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THE ROLE OF INTENTION IN COST OF CURE DAMAGES REVISITED

Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd [2025] SGHC(A) 4

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It is an oft-repeated truism that damages are compensatory. Errant doctrines which recognise the possibility of monetary recovery in excess of loss, such as punitive damages, are marginalised as anomalies. Others, such as negotiating damages, are uncomfortably shoehorned into the Procrustean bed of compensation.

Cost-of-cure damages have likewise become a casualty of the law's apparent fixation on compensation. Despite suggestions to the contrary, these damages are often treated as simply one measure of loss. That approach has thrown up difficult questions about the dual roles of the claimant's intention to effect cure and the reasonableness of curing. In *Terrenus Energy SL2 Pre Ltd v Attika Interior + MEP Pte Ltd* [2025] SGHC(A) 4, the Appellate Division of the High Court was called on to revisit these questions, which had previously been confronted in *JSD Corporation Pte Ltd v Tri-Line Express Pte Ltd* [2022] SGHC 227.

This note argues that the decision in *Terrenus* SGHC(A) was, with respect, a missed opportunity. The Court was undoubtedly correct to reject the proposition that cost-of-cure damages depend on the claimant showing an intention to effect cure. However, the Court's conclusion is difficult to reconcile with its continued adherence to the compensatory analysis of cost-of-cure damages. It is unfortunate, therefore, that the Court did not take up the opportunity to discard this analysis in favour of a more principled "performance" based analysis.

I. Introduction

One of the great truisms in the law of damages is that it would be "against all justice… [to allow a claimant to] be compensated for a loss he never suffered".[1] Lord Bridge considered in *Hodgson v Trapp* that "it cannot be emphasised too often when considering the assessment of damages … that they are intended to be purely compensatory".[2] Errant doctrines which recognise the possibility of monetary recovery in excess of loss, such as punitive damages, are marginalised as

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[1] *Wertheim v Chicoutimi Pulp Co* [1911] AC 301 at 308.

[2] *Hodgson v Trapp* [1989] AC 807 at 819. See similarly *Hunt v Severs* [1994] 2 AC 350 at 357 (Lord Bridge); *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] SGCA 26 at [62].

"anomal[ies]".[3] Others, such as negotiating damages, are uncomfortably shoehorned into the Procrustean bed of compensation.[4] This note examines another casualty of the fixation on compensation: cost of cure damages.

In *Terrenus Energy SL2 Pre Ltd v Attika Interior + MEP Pte Ltd*,[5] the Appellate Division of the High Court of Singapore revisited fundamental questions about cost of cure damages. In particular, the Court considered the extent to which the availability of cost of cure damages depends on the claimant intending to effect cure. The Court concluded that:

> An intention to cure is neither a prerequisite for the award of the cost of cure as damages nor does it generally carry … significant weight … It is but one of the factors to be taken into account when assessing [whether] it is reasonable and proportionate to award the cost of cure as damages.[6]

With respect, although the Court's ultimate conclusion is undoubtedly correct,[7] some aspects of its reasoning raise difficult questions which can only satisfactorily be answered by abandoning the conventional insistence on "compensation".

II. Background

The basic factual background to the dispute was simple. On 5 April 2021, the claimant ("Terrenus") and the defendant ("Attika") entered into a contract for Attika to act as the main contractor for the construction of a solar power generation facility in Changi Business Park. Part of the work involved installing rods onto which the solar panels were to be mounted (known as "PEG Rods"). Pursuant to the parties' contract, these rods had to be installed to a depth of at least 500mm.

On 3 February 2022, Terrenus terminated the contract on a "without default" basis pursuant to cl. 14.3 thereof. It subsequently commenced proceedings against Attika alleging a failure to install the PEG Rods to the requisite depth. Terrenus

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3 *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29 at [95] (Lord Scott). This is not to say that there may not be perfectly sound objections to punitive damages; however, the fact that they are not compensatory is not one.

4 In England, their supposed compensatory nature was authoritatively articulated by Lord Reed in *Morris-Garnerv One Step (Support) Ltd* [2018] UKSC 20 [*One Step*]; the Singapore Court of Appeal reached the same conclusion shortly thereafter in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44. The difficulties with this analysis have been long recognised; see *eg,* Andrew Burrows, "Are 'damages on the Wrotham Park basis' compensatory, restitutionary or neither?" in Ralph Cunnington & Djakhongir Saidov, eds. *Contract Damages: Domestic and International Perspectives* (Oxford: Hart Publishing, 2008); Robert Stevens, *The Laws of Restitution* (Oxford: Oxford University Press 2023) at chapter 17.

5 *Terrenus Energy SL2 Pre Ltd v Attika Interior + MEP Pte Ltd* [2025] SGHC(A) 4 [*Terrenus* SGHC(A)].

6 *Ibid* at [25].

7 *Cf* for *eg*, Alexander Loke, "Damages to protect performance interest and the reasonableness requirement" [2001] Sing JLS 259; Tareq Al-Tawil, "Damages for the breach of contract: compensation, cost of cure and vindication" (2013) 34 Adel L Rev 351; Solène Rowan, "Cost of cure damages and the relevance of the injured promisee's intention to cure" (2017) 76 Cambridge LJ 616; and Kwan Ho Lau, "Recovering cost of cure damages: the necessity of showing an intention to cure" (2024) 140 Law Q Rev 342.

argued that this gave rise to a risk of structural failure in high winds and sought cost of cure damages. It also sought liquidated damages pursuant to cl. 17.1.2 of the contract, as well as general damages pursuant to cl. 17.1.4, for late completion. Attika in turn brought a counterclaim for part of the contract price which it alleged had accrued but had not been paid.

The matter was tried before Kwek Mean Luck J. in 2023.[8] His Honour concluded that Terrenus had failed to prove both (i) how many PEG Rods were not installed to the specified depth and (ii) the depth by which any non-compliant rods were improperly installed (*ie*, the extent of Attika's breach).[9] His Honour also concluded that Terrenus had failed to adduce adequate evidence to demonstrate that the improper installation of the rods indeed gave rise to the alleged risk of structural failure.[10] In the circumstances, Terrenus was awarded merely nominal damages.[11] It should be noted that his Honour appeared to accept that Terrenus had no intention to effect cure,[12] although this fact does not appear to have played a role in his Honour's final conclusions.

As to the other issues, the trial judge held: (i) that Attika completed the work on 23 November 2021;[13] (ii) that although Attika was *prima facie* obliged to complete the work by 30 June 2021, and was therefore 146 days late, it was entitled to 140 days' worth of Extensions of Time pursuant to cl. 5.5.7 of the contract;[14] (iii) that Attika was therefore liable for 6 days' worth of liquidated damages, amounting to SGD$30,600;[15] (iv) that Terrenus was not entitled additionally to recover general damages under cl. 17.1.4 in respect of the late completion, as that clause did not on its true construction apply to damages claimed by reason of late completion;[16] and (v) that Attika was entitled to recover the unpaid balance under the contract.[17]

Terrenus appealed on four bases:[18] (i) that the trial judge erred in refusing cost of cure damages in respect of the improperly installed PEG Rods; (ii) that the trial judge erred in holding that Attika was entitled to Extensions of Time pursuant to cl. 5.5.7; (iii) that the trial judge erred in refusing Terrenus general damages under cl. 17.1.4; and (iv) that the trial judge erred in holding that the balance of the contract price had accrued.

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8 Reported *Terrenus Energy SL2 Pre Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 [*Terrenus* SGHC].

9 *Ibid* at [35]–[43]. There were also issues as to the ground clearance of the solar panels (*ibid* at [73]–[87]) and removal of the "root balls" of trees in the area (*ibid* at [88]–[114]); however, neither of these issues remained live on Terrenus' appeal.

10 *Ibid* at [44]–[69]. The difficulty Terrenus faced was that its failure to establish the extent of any non-compliance meant that it had, rather implausibly, to show that "*any deviation* from the specified minimum embedment depth of 500mm" [emphasis in original] gave rise to structural risk (*ibid* at [46]).

11 *Ibid* at [71].

12 *Ibid* at [29].

13 *Ibid* at [129] and [132].

14 *Ibid* at [196].

15 *Ibid* at [198].

16 *Ibid* at [215].

17 *Ibid* at [257].

18 There was also a very short cross-appeal by Attika in relation to various deductions made by the trial judge to the balance of the contract sum which it was entitled to recover; see *Terrenus* SGHC(A), *supra* note 5 at [90] for discussion.

III. Decision

This Note focusses only on Terrenus' first ground of appeal (which takes up the vast majority of the judgment), *viz*, that relating to cost of cure damages. It is therefore sufficient to note, for the purpose of completeness, that the Appellate Division rejected Terrenus' other three grounds of appeal.

A. *The Trial Judge's Factual Conclusions*

Terrenus first argued that the judge's conclusion that it had failed to prove the extent of the non-compliant installation was incorrect. Perhaps unsurprisingly, the Appellate Division rejected this submission in short order.[19] As is well known, an appeal court will only overturn findings of fact if it "come[s] to a clear conclusion that the judge … was plainly wrong"[20] in the sense of having reached a decision "that no reasonable judge could have reached".[21] Not only was the trial judge's decision far from crossing this threshold, it is clear that the Appellate Division in fact agreed with the trial judge's assessment of the evidence.

For this reason, the Appellate Division considered that Terrenus' "claim for the cost of cure as damages was not made out".[22] The Appellate Division gave no explanation for this conclusion; however, the trial judge reached the same conclusion on the basis that, "[a]s Terrenus cannot establish with any certainty the amount of loss suffered as a matter of evidence, it is at best only entitled to nominal damages".[23] It appears that the reason the trial judge thought that Terrenus' case on quantum failed was a direct consequence of its failure to establish the extent of Attika's breach.[24]

With respect, it is not obvious why the extent of non-compliant PEG Rod installation was necessarily relevant to quantifying Terrenus' claim for the cost of cure. Of course, it is possible that the cost of cure scaled with the extent of non-compliant installation (on which hypothesis the trial judge's conclusion is clearly correct). But an alternative possibility is that the cost of cure was fixed rather than variable. Which of these alternatives is correct is a question of fact, which depends on the basis on which remedial works would be priced. Regrettably, it does not appear from the judgment that there was any investigation of this question at trial. In those circumstances, the trial judge's conclusion that Terrenus could not quantify its claim is unsupportable.

Indeed, although it is not clear whether Terrenus attempted independently to quantify the cost of cure before the trial judge, its claim for the cost of cure before the Appellate Division was for a specified sum.[25] Assuming that this reflected an actual quote for remedial work, Terrenus' failure to prove the exact extent of

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19 *Ibid* at [18]–[20].

20 *Clarke v Edinburgh & District Tramways Co Ltd* 1919 SC HL 35 at 37 (Lord Shaw) (Scot); see also *Yong Kheng Leong v Panweld Trading Pte Ltd* [2012] SGCA 59.

21 *Henderson v Foxworth Investments Ltd* [2014] UKSC 41 at [62] (Lord Reed).

22 *Terrenus* SGHC(A), *supra* note 5 at [21].

23 *Terrenus* SGHC, *supra* note 8 at [43].

24 This is clear from a reading of *Terrenus* SGHC, *ibid* at [43] as a whole.

25 Of SGD$388,566.72; see *Terrenus* SGHC(A), *supra* note 5 at [63].

non-compliant installation clearly should not have been an obstacle to its case on quantum succeeding. The quantum of its claim had been established directly, without needing to rely on the extent of Attika's breach.

B. *The Role of Intention to Cure*

In considering the role intention plays in the availability of cost of cure damages, the Court took as its starting point the proposition that "the claimant is to be compensated for its expectation loss", that is, to receive damages "to put [them], so far as money can, in the same situation as if the contract has been performed" [emphasis omitted].[26] The Court considered damages assessed on this basis to be the "primary and default remedy for contractual breach".[27]

The Court proceeded to hold that there "are two main methods of assessing expectation loss":

> First, diminution in value of the delivered product. This aims to place the claimant, as far as possible, in the *financial* position it would have been had the contract been performed. Second, cost of cure. This aims to place the claimant in the *actual* position it would have been had the contract been performed. The aim is to give the claimant the financial means to obtain *actual* performance [emphasis in original].[28]

Although the Court stated that cost of cure damages are "the most logical and straightforward way of remedying the claimant's expectation loss",[29] it recognised that they would not be available—for "pragmatic"[30] reasons—where it would be disproportionate or unreasonable to effect cure.

The Court concluded, in line with Lord Jauncey's remarks in *Ruxley Electronics and Construction Ltd v Forsyth*,[31] that the claimant's intention to cure is only relevant to this latter question, *ie*, whether it is reasonable to effect cure.[32] This, the Court said, follows from "the established principle that a court is not concerned with the use to which a successful claimant puts the damages awarded".[33]

In reaching this conclusion, the Court departed from the previous decision of the General Division of the High Court in *JSD Corporation Pte Ltd v Tri-Line Express Pte Ltd*.[34] In that case, Goh Yihan J.C. held that, "absent very special countervailing

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26 *Ibid* at [39].
27 *Ibid* at [39].
28 *Ibid* at [40].
29 *Ibid* at [41].
30 *Ibid* at [43].
31 *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 at 359; see also *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811 (TCC) at [263] (Ramsey J.), both cited by the Appellate Division in *Terrenus* SGHC(A), *ibid* at [53].
32 *Terrenus* SGHC(A), *ibid* at [44].
33 *Ibid* at [44].
34 *JSD Corporation Pte Ltd v Tri-Line Express Pte Ltd* [2022] SGHC 227 [*JSD Corporation*]. See *Terrenus* SGHC(A), *ibid* at [53].

factors",[35] cost of cure damages would be refused if the claimant did not intend to effect cure. This was because "where the cost of cure has not yet been incurred, it is not yet a loss, and if it is never incurred, it will never be a loss".[36]

The Appellate Division held that the decision in *JSD Corporation* was wrong because it "is contrary to the general principle that any loss arising from a breach of contract is suffered at the time of breach".[37] It followed from that, the Court thought, that the question whether the claimant, post-breach, has effected or will effect cure is irrelevant to assessing the claimant's loss.[38]

C. *Reasonableness of Cure on the Facts*

The Court's willingness to depart from *JSD Corporation* was little comfort to Terrenus. As noted previously,[39] the Court had already concluded that Terrenus' claim failed by reason of its failure to prove the extent of Attika's breach. In addition, however, the Court also held that cure would be unreasonable—and so in any event would have refused cost of cure damages despite accepting Terrenus' arguments regarding the role of intention.

As will be remembered, Terrenus failed to establish that the non-compliant PEG Rods gave rise to a risk of structural failure. But Terrenus argued that, in light of the Court's conclusions on intention, "it was not necessary to prove structural risk in order to be entitled to the cost of cure".[40] The Court disagreed. As the Court put it:

> Structural risk … was the chief ingredient in Terrenus' own argument before the Judge that it would be reasonable to grant the cost of cure in respect of the PEG Rods. Absent any structural risk, it was not clear to us how any minimal deviation from the contractually specified embedment depth would justify granting the cost of cure.[41]

In the circumstances, therefore, the Court dismissed Terrenus' appeal in relation to cost of cure.

IV. Intention and Reasonableness

The first, and narrowest, issue which arises out of the judgment concerns the relationship between the claimant's intention to cure and the reasonableness of effecting cure. Although the Court was willing to accept the proposition that intention was a

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35 *JSD Corporation*, *ibid* at [82].

36 *Ibid* at [73]. The learned judge accepted at [77] that this reasoning meant that an intention to cure should be a prerequisite to cost of cure damages, rather than merely a weighty factor in the assessment of reasonableness; however, his Honour felt constrained by authority to accept the latter proposition.

37 *Terrenus* SGHC(A)*, supra* note 5 at [54].

38 *Ibid* at [56].

39 See section A.

40 *Terrenus* SGHC(A), *supra* note 5 at [64].

41 *Ibid* at [64].

factor to be taken into account in assessing reasonableness,[42] it offered little explanation of how the former was relevant to the latter. The connection is, on its face, quite difficult to understand. Put bluntly: sometimes, people intend to do unreasonable things; at other times, people fail to intend to do things which are perfectly reasonable.

One indication of what the Court may have had in mind is found at [53], at which the Court states that:

> The intention to cure as a factor in assessing reasonableness would be most relevant where it comes to showing the claimant's 'consumer surplus', which is the subjective value of the agreed performance to the claimant over and above the objective value. For example, where a claimant insists that the builder's breach in constructing a house with blue instead of yellow windows greatly affects his or her enjoyment of the property, and yet displays no intention to change out the panels, this may raise doubts as to the true value of the 'consumer surplus' provided by the yellow windows.[43]

The thinking, it seems, is that although it may be reasonable to effect cure to obtain the satisfaction of a contracted-for subjective preference, this will only be so where there is indeed a preference to be satisfied. The absence of an intention to cure may be cogent evidence that the claimant is in fact ambivalent or may have only very weakly-held preferences.

If this is what the Court envisaged, the relevance of intention to reasonableness is narrow indeed. In many cases, particularly commercial cases, the question of reasonableness has nothing to do with subjective preferences. In these cases, it seems that the relevance of intention falls away entirely.

However, there is perhaps room for intention to play a slightly broader role. It may be that the Court is, at least absent reason to do otherwise, sometimes prepared to treat the claimant as a passable proxy for the "reasonable person". Unless there are reasons for thinking that the claimant is acting unreasonably, the fact that the claimant intends to cure indicates that it might be reasonable to do so; conversely, if the claimant does not intend to cure, this might show (at the very least) that the claimant does not think that curing would be reasonable.[44] No doubt there will be some cases in which the claimant is in fact simply unreasonable, one way or the other—but one would think that these cases would be the minority.

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[42] *Ibid* at [44]. This proposition has considerable pedigree in English law; in addition to the cases cited *supra* note 31, see also: *Dean v Ainley* [1987] 1 WLR 1729 at 1737 (Kerr L.J.) (CA, Eng); *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68 at 80 (Dillon L.J.) (CA, Eng); *Southampton Container Terminals Ltd v Schiffahrtsgesellschaft GmbH ("The Maersk Colombo")* [2001] EWCA Civ 717 at [56] and [71] (Clarke L.J.); and *Endurance Corporate Capital Ltd v Sartex Quilts & Textiles Ltd* [2020] EWCA Civ 308 at [62] (Leggatt L.J.). It is, however, no more fully explained in the English cases than in *Terrenus* SGHC(A), *ibid.*

[43] *Terrenus* SGHC(A), *ibid* at [53].

[44] Of course, the latter point must be subject to the caveat that the claimant may not intend to cure only because effecting cure is only financially viable if the claimant is awarded substantial damages.

V. Intention and Loss

The central issue on appeal—the relationship between the claimant's intention to cure and loss—raises even more vexing issues. As a preliminary to assessing the Court's analysis, it is crucial at the outset to (i) identify precisely what is meant by "loss"; and (ii) to differentiate thereby between "loss" and "non-performance". With respect, a number of errors in the Court's reasoning appear to flow from the mistaken belief that "loss" can consist simply in the fact of not having received performance.

A. *Loss and Performance*

The idea of loss is central to private law.[45] The canonical explications of the term have developed in relation to its close cognate, "harm",[46] which can for present purposes be taken to be a synonym.[47]

It is generally accepted that "harm" is a comparative concept, *ie*, that to suffer "harm" one has to be in a worse state relative to some other state.[48] More controversial is the question whether the relevant comparison is counterfactual[49] or chronological.[50] For now, however, that debate can be put to the side: in law, "loss" tends to be used only in its counterfactual sense.[51] For example, in *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd*, Lord Nicholls stated that:

> It is axiomatic that in assessing loss … the basic measure is the comparison between (a) what the plaintiff's position would have been if the defendant had fulfilled his duty … and (b) the plaintiff's actual position.[52]

Also difficult is how one measures whether a given state of being is "worse" than another. It is common to assume that, to suffer a "loss", one's interests need to be

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45 Even if one accepts, as I intend to argue below, that private law remedies do *more* than just respond to loss, it is undeniable that many private law claims are indeed about loss.

46 In addition to the material cited below, see also Donal Nolan, "Rights, damage, and loss" (2017) 37 Oxford J Leg Stud 255.

47 Although to suffer "harm" might connote a greater degree of intentionality than to suffer "loss".

48 *Cf* Seana Shiffrin, "Wrongful life, procreative responsibility, and the significance of harm" (1999) 5 Leg Theory 117 and Seana Shiffrin, "Harm and its moral significance" (2012) 18 Leg Theory 357. I think the difficulties with such "non-comparative" views are well-identified in Stephen Perry, "Harm, history, and counterfactuals" (2003) 40 San Diego L Rev 1283 at 1299–1303 [Perry] (and see also Victor Tadros, "What might have been" in John Oberdiek, ed. *Philosophical Foundations of the Law of Torts* (Oxford: Oxford University Press, 2014) at 177–182 [Tadros]).

49 See *eg*, Joel Feinberg, "Wrongful life and the counterfactual element in harming" (1986) 4 Social Philosophy and Policy 145 [Feinberg]. For an associated view, albeit one with a more nuanced relevant counterfactual, see Tadros, *ibid*.

50 See *eg*, Perry, *supra* note 48.

51 One exception is that some cases refer to a distinct concept called "direct loss" (see *eg*, *Coles v Hetherton* [2013] EWCA Civ 1704 at [27]–[33] (Aikens L.J.)). This language might plausibly denote a chronological, as opposed to counterfactual, setback.

52 *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1997] 1 WLR 1627 at 1631 (HL, UK) (See also *One Step*, *supra* note 4 at [36] (Lord Reed)).

set back in a global or agglomerated sense. This presupposes some common metric which can be used to measure one's interests so that they can be agglomerated and compared. In private law, this is often done in financial terms—although this is not to say that private law only looks to financial interests.[53]

In summary: a person suffers loss just when their interests (in a global or agglomerated sense)[54] are in a worse position relative to the position in which they would be had a putative loss-causing event[55] not occurred.

It follows from this that there is necessarily a distinction between "wrongs" and "losses".[56] The former is a description of certain kinds of events (namely, events which constitute a breach of duty);[57] the latter identifies certain consequences of those events. Not all instances of wrongdoing will lead to loss as a consequence. To take a trite example: if *A* promises *B* that *A* will burn down *B*'s house, *A* commits a wrong against *B* in failing to do so; however, in the absence of fairly unusual circumstances, *B* is plainly better rather than worse off if *A* commits this wrong.

B. *Loss in the Absence of an Intention to Cure*

Against this background, it can be seen that Goh Yihan J.C.'s reasoning in *JSD Corporation* is unanswerable.

Where a defendant fails properly to complete work to the contractual specification, the claimant is left with a non-conforming product. As explained previously, this is necessarily a "wrong", but it may or may not be a "loss". The non-conforming product might be better than the one for which the claimant contracted (that is, it leads overall to a promotion rather than worsening of the claimant's agglomerated interests).[58] In the typical case, where the only thing at stake is money, the extent of the claimant's loss (if any) can be measured by:

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[53] So, for example, although private law *measures* a worsening of one's mental amenity in monetary terms, this does not mean that unhappiness is a *monetary* loss.

[54] Feinberg, *supra* note 49 at 146–147. *Cf* Perry, *supra* note 48 at 1290.

[55] I take it to be axiomatic that losses are by definition responses to "events", broadly defined to include omissions and changes in circumstances.

[56] See further Feinberg, *supra* note 49 at 146; Heidi Hurd, "What in the world is wrong?" (1994) 5 J Contemp Leg Issues 157 at 208–214; Peter Birks, "The concept of a civil wrong" in David Owen, ed. *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1997) at 38–41; Arthur Ripstein, "Beyond the harm principle" (2006) 34 Philosophy and Public Affairs 215 at 218–222; Robert Stevens, "Private rights and public wrongs" in Matthew Dyson, ed. *Unravelling Tort and Crime* (Cambridge: Cambridge University Press, 2014) at 134–135; and Tadros, *supra* note 48 at 176–177.

[57] This definition of wrongdoing is widely, although not universally, accepted; *cf* Nicolas Cornell, "Wrongs, rights, and third parties" (2015) 43 Philosophy and Public Affairs 109; David Owens, "The roles of rights" in Paul Miller & John Oberdiek, eds. *Civil Wrongs and Justice in Private Law* (Oxford: Oxford University Press, 2020) esp. at 5–6; and Nicolas Cornell, *Wrongs and Rights Come Apart* (Cambridge, Massachusetts: Harvard University Press, 2025).

[58] I leave out of consideration the question of subjective preferences here, which will not be relevant in most commercial contexts.

(i) comparing the difference in value between the product they received and the product they were supposed to receive (*ie*, the conforming product); and then,

(ii) taking into account the impact of any further consequences which were caused by the claimant having received the non-conforming product (*eg*, where the product was intended to generate revenue, but generates either more or less revenue as a result of its non-conforming state).

One possible consequence of the claimant having received a non-conforming product is that the claimant expends money curing the non-conformity.[59] If so, the claimant will not suffer any loss relating to the difference in value between the non-conforming and conforming products (since they will ultimately have a conforming product). However, they will incur the expense of paying for remedial work for which they would not have had to pay had they received a conforming product at the start. Plainly, the expenditure of this money is a setback to the claimant's interests. But, crucially, for it to be suffered as a loss it must in fact be expended. For that reason, the claimant cannot suffer the costs of remedial works as a loss if they do not have that work carried out, or if (as in *Burdis v Livsey*[60]) they are not ultimately required to pay for that work.

Put simply: the cost of remedial works is only a consequence of the defendant's wrong if that cost is (or will be) actually incurred.

The difficulty with the Appellate Division's reasoning is that, contrary to the analysis above, it assumed that the receipt of a non-conforming product was in itself a "loss", rather than merely a "wrong". The clearest example of this is when, in its discussion of *Alfred McAlpine Construction Ltd v Panatown Ltd (No. 1)*,[61] the Court refers to "the intangible loss suffered as a result of not receiving the agreed performance".[62] However, this assumption also clearly underlies the Court's criticism of *JSD Corporation* for supposedly overlooking that "any loss arising from a breach of contract is suffered at the time of the breach".[63] This is true in one sense, in that, as soon as breach occurs, the claimant will inevitably (in a deterministic sense) suffer the consequences of that breach. But that does not mean that all of those consequences immediately *occur* upon breach. Many claims for damages are in respect of *future* losses, that is, losses which have not yet been suffered, but which will be suffered (*eg*, where a claimant who is wrongfully dismissed from their employment claims in respect of wages which had not, but would have, accrued). What *does* occur immediately, however, is the fact of non-performance or defective performance. It must therefore have been this fact which the Court had in mind when it spoke of "the loss aris[ing] at the point of breach".[64]

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[59] Although it may be unreasonable for them to do so, *eg*, in circumstances where the non-confirming product is in fact superior to a conforming product.

[60] *Burdis v Livsey; Lagden v O'Connor* [2002] EWCA Civ 510.

[61] *Alfred McAlpine Construction Ltd v Panatown Ltd (No. 1)* [2001] 1 AC 518.

[62] *Terrenus* SGHC(A), *supra* note 5 at [47].

[63] *Ibid* at [54]. See also at [55], [60], and [62].

[64] *Ibid* at [62].

On the Court's assumption that the receipt of a non-conforming product is itself a loss, it is readily understandable how the Court concluded that "cost of cure addresses the loss which arises at the point of breach and cannot be viewed as a loss which only arises upon incurrence of the same".[65] But, as discussed, this is a mischaracterisation: it is the expenditure on cure, rather than the receipt of a non-conforming product, which is a "loss". Once the mischaracterisation is exposed, it is clear that any claim for the costs of cure as loss requires that the claimant has or will incur those costs.

This does not involve any inroad into "the general principle that … the court is not concerned with the use to which the claimant puts an award of damages".[66] Most obviously, a claimant might show that they intend to cure without any reference to damages altogether: they intend to effect cure come what may. Nor is there any question of the defendant clawing back any damages awarded if the claimant does not in fact effect cure. The position is no different from any other situation in which the Court makes an award of damages premissed on a particular understanding of the facts giving rise to loss which is subsequently falsified: short of an application to have the order set aside for fraud, the order is final and conclusive.

VI. The Nature of Cost of Cure Damages

Overall, insofar as cost of cure damages are concerned with compensation for loss, the Court's analysis suffers from serious difficulties. However, the Court's conclusion can satisfactorily be explained by an alternative analysis of cost of cure damages—traces of which can be found in the Court's judgment.

As noted previously, the Court considered that there "are two main methods of assessing expectation loss",[67] one of which was said to be the cost of cure. However, somewhat confusingly, in the very same paragraph the Court stated that "the cost of cure quantifies the means to obtain actual performance *rather than the expectation loss*" [emphasis added].[68] The Court then proceeded to explain that "a claimant is in principle always entitled to seek actual performance of the contract", but that "for practical, policy and historical reasons, courts are reluctant to compel a party to complete its end of the bargain and the remedy of specific performance is considered both special and extraordinary in character".[69] The Court considered that cost of cure damages "come[s] closest to giving the claimant actual performance without compelling the breaching party to perform".[70] Indeed, in many cases it will be a matter of indifference to the claimant whether defects in the defendant's performance are remedied by the defendant being ordered to rectify the work or by a third party being paid to do so.[71]

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65 *Ibid* at [62].
66 *Ibid* at [55].
67 *Ibid* at [40].
68 *Ibid* at [40].
69 *Ibid* at [41].
70 *Ibid* at [41].
71 In fact, a claimant may be more optimistic about the quality of work they are likely to receive from a third party as opposed to the defaulting defendant.

This analysis accords with the view that cost of cure damages are a monetary form of specific performance, rather than a form of compensation for loss.[72] In recent years, the view that some monetary remedies take this form has gained increasing traction.[73] It offers considerable advantages in explaining some circumstances in which claimants are entitled to recover sums in excess of their loss.[74]

On this analysis, there is no difficulty in seeing why the claimant need not prove an intention to effect cure in order to be entitled to cost of cure damages. Their entitlement to cure flows directly from their entitlement to performance; it is not a response to any loss suffered by the claimant. The position is analogous to situations where claimants seek specific performance or bring actions in debt: in both cases, it is immaterial that the claimant might be no worse off for having not received performance.[75]

Adopting this analysis would additionally help explain what the Court meant when it referred to reasonableness operating as a "pragmatic" limitation on the availability of cost of cure damages. If the cost of cure were actually a measure of the claimant's loss, it is far from clear on what basis it could be said that "in certain situations, the quantum of the cost of cure may be disproportionate to the value of the expectation loss"[76] so as to make it unreasonable to cure. By contrast, it is well known that specific performance will be refused when compensatory damages are an adequate remedy; and I have argued elsewhere that the same is true of orders to pay agreed sums[77] or to seek monetary reconstitution of a trust.[78] Viewed in that light, the "reasonableness" bar to cost of cure damages is entirely consistent with other types of performance-based remedies.

VII. Three-Party Cases

This analysis is, if anything, bolstered by the Court's recognition that the same rules apply to cost of cure damages in both "two-party" and "three-party" cases[79]

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[72] Although this view is unorthodox, it does have some judicial support; see *Joyner v Weeks* [1891] 2 QB 31 at 37–38 (Wright J.) (CA, Eng).

[73] See *eg*, Brian Coote, "Contract damages, *Ruxley*, and the performance interest" (1997) 56 Cambridge LJ 537; Ewan McKendrick, "Breach of contract and the meaning of loss" (1999) 52 Current Leg Probs 37; Stephen Smith, "Substitutionary damages" in Charles Rickett, ed. *Justifying Private Law Remedies* (Oxford: Hart Publishing, 2008); James Edelman, "Money awards of the cost of performance" (2010) 4 Journal of Equity 122; David Winterton, *Money Awards in Contract Law* (Oxford: Hart Publishing, 2015); Charlie Webb, "Performance damages" in Graham Virgo & Sarah Worthington, eds. *Commercial Remedies: Resolving Controversies* (Cambridge: Cambridge University Press, 2017); and *Lewis v Australian Capital Territory* [2020] HCA 26 at [142]–[149] (Edelman J.).

[74] One notable example is the so-called "market rule" in the context of the sale of goods, which is in a sense simply a form of the cost of cure (*viz*, where "cure" consists in the claimant purchasing replacement goods and selling whatever they received (if anything) from the defendant).

[75] See, in the context of actions for agreed sums, *Jervis v Harris* [1996] Ch 195 at 202 (Millett L.J.) (CA, Eng) and, in the context of specific performance, *Radford v De Froberville* [1977] 1 WLR 1262 at 1286 (Oliver J.) (HC, Eng).

[76] *Terrenus* SGHC(A), *supra* note 5 at [43].

[77] Alexander Georgiou, "Making contract-breakers pay" (2025) 141 Law Q Rev 104.

[78] Alexander Georgiou, "Taking trusts seriously" (2021) 137 Law Q Rev 305.

[79] *Terrenus* SGHC(A), *supra* note 5 at [47].

(the latter referring to situations where the claimant seeks cost of cure damages in respect of work the defendant had contracted to do for the benefit of a third party).

In three-party cases, it is even clearer that the cost of cure cannot be a measure of the claimant's loss unless the claimant has or will incur that cost. In these situations, there is not even the suggestion that the cost of cure can somehow reflect a "loss" consisting in not having the contracted-for end result, since the claimant would not have obtained that even had the contract been properly performed. The benefit would, *ex hypothesi*, accrue to the third party.

VIII. Conclusion

There is much to commend in the Appellate Division's analysis of the role of the claimant's intention to cure. In contrast to the still-unsettled position in English law, it heralds a clear and principled way forward. However, the apparent insistence on analysing cost of cure damages in terms of compensation for loss stands in the way of convincingly explaining why the Court was right. It is to be hoped that future examinations of cost of cure will pay closer attention to the Court's references to performance, which signal a far more satisfactory approach.