *One Step*, the more principled approach adopted by the Court of Appeal immediately asserts itself.

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37 *Ibid* [emphasis and bold in original].

38 David Campbell, "The expansion of restitution" in Donald Harris, David Campbell & Roger Halson, eds. *Remedies in Contract & Tort*, 2nd ed (UK: Cambridge University Press, 2002) at 264 [emphasis added].

39 *Ibid* [emphasis added].

40 See *eg*, Andrew Phang and Pey Woan Lee, "Rationalising Restitutionary Damages in Contract Law—An Elusive or Illusory Quest?" (2001) 17 JCL 240.

41 See *eg*, Anthony Robert Sangiuliano, "A Corrective Justice Account of Disgorgement for Breach of Contract by Analogy to Fiduciary Remedies" (2016) 29 CJLJ 149.

42 *Turf Club*, *supra* note 3 at para 217.

Where the breach of contract does not entail any financial loss and that a plea of specific relief is refused (due to countervailing policy considerations)[43] despite the claimant's *prima facie* entitlement to it, the court recognised a remedial lacuna which would be left otherwise unfilled if the law only has in its remedial armory the orthodox method of computing damages by measuring the loss suffered by the plaintiff. That said, the circumstances which would give rise to such lacuna must be delineated with due circumspection. The Court of Appeal in particular reiterated that mere *difficulty* in assessing the plaintiff's loss or the contention that the damages are *inadequate* under orthodox compensatory approach—falling short of a "***high threshold***" of *practical impossibility*[44] in assessing damages—does not pass the '*unavailability*' muster and hence no remedial lacuna would eventuate.[45] This is manifestly right, taking into account "the practical reality that courts invariably face difficulties in the assessment of damages in the face of incomplete evidence".[46] The law does not require damages to be computed with mathematical precision—adequate latitude is accorded to the trial judge in working out the appropriate quantum.[47] The unnecessary recourse to a hypothetical bargain measure thus constitutes an unprincipled derogation of the court's duty to "***simply do the best it can on the evidence available*** and adopt a ***flexible approach***" in the proof and quantification of loss under the orthodox compensatory framework.[48]

The centrality of a remedial lacuna is also reflected in the second requirement positing a breach of a negative covenant. The logic ascribed to such a requirement is that there is no need for negotiating damages to come into play for a breach of positive covenant where substitute performance can usually be procured, which entails an identifiable loss (consisting of the difference in value between the covenanted-for and substitute performance). Having said that the Court of Appeal did not foreclose, and rightly so, the possibility of a breach of positive covenant attracting a remedial lacuna by reason of a substitute performance being unavailable.[49] The court stopped short of committing itself to the view that a breach of negative obligation is the *only* source from which a remedial lacuna may spring. The second requirement—framed by the Court of Appeal "as a general rule, but ***not*** an ***absolute or inviolable condition*** as such"[50]—could thus be critiqued as a mockery to those seeking certainty in the law. If the concern which underlies the Court of Appeal's prescription of a breach of negative covenant is the inability of the innocent party to obtain substitute performance, it begs the question why the unavailability of substitute performance was not taken instead as a requirement.

While the first and second requirements are directed at an existence of a remedial lacuna which warrants a departure from orthodox compensatory reasoning and deployment of a hypothetical bargain as an evidential tool to compute damages, the inherent artificiality of the hypothetical bargain is militated by the third requirement.

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43 *Wrotham Park Estate*, *supra* note 1 at 812.
44 *Turf Club*, *supra* note 3 at para 225 [emphasis and bold in original].
45 *Ibid* at paras 221, 222.
46 *Ibid* at para 222.
47 James Edelman, ed. *McGregor on Damages*, 20th ed (London: Sweet & Maxwell, 2018) at para 8-002.
48 *Turf Club, supra* note 3 at para 222 [emphasis and bold in original].
49 See *eg*, *Giedo Van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB).
50 *Turf Club, supra* note 3 at para 229 [emphasis and bold in original].

Whereas the hypothetical bargain does not hinge on the *subjective* willingness of the contracting parties to engage in such putative negotiation,[51] the Court of Appeal was cognisant of the *objective* limitations that are in place which would prevent the hypothetical deal from being "irrational or totally unrealistic"[52] in the face of its manifested artificiality. Whether such fictional negotiation would be totally detached from reality is of course contingent upon the nature of contract and individual circumstances accompanying the case. It is for example inconceivable—as in the case of *Blake*—that the British Government would allow the delinquent double agent to disclose the State's confidential information to the Soviet authorities, however profitable the release fee might be.[53] The line is muddled when one goes from the "***legally impermissible***"[54] putative negotiation to the commercial arena—under which an objective inquiry will be undertaken: whether the hypothetical bargain would have "put the entire transaction in jeopardy?".[55] However, little guidance was furnished by the Court of Appeal in the general outworking of such formulation. The elusive nature of inquiry as to whether the whole transaction would be jeopardised is therefore apt to generate confusion if the court is to consider whether the hypothetical bargain is devoid of rationality or is totally incredible.

Having said that, *Turf Club* still offers a valuable elucidation as to how the contours of negotiating damages could be demarcated within the doctrinal parameters laid down by the Court of Appeal. Despite some of the aforesaid difficulties that a court may encounter in navigating some of the legal ingredients, the case still provides much certainty and predictability that are desired by litigants eager to be acquainted with firm guidance on what exact elements need to be marshalled in order to convince the court that the circumstances necessitate an award of negotiating damages. Significantly, the application of the three legal requirements would shun the much maligned instability and circularity associated with the query of what amounts to a valuable asset.[56] The disagreement between the majority and minority in *One Step* as to whether a contractual right pertaining to commercial goodwill could be regarded as a proprietary or analogous right sounds alarm bells. In refusing to embrace the loss of valuable asset test, the Court of Appeal does not have to drag itself into the psychological gymnastics involved in delimiting the boundaries surrounding an economically valuable asset.

V. How Should Negotiating Damages be Mapped with Damages Awarded under the *LCA*?

The final point of divergence between *One Step* and *Turf Club* relates to their views on the relationship between negotiating damages under *common law* and damages granted pursuant to the court's *equitable* jurisdiction via the *LCA*, although such issue was not underpinned by robust *ratio* in either judgement (which renders their judicial

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51 *Ibid* at para 236.
52 *Ibid* at para 230 [emphasis and bold omitted].
53 *Ibid* at para 232.
54 *Ibid* [emphasis and bold in original].
55 *Ibid* at para 234, citing *JES International Holdings Ltd v Yang Shushan* [2016] 3 SLR 193 at para 214 (HC) [emphasis omitted].
56 Davis, *supra* note 2 at 439; Burrows, *supra* note 2 at 520, 521; Peel, *supra* note 2 at 232.

pronouncement in this respect strictly *obiter* in nature). While the UK Supreme Court opined that the hypothetical bargain award granted under different jurisdictions are dictated by different rules of assessment,[57] the Court of Appeal eschewed such a stark dichotomy.[58] This section unveils the reasoning mooted by the UK Supreme Court and the Court of Appeal, and suggests a deeper but latent logic driving the courts apart in their differing treatments of the relationship between negotiating damages and an *LCA* award.

The reason which underlies the UK Supreme Court's position is premised upon a distinction between past and future loss. It is axiomatic that the *LCA* damages are meant to be a monetised substitute for injunction which the court has decided to withhold.[59] Since the primary functional significance of an injunction lies in its prophylactic feature by preventing the defendant from committing the wrong complained of and hence effectively barring the loss from even eventuating in the first place, the *LCA* damages which seek to substitute an injunction should—unlike common law damage[60] (including negotiating damages)—accordingly be directed at future, rather than past or present, loss.[61] *Ergo*, just as an injunction could only be refused *at trial*, so too in assessing the *LCA* damages would the court be entitled to take into account events since the date of breach to *the time of trial*, as opposed to the routine ascription of date-of-breach rule to the assessment of common law damages.[62] The Court of Appeal however was not persuaded by the UK Supreme Court's analysis but without providing an elaborated explanation[63]—is there a possible rationalisation to fill this gap?

In *One Step*, Lord Reed's reasoning was entrenched in the tripartite classification of cases articulated by Lord Shaw in *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson*.[64] While the first category refers to damages awarded on the conventional compensatory basis, the second and third categories are relevant to the hypothetical bargain awards, which refer to (i) the 'user principle' involving abstraction and invasion of property or analogous rights in *common law* and (ii) the *LCA* in *equity* respectively. While the proprietary and quasi-proprietary analysis of user principle offers the bedrock through which a 'loss of valuable *asset*' formulation was developed, the *LCA* continues to feature as a distinct ground for awarding the damages premised on a notional release fee.[65] The compartmentalisation of the second and third categories means that the hypothetical bargain measure of damages under different jurisdictions would *ex hypothesi* be governed by different rules of assessment. Parenthetically, this also explains why the UK Supreme Court would prefer the term 'negotiating damages' over '*Wrotham Park* damages' when a hypothetical award is predicated upon a loss of valuable asset, as the monetary award granted in

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57 *One Step, supra* note 2 at paras 41-47, 56 (per Lord Reed) and 153-159 (per Lord Carnwath). *Cf Johnson v Agnew* [1980] AC 367 at 400 (per Lord Wilberforce) (HL).

58 *Turf Club*, *supra* note 3 at para 286.

59 *Wroth v Tyler* [1974] Ch 30.

60 *Jaggard v Sawyer* [1995] 1 WLR 269 at 291 (per Millet LJ) (CA).

61 Alvin W-L See, "Unlocking *Wrotham Park* damages: Lord Cairns' Act and loss of the ability to sue for future infringement" [2017] Conv 341.

62 Edwin Peel, *Treitel on the Law of Contract*, 14ed (London: Sweet & Maxwell, 2015) at para 20-071.

63 *Turf Club*, *supra* note 3 at para 286.

64 1914 SC (HL) 18.

65 *One Step, supra* note 2 at para 128.

Wrotham Park Estate was established on the court's equitable jurisdiction derived from the *LCA*—which was treated by the UK Supreme Court as being historically and conceptually separate from damages awarded on the basis of the user principle from which a loss of valuable asset reasoning was derived.

The Court of Appeal, on the contrary, was not constrained by what Lord Sumption called "the historic categorisation of legal rules",[66] which ultimately culminates in its departure from the position adopted in *One Step*. The Court of Appeal appears to have *assimilated*—if implicitly—the second and third categories of cases: whereas Andrew Phang JA regarded such damages to be "falling within what has been termed the 'user principle' ",[67] the unavailability of specific relief is embedded into the first element of the three-fold requirements[68] (which is analogous to a situation in which the *LCA* is invoked). This is not surprising, given the not insignificant overlapping sphere of application between the two categories of cases. While negotiating damages as explicated by the UK Supreme Court are rooted in a *property*-based analysis, it is hardly a happenstance that specific relief was a routine remedy for a interference with *proprietary* rights,[69] noting that in order to invoke the *LCA* the claimant must satisfy the court that he has a *prima facie* entitlement to specific relief. Though negotiating damages compensating for the loss of valuable asset have arguably expanded the scope of the *LCA* damages insofar as the former also capture rights *analogous* to property rights, this does not detract from the fact that the same set of factual matrix may support both an award of negotiating damages or damages under the *LCA*. Hence, the differing approaches with respect to the relationship between hypothetical bargain damages granted at common law and equity are readily explicable based on the different ways by which the UK Supreme Court and the Court of Appeal categorised the user principle and negotiating damages on the one hand, and the *LCA* award on the other.

The contrasting approaches between the Court of Appeal and the UK Supreme Court prompt one to question whether such asymmetry in rules of assessment of hypothetical bargain awards granted under different jurisdictions posited by the UK Supreme Court is defensible. Conceptual clarity would appear to favor the approach adopted by the majority in the UK Supreme Court, given the avowed *conceptual* distinction between past and future loss. However, Lord Sumption's observation was instructive: "[the law] should not be allowed to fragment into self-contained sectors governed by arbitrary rules which have little relationship to the task in hand or to principles applied in cognate areas.".[70] Lord Sumption's perceptive remarks—that *formalism* should be eschewed in favor of *pragmaticism* insofar as more weight ought to be accorded to the *pragmatic application* of legal rules than to their *abstract conceptual division* when it comes to the categorisation of legal doctrines—argues compellingly and cogently in favour of the Court of Appeal's approach to streamline its analytical structure by doing away with the superfluous distinction between negotiating damages predicated upon a loss of a valuable asset and the *LCA* award. If the second and third categories of cases could be applied to largely similar situations,

66 *Ibid* at para 103.
67 *Turf Club*, *supra* note 3 at para 210.
68 *Ibid* at para 286.
69 Peel, *supra* note 62 at para 21-019.
70 *One Step*, *supra* note 2 at para 109.

there appears to be no serious obstacle in the face of the Court of Appeal in amalgamating the two groups of cases into a single category—provided that the court could come up with a comprehensive framework within which the case law associated with the two categories may be accommodated. Clearly the Court of Appeal has not taken up the trouble of doing so in *Turf Club*, given the *obiter* nature of the court's observation and so it remains to be seen whether it would do so in the future should the same issue falls squarely before the court.

VI. Conclusion

Standing as a testament to the conviction of the Singapore judiciary to build an autochthonous legal system, *Turf Club* is yet another of the many cases delivered by the apex court of Singapore which have taken a different evolutionary path from the authorities rendered by the English court. The aspiration of legal "indigenisation"[71] has led the Singapore court to critically evaluate the doctrinal soundness of well-established English law as well as contemporary English authorities, interrogate their ability to withstand critiques stemming from scholarly discourse and—if necessary—depart therefrom. *Turf Club* is a quintessential paradigm of such departure, underpinned by "an *integrated* and *comparative* enquiry in which considerations of doctrine and fairness interact".[72] In particular, the voluminous amount of scholarly literature scrutinised in *Turf Club* and the failure of the UK Supreme Court to engage academic discourse even at a superficial level in *One Step*[73] constitute a stark bipolarity. While the quantity of law journals or legal treatises cited is not necessarily reflective of the analytical force and persuasiveness of the court's reasoning, this should not be taken to undermine the pivotal, and sometimes decisive, role played by academic literature in formulating legal doctrines. Negotiating damages, as a very much nascent and unsettled area of law, would render it even more needful for the court to adopt an analytical approach which *integrates* academic scholarship and practical analysis. The Court of Appeal's sensitivity to—and its exhaustiveness in engaging—contemporary academic debates in *Turf Club* is a salutary reminder to anyone doing comparative law. While the quest for a sound theoretical and doctrinal foundation of negotiating damages will continue, *Turf Club* surely speaks, with its unique 'Singapore accent', to other common law jurisdictions as another attractive alternative to the 'English accent' enunciated in *One Step*. It deserves to be closely examined—or to be precise, 'heard'—by other Commonwealth jurisdictions which may in the future wish to lend their voices to and add to the development of this intractable yet fascinating area of private law.

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71 Andrew Phang, *The Development of Singapore Law—Historical and Socio-Legal Perspectives* (Singapore: Butterworths, 1990) at 91-96.

72 Andrew Phang, "The Law of Remedies: The Importance of Comparative and Integrated Analysis" (2016) 28 Sing Ac LJ 746 [emphasis added].

73 Davies, *supra* note 2 at 438.