CITATION:	*FE Accommodation Pty Ltd & Anor v Gold Valley Iron Ore Pty Ltd* [2024] NTSC 61
PARTIES:	FE ACCOMMODATION PTY LTD (ACN 160 943 082) and G&C PASTORAL CO PTY LTD (ACN 008 039 405) v GOLD VALLEY IRON ORE PTY LTD (ACN 618 094 634)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	64 of 2018 (21830728)
DELIVERED:	22 August 2024
HEARING DATES:	10, 11 and 12 April 2024, with further written submissions filed on 16 and 26 April 2024
JUDGMENT OF:	Brownhill J

CATCHWORDS:

CONTRACT – Remedies – Damages – Assessment of damages – General principles – ‘Ruling Principle’ –Onus of proof on the Plaintiff – Damages must be proved with degree of precision as reasonably available – Entitlement to damages limited to damages that arise naturally – Plaintiff has a duty to mitigate of loss – Plaintiff cannot recover losses which are

avoided – Plaintiff cannot be placed in a superior position to which they would have been if the contract had been performed.

DAMAGES – Claim for interest – Calculation of interest on damages – s 84(1) *Supreme Court Act 1979* (NT) – Interest *as* damages – Requirement to prove loss not satisfied by first plaintiff – Award of nominal damages.

DAMAGES – Assessment of damages – Prima facie measure – Whether prima facie measure applies – Whether s 52(3) *Sale of Goods Act 1972* (NT) applies – s 52(3) *Sale of Goods Act 1972* (NT) not applicable to claim for damages.

DAMAGES – Assessment of damages – Prima facie measure at common law – Whether prima facie measure applies – Defendant did not plead any prima facie measure of damages outside of the *Sale of Goods Act 1972* (NT) – Departure from the general rule when in the 'interests of justice'– Prima facie measure displaced.

DAMAGES – Assessment of damages – Whether legal costs incurred in relation to another proceeding are claimable as damages – Whether there is a causal connection between legal costs and the defendant's breach of contract – Legal costs incurred may reasonably be supposed to have been a probable result of the defendant's breach – Entitled to share of legal costs.

BREACH OF CONTRACT – Counter-claim – Whether res judicata, issue estoppel or Anshun estoppel preclude counter-claim being made – Res judicata, issue estoppel and Anshun estoppel do not arise – Whether defendant is entitled to recover moneys paid – Defendant is entitled to recovery.

Clark v Macourt (2013) 253 CLR 1, *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, *Hadley v Baxendale* (1854) 9 Ex 341, *TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd* (1989) 16 NSWLR 130, *Sabouni v Revelop Building and Developments Pty Ltd* [2021] NSWCA 31, *Troulis v Vamvoukakis* [1998] NSWCA 237, *Barrow v Arnaud* (1846) 8 QB 595, *Bellgrove v Eldridge* (1954) 90 CLR 613, *Motor Accidents (Compensation) Commission v Motor Accidents Insurance Board (No 2)* [2023] NTSC 71, *Haines v Bendall* (1991) 172 CLR 60, *IM Properties Plc v Cape & Dalgleish* [1999] QB 297, *Hungerfords v Walker* (1988) 171 CLR 125, *Ajaimi v Giswick Pty Ltd (No 3)* (2022) 67 VR 529, *Hobartville Stud*

Pty Ltd v Union Insurance Co Ltd (1991) 25 NSWLR 358, *Johnson v Perez* (1988) 166 CLR 351; *Vieira v O'Shea* [2012] NSWCA 21, *Ng v Filmlock Pty Ltd* (2014) 88 NSWLR 146, *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, *Moffet Farms v Pauls Services & Sales Pty Ltd* (1991) 7 SR (WA) 351, *Shaw v Gadens Lawyers* [2014] VSCA 74, *Willoughby v Clayton Utz (No 2)* (2009) 40 WAR 98, referred to.

Sale of Goods Act 1972 (NT) ss 4, 6, 38, 52, 54.

Supreme Court Act 1979 (NT) s 84.

Supreme Court Rules 1987 (NT) Order 59.02(3).

JW Carter, W Courtney and GJ Tolhurst, 'Issues of Principle in Assessing Contract Damages' (2014) 31 Journal of Contract Law.

JW Carter, *Carter's Breach of Contract*, 2nd ed, 2018, LexisNexis Butterworths.

REPRESENTATION:

Counsel:

First & Second Plaintiffs:	A Harris KC
Defendant:	A Wyvill SC with R Sanders

Solicitors:

First & Second Plaintiffs:	CCK Lawyers
Defendant:	HWL Ebsworth Lawyers

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

FE Accommodation Pty Ltd & Anor v Gold Valley Iron Ore Pty Ltd
[2024] NTSC 61
No. 64 of 2018 (21830728)

BETWEEN:

FE ACCOMMODATION PTY LTD (ACN 160 943 082)
First Plaintiff

AND:

G&C PASTORAL CO PTY LTD (ACN 008 039 405)
Second Plaintiff

AND:

GOLD VALLEY IRON ORE PTY LTD (ACN 618 094 634)
Defendant

CORAM: BROWNHILL J

REASONS FOR JUDGMENT

(Delivered 22 August 2024)

[1] On 11 September 2020, following a trial on the preliminary question of liability, Southwood J decided that the defendant is liable to the plaintiffs for a wrongful repudiation of the Contract of Sale the parties

entered into on 16 August 2017 ('Contract of Sale'), with damages to be assessed accordingly.[1]

[2] On 15 September 2020, Southwood J ordered that there be judgment for the plaintiffs in the action on the question of liability, with damages to be assessed.

[3] The defendant appealed from that decision.

[4] On 22 February 2021, the Court of Appeal dismissed the appeal, except in relation to two grounds relating to a drilling rig.[2] The Court of Appeal allowed the appeal in relation to grounds 19 and 20 and declared that the term 'Ex WDR Plant & Equipment' in the Contract of Sale included the drilling rig.[3]

Liability trial – findings and determination of liability

[5] The found factual background surrounding the parties' entry into the Contract of Sale and its terms are set out in the Liability Reasons at [19]-[57]. The Court's findings as to the effect of execution of the Contract of Sale are set out in the Liability Reasons at [58]-[59]. The found factual circumstances and conduct of the parties after execution of the Contract of Sale are set out in the Liability Reasons at [154].

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1 *FE Accommodation Pty Ltd & Anor v Gold Valley Iron Ore Pty Ltd* [2020] NTSC 61 ('Liability Reasons') at [181], [195].

2 *Gold Valley Iron Ore Pty Ltd v FE Accommodation Pty Ltd & Anor* [2021] NTCA 2 ('Appeal Reasons') at [113].

3 Application to the High Court for special leave to appeal was refused on 2 December 2021.

[6] The factual findings of the Court are relevant to the assessment of damages. The following findings in particular are noted here.

[7] On 28 August 2013, the first plaintiff purchased the Sawfish Camp ('Camp') located on mineral leases held by a company called Western Desert Resources Ltd ('WDR') from WDR.[4] The Camp is a collection of chattels.

[8] On 7 September 2016, the second plaintiff purchased items of plant and equipment located on mineral leases held by WDR, including the plant and equipment the subject of the Contract of Sale ('Plant and Equipment'), from the liquidator of WDR through Pickles Auctions for $450,000 excluding GST, with the descriptions and the prices set out in a 69 page invoice from Pickles Auctions ('Pickles Invoice').[5]

[9] By the Contract of Sale, the defendant agreed to purchase the Camp and the Plant and Equipment from the plaintiffs for $3.5 million, to be paid in instalments, with the defendant entitled to possession under licence from the date of execution, in exchange for a further $3.5 million in licence fees to be paid in instalments.[6]

[10] On 16 August 2017, the Camp and the Plant and Equipment were delivered into the defendant's possession, and possession and risk

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4 Liability Reasons at [21].

5 Liability Reasons at [27].

6 Liability Reasons at [53]-[57].

passed to the defendant.[7] The defendant took possession of the chattels under licence in accordance with cl 2.7 of the Contract of Sale. A bailment of the chattels came into existence until the Settlement Dates. Under the bailment, subject to the Contract of Sale, the plaintiffs were to have no physical possession and no immediate right to possession of the chattels. The defendant could not remove the chattels from their location on the mineral leases without the prior written consent of the plaintiffs, and the plaintiffs had certain rights of inspection of the chattels. Property in the Camp and the Plant and Equipment remained with the plaintiffs until settlement.

[11] On 25 August 2017, the defendant paid the second plaintiff the first instalment of $500,000 towards the purchase price for the Plant and Equipment.[8]

[12] On 28 September 2017, the parties entered into a variation of the Contract of Sale which required the defendant to pay the amount of $500,000 outstanding under the Contract of Sale in two tranches.[9]

[13] On 2 October and 16 October 2017, the defendant paid the first plaintiff the outstanding sum of $500,000.[10]

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7 Liability Reasons at [58].

8 Liability Reasons at [61].

9 Liability Reasons at [63].

10 Liability Reasons at [64].

[14] On 27 November 2017, the liquidator of WDR sold the mineral leases to a company called Britmar (Aust) Pty Ltd ('Britmar') and the transfer of the mineral leases was registered on 18 December 2017.[11]

[15] Between late May and early July 2018, the defendant removed 52 of the 94 items of Plant and Equipment the subject of the Contract of Sale from the mineral leases without notice to the plaintiffs that it was going to do so.[12] The defendant's removal of those 52 items was without the plaintiffs' consent and without payment of the full amount for the sale under the Contract of Sale.[13]

[16] The effect of the defendant's removal of the 52 items was to deprive the second plaintiff of its rights to inspect the state of repair of the Plant and Equipment in accordance with cl 2.7(h) of the Contract of Sale and the security provided by cll 2.7(f) and 15 of the Contract of Sale, in circumstances where the second instalment payment of $500,000 for the Plant and Equipment and the licence fee of $750,000 for the Camp were due and payable on 17 August 2018.[14]

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11 Liability Reasons at [13], [71], [80].

12 Liability Reasons at [154.11].

13 Liability Reasons at [154.14].

14 Liability Reasons at [154.14].

[17] The defendant's purported termination of the Contract of Sale on 9 August 2018 was invalid and constituted a repudiation of the Contract of Sale.[15]

[18] The plaintiffs' termination of the Contract of Sale on 30 August 2018 was valid.[16]

Further factual findings

[19] The following facts, deposed to by the directing mind of the plaintiffs, Vivian Oldfield, in his affidavits made on 5 December 2023 and 14 March 2024, and in his oral evidence, are not in dispute.

[20] Aside from the $1 million referred to above, the defendant has not made any further payments to either plaintiff under the Contract of Sale, which provided for the defendant to pay the plaintiffs a total of $7 million in instalments, plus $700,000 in GST.

[21] On or about 15 March 2019, Britmar commenced proceedings in the Federal Court of Australia against Mr Oldfield and the plaintiffs, seeking injunctions requiring the removal of a conveyor and other plant and equipment from the mineral leases, and seeking damages for: (i) misleading and deceptive conduct regarding Mr Oldfield's representations to Britmar about the removal of the conveyor and plant and equipment from the mineral leases; and (ii) trespass, nuisance or

15 Liability Reasons at [148], [181].

16 Liability Reasons at [153], [181].

interference with Britmar's statutory rights under the mineral leases by way of the presence on the mineral leases of the conveyor and plant and equipment.

[22] The conveyor and plant and equipment the subject of the Federal Court proceedings comprised the Camp and the Plant and Equipment the subject of the Contract of Sale.

[23] On 10 April 2019, there was a mediation relating to the Federal Court proceedings. The Federal Court proceedings did not resolve, but the parties continued negotiations seeking a resolution.

[24] On 10 July 2019, Britmar, Mr Oldfield and the plaintiffs executed a settlement deed, an asset sale deed between the first plaintiff and Britmar, and an asset sale deed between the second plaintiff and Britmar.

[25] In accordance with the settlement deed, on 18 July 2019, the Federal Court proceedings were discontinued by consent.

[26] Mr Oldfield and the plaintiffs were legally represented in relation to the Federal Court proceedings, their resolution and negotiation of the asset sale deeds. Legal costs (comprising counsels' fees, solicitors' fees and mediator's fees) were incurred between 21 March and 30 August 2019, totalling $244,901.06. The second plaintiff paid those legal costs on or about the dates they were incurred.

[27] The asset sale deeds provided for the sale to Britmar of most of the Plant and Equipment remaining on the mineral leases and a substantial part of the Camp on terms which required Britmar to pay a total of $6 million by instalments over some four years, and interest on late payments.

[28] Under the asset sale deed between Britmar and the first plaintiff ('FE Asset Sale Deed'), Britmar agreed to purchase the Camp, excluding specified excluded assets ('FEA Excluded Assets') for the sum of $5.5 million, payable in instalments over four years, with interest on late instalments. The Camp was depicted on a plan marked as Annexure A to Schedule 1 of the FE Asset Sale Deed. The FEA Excluded Assets were shown in an area coloured red on the north-west side of the Camp. They comprised 24 x four room buildings (and contents), four x one room buildings (and contents), two x two room buildings (and contents) and one laundry module comprising two 12 metre buildings (and contents). Title to the Camp remained with the first plaintiff until payment of the purchase price in full, with Britmar granted a right of use and a first right of refusal in relation to any proposed sale of the FEA Excluded Assets.

[29] The FEA Excluded Assets included four x one room buildings and two x two room buildings shown on the plan at Annexure A and marked with numbers 15 and 16. Those six buildings were not present at the Camp on 3 May 2018 when Mr Oldfield arranged for a friend to take aerial photographs of the Camp. There is some dispute as to whether these six

buildings were the subject of the Contract of Sale and, if so, what happened to them. Ultimately, because of the conclusions reached below, it is unnecessary to resolve that dispute.

[30] Under the asset sale deed between Britmar and the second plaintiff ('G&C Asset Sale Deed'), Britmar agreed to purchase all of the Plant and Equipment located on the mineral leases on 10 July 2019, excluding six x 12 metre fuel pods and one x five metre fuel pod, for the sum of $500,000, payable in instalments over four years, with interest on late instalments. Title to the Plant and Equipment the subject of the sale remained with the second plaintiff until payment of the purchase price in full, with Britmar granted a right of use.

[31] In about July 2019, the seven fuel pods that were excluded from the G&C Asset Sale Deed were transported from the mineral leases by Roper River Transport ('RRT') to their yard in Mataranka at a cost of $33,556.60 including GST.

[32] The 52 items removed by the defendant from the mineral leases were listed in the first schedule of the defendant's Amended Defence and Counterclaim, with a description and a location ('Removed Items'). The Removed Items have never been returned to the second plaintiff by the defendant.

[33] In around February 2021, the second plaintiff arranged for the transportation to storage yards in Alice Springs of around half of the

Removed Items from the locations to which the defendant took them. The total cost for that transportation was $107,628.51. That amount was reduced to $26,788.51 because RRT acquired from the second plaintiff: (a) a number of the Removed Items it had transported, namely a truck, three modular buildings, and a communications tower; and (b) a 40 foot fuel tank, which was one of the seven fuel pods excluded from the G&C Asset Sale Deed and transported by RRT in July 2019.

[34] In August 2021, the first plaintiff sold some of the FEA Excluded Assets, namely 12 of the four room accommodation buildings and one laundry building, to Nathan River Resources ('NRR'), a related entity of Britmar, for $500,500 plus GST.

[35] In September 2021, Mr Oldfield had discussions with John Robinson, a friend and business associate of his, about him purchasing some of the FEA Excluded Assets. Mr Robinson arranged for Kevin Clarke to inspect the FEA Excluded Assets on the mineral leases. Mr Clarke conducted that inspection in late September 2019. Following that inspection, Mr Robinson offered Mr Oldfield $38,500 plus GST each for the 30 x four room accommodation buildings, which offer was subject to: (a) Mr Robinson paying the demobilisation and transportation costs, which he estimated at around $20,000 per building; (b) Mr Robinson securing a contract for the use of the buildings in Katherine which he was negotiating; and (c) Britmar's right of first refusal on the sale. In early October 2019, Mr Robinson confirmed an offer to purchase eight

of the four room accommodation buildings and one laundry building and arrangements were made for their demobilisation and transportation. On 7 October 2019, Mr Oldfield informed Britmar of Mr Robinson's offer to purchase the 30 x four room accommodation buildings and two laundry buildings. On 11 October 2019, Britmar responded that it would not exercise its right of first refusal in relation to that sale. The first plaintiff issued Mr Robinson an invoice for $381,150 including GST for his purchase of the eight accommodation buildings and one laundry building. Around 7 November 2019, Mr Robinson informed Mr Oldfield that he had not secured the contract he had been negotiating for the use of the buildings, so he did not require them. Mr Oldfield decided to continue the arrangements made with Mr Clarke for the demobilisation of the nine buildings from the mineral leases, and to transport them to the Moura Caravan Park in Queensland, which is a business owned by a company owned by Mr Oldfield called Panchek Pty Ltd ('Panchek'). In November 2019, Mr Clarke demobilised the eight accommodation buildings and one laundry building and transported them to the Moura Caravan Park. Mr Clarke charged $236,565.51 excluding GST for that work. The invoice was paid by Panchek.

[36] In late 2019, Mr Oldfield had discussions with various other people about selling to them any of the remaining FEA Excluded Assets. He had not had any offer for purchase of any of them which was capable of acceptance. The FEA Excluded Assets which remain on the mineral

leases and have not been sold by the first plaintiff are four x four room accommodation buildings.

[37] By the date of the trial on damages, the Removed Items that had not been transported by RRT to Alice Springs on behalf of the second plaintiff remained at the locations to which they had been taken by the defendant.

[38] By the date of the trial on damages, Britmar had paid to the plaintiffs all of the instalment payments under the two asset sale deeds. Britmar had also paid some, but not all, of the interest which had accrued on late payments of the instalments.

The parties' approaches to assessment of damages

[39] The plaintiffs claimed damages assessed essentially as the amount of the unpaid monies due under the Contract of Sale on the date of the plaintiffs' termination for the defendant's repudiation, argued to be $6 million due and payable pursuant to cl 15, with interest calculated on a cash flow basis over time, from the date of termination to the date by which judgment was anticipated, deducting the amounts paid by Britmar under the asset sale deeds and the amount paid by NRR for some of the FEA Excluded Assets and adding the legal costs as they were received or paid. Counsel for the plaintiffs argued that the items of Plant and Equipment and the Camp that had not been purchased by Britmar or NRR were worthless at the time of termination of the Contract of Sale

or, in relation to the Removed Items, were not in the second plaintiff's possession, such that no deduction of any amounts to reflect the worth of those items in the plaintiffs' hands was appropriate.

[40] Counsel for the defendant argued that the plaintiffs were only entitled to damages assessed on the prima facie measure in s 52(3) of the *Sale of Goods Act 1972* (NT) ('SGA'), being the difference between the contract price and the market price of the Camp and the Plant and Equipment at the date the plaintiffs terminated the Contract of Sale for the defendant's repudiation. On that prima facie measure, it was argued that the plaintiffs were entitled only to nominal damages because they had not proved the market price of the Plant and Equipment or the Camp at that date, and they had not proved that there was no market for those goods, so the plaintiffs had failed to prove their loss. Alternatively, if the prices under the asset sales deeds with Britmar could be used as a proxy for the market price, the plaintiffs were again only entitled to nominal damages because there was no evidence about the market price of the items of Plant and Equipment and the Camp *not* purchased by Britmar at the date of termination of the Contract of Sale, so the plaintiffs had therefore failed to prove their loss. Alternatively, if the prices under the asset sales deeds with Britmar could be used as a proxy for the market price, and other evidence was sufficient to establish a proxy for the market price of the items of Plant and Equipment and the Camp not purchased by Britmar, the plaintiffs were again only entitled to nominal damages

because the proxy market price exceeded the contract price and the plaintiffs had, therefore, not sustained any loss, whether or not the legal costs were recoverable as damages. On each of those bases, the defendant counterclaimed the $1 million paid by the defendant under the Contract of Sale as restitution, with interest.

The assessment of damages – Legal principles

The ruling principle

[41] The 'ruling principle' is that, where a party sustains a loss by reason of a breach of contract, damages are to put the party, so far as money can do it, in the same position as if the contract had been performed as promised.[17]

[42] The award of damages for breach of contract protects a plaintiff's expectation of receiving the defendant's performance, which expectation arises out of or is created by the contract.[18] The onus of proving damages sustained lies on a plaintiff and the amount of damages awarded will be commensurate with the plaintiff's expectation, objectively determined, rather than subjectively ascertained.[19] A plaintiff must prove, on the balance of probabilities, that their expectation of a certain outcome, as a

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17 *Clark v Macourt* (2013) 253 CLR 1 ('*Clark v Macourt*') at [7] per Hayne J, at [26] per Crennan and Bell JJ, at [60] per Gageler J (in dissent), at [106] per Keane J, all citing *Robinson v Harman* (1848) 1 Ex 850 at 855; 154 ER 363 at 365 and *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [13].

18 *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80 per Mason CJ and Dawson J.

19 Ibid, cited in *Clark v Macourt* at [28] per Crennan and Bell JJ.

result of performance of the contract, had a likelihood of attainment rather than being a mere expectation.[20]

[43] Under the rule in *Hadley v Baxendale* (1854) 9 Ex 341, the entitlement of a plaintiff to recover damages for breach of contract is limited to such damages as arise naturally, that is according to the usual course of things, from the breach of contract, or such damages as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of the breach.[21]

[44] A plaintiff has a duty to mitigate their loss. That principle means a plaintiff cannot recover damages for a loss which they ought reasonably to have avoided. Consideration of whether the plaintiff has failed to mitigate their loss by avoiding damage only arises if the defendant has pleaded such a failure, because the onus is on the defendant to show that the plaintiff has not fulfilled the duty.[22] In this case, the defendant has not made any plea that the plaintiffs failed to mitigate their losses. This issue does not arise in this case.

[45] The duty to mitigate also means a plaintiff cannot recover losses which are in fact avoided, whether or not there was an obligation to mitigate in

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20 Ibid.

21 *Clark v Macourt* at [119] per Keane J, citing *European Bank Ltd v Evans* (2010) 240 CLR 432 at [11]-[13] per French CJ, Gummow, Hayne, Heydon and Kiefel JJ.

22 *TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd* (1989) 16 NSWLR 130 at 157 per Hope JA (Meagher JA agreeing) and at 161 per Priestly JA.

that way.[23] This aligns with the corollary of the ruling principle that a plaintiff is not entitled, by an award of damages for breach of contract, to be placed in a superior position to that in which they would have been had the contract been performed.[24] Because of the plaintiffs' sales of some of the Camp and the Plant and Equipment to Britmar and NRR, this issue *does* arise in this case. The plaintiffs accepted that reductions must be made to their award of damages to reflect the amounts paid to them by Britmar and NRR. In its alternative cases, the defendant also accepted that reductions must be made to any award of damages to reflect the amounts paid, at least, by Britmar and also by NRR on the basis that those amounts were a proxy for the market value of the goods.

Proof of loss

[46] The onus of proof in respect of a claim for breach of contract damages is on the plaintiff.[25]

[47] The Court must do the best it can to make a reliable assessment of damages where damages are difficult to assess, including where a party has failed to lead the best evidence of damages.[26] The common law does

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23 *Clark v Macourt* at [17]-[18] per Hayne J, citing *British Westinghouse Electric & Mfg Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 at 689 per Viscount Haldane LC.

24 *Clark v Macourt* at [27] per Crennan and Bell JJ, citing *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 82 per Mason CJ and Dawson J, at [59] per Gageler J (in dissent), citing *Haines v Bendall* (1991) 172 CLR 60 at 63.

25 *Clark v Macourt* at [27] per Crennan and Bell JJ, citing *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 82 per Mason CJ and Dawson J.

26 *Sabouni v Revelop Building and Developments Pty Ltd* [2021] NSWSC 3 at [41] per Black J, citing *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 83 per Mason CJ and Dawson J, at 125 per Deane J, at 153 per Gaudron J.

not permit difficulties of assessing the loss in money to defeat the only remedy it provides for breach of contract, an award of damages.[27]

[48] However, damages must be proved with a degree of precision which reflects the proof that is reasonably available to the parties.[28] If the evidence called on behalf of the plaintiff fails to provide any rational foundation for a proper estimate of damages, the Court should decline to make one.[29]

[49] It has been observed that, where damages are susceptible of ordinary proof, but there was an absence of raw material to which good sense may be applied, justice does not dictate that a figure should be 'plucked out of the air'.[30] That case involved a claim for damages for misleading and deceptive conduct and conversion in relation to a contract for the sale of a business. The loss suffered was held to be the difference between that part of the contract price attributed to the goodwill of the business and the value of the goodwill of the business. The plaintiff had not adduced reliable evidence about the trading results of the business, or evidence as to how one goes about valuing such a business. It was held (at 14) that there was, therefore, an absence of the raw material to

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27 Ibid, citing *Uszok v Henley Properties (NSW) Pty Ltd* [2007] NSWCA 31 at [135] per Beazley J.

28 Ibid at [42], citing *New South Wales v Moss* (2000) 54 NSWLR 536 at [72] and *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 77 ALJR 768 at [38].

29 Ibid, citing *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 89 ALR 275 at 319 per Pincus J, approved in *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237 at 243 per Brooking J and *Troulis v Vamvoukakis* [1998] NSWCA 237 at 27 per Gleeson CJ.

30 *Troulis v Vamvoukakis* [1998] NSWCA 237 at 29 per Gleeson CJ, approved in *McCrohan v Harith* [2010] NSWCA 67 at [128] per McColl JA (Campbell JA and Handley AJA agreeing).

which good sense could be applied to determine the value of the goodwill of the business. No damages were awarded on this part of the claim.

[50] By way of an example of an absence of raw material to which good sense could be applied to assess damages, the case of *Sabouni v Revelop Building and Developments Pty Ltd* concerned a cross-claim for damages for breach of a building contract and the defendant claimed over $1.9 million for work done on the building after the contract was terminated for breach, being over $800,000 more than the contract price.[31] There was no evidence that the work done after termination was within the scope of the contract or was in rectification of defects in the contracted work or was otherwise caused by termination of the contract, or to explain the escalation in cost from the contract price. There was held (at [46]) to be no rational basis in the evidence to hold the builder liable for the whole of those costs or to identify any lesser amount recoverable as a result of the breach. Consequently, the cross-claim for damages failed.

The prima facie measure

[51] Much reliance was placed by the defendant on the High Court's decision in *Clark v Macourt*.[32] In that case, a doctor agreed to purchase frozen sperm and other assets of an assisted reproductive technology business. The vendor warranted that it would give the purchaser records for the

31 *Sabouni v Revelop Building and Developments Pty Ltd* [2021] NSWSC 31.

32 *Clark v Macourt* (2013) 253 CLR 1 ('*Clark v Macourt*').

frozen sperm that complied with guidelines. Most of the sperm delivered by the vendor at completion in 2002 was not usable because the records were non-compliant. In 2005, the purchaser acquired usable frozen sperm from the only alternative supplier. The vendor sued the purchaser to recover the purchase price under the contract. The purchaser cross-claimed for damages for breach of the warranties, but not for loss of profits. Damages were assessed at trial by reference to the amount that the purchaser would have had to pay at completion in 2002 for the sperm which was not, but ought to have been, usable. The 2005 acquisition cost was used as a proxy for that amount (with a time value adjustment). The High Court upheld the assessment of damages made at trial.

[52] In *Clark v Macourt*, there was no dispute about the ruling principle, but there were issues as to the application of the ruling principle to the facts of the case. Hayne J held (at [8]-[10]) that it is necessary to identify what loss is being compensated, which does not depend on whether the contract can be classified as a contract for the sale of goods, but on the loss of the value of what the promisee would have received if the promise under the contract had been performed. His Honour observed (at [13]) that the answer to the question: 'what was the value of what the [promisee] did not receive?' depends upon determining the content of the unperformed promise.

[53] Crennan and Bell JJ held (at [28]) that an award of damages for loss of a bargain protects the plaintiff's objectively determined expectation of

recoupment of expenses and this explains the prima facie measure of damages at common law in respect of a sale of goods stated in *Barrow v Arnaud* (1846) 8 QB 595 at 609-610, and codified subsequently in sale of goods legislation. The measure is the market price of goods at the contractual time for delivery, less the contract price (if the latter has not been paid to the seller), which is the amount of money theoretically needed to put the promisee in the position which would have been achieved if the contract had been performed.

[54] Keane J cited (at [107]) the observation of Dixon CJ, Webb and Taylor JJ in *Bellgrove v Eldridge* (1954) 90 CLR 613 at 617-618 that the practical operation of the ruling principle may vary depending on the commercial context, but the principle is always applied with a view to assuring to the purchaser the monetary value of faithful performance by the vendor of the bargain. His Honour held (at [108]) that the rule in the equivalent of s 54(3) of the SGA (which relates to breach of warranty by a seller) is a statutory expression of the ruling principle, but it does not exhaust its operation.

[55] Keane J went on to hold (at [109]) that the value to be paid in accordance with the ruling principle is assessed at the date of breach of contract, not as a matter of discretion, but as an integral aspect of the principle, which is concerned to give the purchaser the economic value of the performance of the contract at the time that performance was promised, such that the measure of damages captures for the purchaser

the benefit of the bargain and compensates the purchaser for the loss of that benefit. His Honour held (at [110]) that the application of the ruling principle to measure value lost at the date of breach of contract serves the important end of bringing finality and certainty to commercial dealings. It ensures that whatever might befall the purchaser after the date of breach, for good or ill, and whether by reason of the purchaser's acumen, or lack of it, in dealing with other persons who were not party to the contract, and whatever movements may occur in the market, these developments have no bearing on the entitlement of the purchaser and the liability of the seller.

[56] Counsel for the defendant relied on these observations from *Clark v Macourt* to argue that the prima facie measure applies to this case, in the form of s 52(3) of the SGA, namely that the measure of the plaintiffs' damages is to be ascertained by the difference between the contract price and the market price at the time of termination of the Contract of Sale. Counsel for the plaintiffs argued that *Clark v Macourt* involved a claim for damages by a buyer from a seller who delivered goods which did not comply with a contractual warranty, and consequently it says little about the assessment of damages in this case. Prima facie measures are considered further below.

What was the content of the unperformed promise?

[57] The starting point of the plaintiffs' claim for damages was the defendant's promise, found in cl 15 of the Contract of Sale, that it would not remove the chattels from the mineral leases prior to payment in full of all monies payable under the Contract of Sale or otherwise only with the plaintiffs' consent. Counsel for the plaintiffs argued that, when the defendant removed the Removed Items from the mineral leases without the plaintiffs' consent, all monies payable under the Contract of Sale became payable in full. Clause 15 was said to be an 'accelerated payments clause' and it was argued that the unperformed promise at the time of termination of the Contract of Sale on 30 August 2018 was the defendant's failure to pay the $6 million accelerated by cl 15. Consequently, it was argued that the starting point for the measure of the plaintiffs' loss was that $6 million.

[58] Counsel for the defendant argued that cl 15 did not *oblige* the defendant to pay any money, it simply provided a circumstance in which the defendant could remove the chattels, the only remedy for breach being restraint of removal of the chattels or an award of damages suffered by the plaintiffs from the removal of the chattels.

[59] Before Southwood J, counsel for the plaintiffs argued that the Contract of Sale provided for a scenario in which a third party acquired the mineral leases and required the defendant to remove the chattels from

them, and under that scenario, cl 15 of the Contract of Sale operates for the benefit of the plaintiffs so as to accelerate all remaining payments in full for the chattels.[33] His Honour held that, when the Contract of Sale was executed, it was within the parties' contemplation that Britmar was likely to purchase the mineral leases and may require the defendant to remove the chattels within a reasonable period of time.[34] Further, Mr Xie (the guiding mind of the defendant) fully understood the consequences for the defendant if the defendant elected not to purchase the mineral leases or was unsuccessful in doing so and was aware that risk passed to the defendant upon execution.[35] His Honour held that, moreover, the proper construction of cl 15 requires regard to be had to the circumstances in which the clause came to be inserted, which were that it replaced in the draft contract a director's guarantee clause, providing a measure of security for the plaintiffs given that property did not pass until full payment of the purchase price and payment was by instalments over a number of years.[36] Mr Xie refused to execute a contract with a directors' guarantee, so cl 15 was inserted instead.[37] His Honour held that cl 15 is to be construed not only in the context of the shared understanding that the defendant may be required to remove the chattels, but also in the context of the security which was provided to the

33 Liability Reasons at [175].

34 Liability Reasons at [183].

35 Liability Reasons at [183].

36 Liability Reasons at [185].

37 Liability Reasons at [186].

plaintiffs by cl 15.[38] His Honour held that, in circumstances where the defendant had removed 54 items of the Plant and Equipment without notifying the plaintiffs, and had refused to take up alternative proposals for obtaining the plaintiffs' consent for the removal under cl 15, the plaintiffs were entitled to at least make a claim for the payment of the outstanding instalments for the Plant and Equipment.[39] His Honour held that making that claim was not a repudiation of the Contract of Sale, and his Honour expressly accepted the plaintiffs' submissions as to the construction of cl 15.[40]

[60] It follows that this Court has determined that cl 15 operates for the benefit and security of the plaintiffs as an 'accelerated payment clause', breach of which (by removal of some of the Plant and Equipment) entitled the plaintiffs to claim payment of the outstanding instalments of the contract price at least as they related to those chattels (the outstanding instalments for the Plant and Equipment).

[61] The submissions on behalf of the defendant that cl 15 was only a prohibition on removal of the chattels except in certain circumstances, did not impose an obligation on the defendant to pay any monies and that the only remedy for its breach was restraint of removal or damages for loss from removal flies in the face of the Supreme Court's findings about the effect of cl 15 in the liability trial.

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38 Liability Reasons at [188].

39 Liability Reasons at [194].

40 Liability Reasons at [194].

[62] There is nothing in the reasons of the Court of Appeal which would suggest that the Supreme Court's determination regarding cl 15 of the Contract of Sale was erroneous or even questionable. The Court of Appeal unanimously dismissed the defendant's appeal (save in relation to the drilling rig).[41] The Court referred to the parties' competing submissions about cl 15[42] and held that cl 15 gives the plaintiffs the power to demand payment in full or to otherwise give consent for the removal of the chattels, that by giving the plaintiffs the option of requiring the purchaser to pay for the chattels in full before removing them, cl 15 confirms that the risk of being unable to access and use the chattels is on the defendant, and that cl 15 would have no benefit to the plaintiffs (contrary to its terms) if the defendant could remove the chattels without payment.[43] The determination of the Court of Appeal is consistent with and does not in any way detract from the Supreme Court's determination in the liability trial regarding the effect and operation of cl 15.

[63] Consistently with the determination of the Supreme Court on the liability trial, I find that the defendant's removal of the Removed Items from the mineral leases without the plaintiffs' consent, without notifying the plaintiffs of its intention to do so, and without informing the plaintiffs of what items were removed and where they were taken to, was

41 Appeal Reasons at [113].

42 Appeal Reasons at [87]-[88].

43 Appeal Reasons at [89].

a breach of cl 2.7 and 15 of the Contract of Sale which enlivened the defendant's obligation under cl 15 to then pay in full 'all monies payable under' the Contract of Sale, namely the $6 million not paid by the defendant to the plaintiffs as contemplated by the Contract of Sale.

[64] I do not accept the submission on behalf of the defendant that the inclusion in the fifth schedule to the Contract of Sale of a clause providing that if the defendant is in arrears with payment of the licence fees instalment for more than 14 days, the plaintiffs may serve notice requiring the defendant to pay the whole balance of the purchase price and the licence fees in full within three months, is inconsistent with the construction of cl 15 as obliging the defendant to pay any monies. The two clauses serve different purposes and operate in different scenarios. The existence of one does not bear on the proper construction of the other. Ultimately, if cl 15 did not operate to oblige the defendant to pay the outstanding contract sum upon breach, it would not provide the plaintiffs with any security, let alone a security which a reasonable business person would have understood to be appropriate to replace a director's guarantee.

[65] I find that, at the date of termination of the Contract of Sale, the unperformed promise was the defendant's failure to pay that $6 million which had become due under cl 15, in exchange for ownership of the Camp and the Plant and Equipment.

[66] That $6 million was payable to the plaintiffs individually as follows:

(a) $1.5 million remaining of the purchase price for the Camp, payable to the first plaintiff pursuant to cl 2.3 of the Contract of Sale;

(b) $3.5 million in licence fees for the Camp, payable to the first plaintiff pursuant to cl 2.7(d) and the fifth schedule of the Contract of Sale; and

(c) $1 million remaining of the purchase price for the Plant and Equipment, payable to the second plaintiff pursuant to cl 2.4 of the Contract of Sale.

What was the value of the unperformed promise?

[67] Upon the plaintiffs' termination of the Contract of Sale on 30 August 2018 for the defendant's repudiation: (a) the first plaintiff was deprived of the $5 million owed to it, and the second plaintiff was deprived of the $1 million owed to it, by the defendant under cl 15; (b) each plaintiff retained its respective ownership of the Camp and the Plant and Equipment; and (c) each plaintiff regained its respective rights to possession which it had, by the Contract of Sale, conferred on the defendant.

[68] Counsel for the plaintiffs argued that the value of the unperformed promise is:

(a) the $6 million payable to them under cl 15; less

(b) the monies received from the sales of most of the Camp and the Plant and Equipment to Britmar and NRR; plus

(c) legal costs caused by the defendant's breach; plus

(d) interest, calculated on a cash flow basis taking account of the time at which these amounts were received or paid.

[69] Counsel for the defendant argued that the value of the unperformed promise is:

(a) the contract price of $7 million; less

(b) the market value on 30 August 2018 of all of the Camp and the Plant and Equipment;

(c) excluding legal costs as they were not caused by the defendant's breach; and

(d) excluding interest as the 'benefits' to the plaintiffs from termination of the Contract of Sale exceeded the benefits the plaintiffs would have received if the Contract of Sale had been performed.

Assessment of the plaintiffs' damages – interest claim

[70] In dollar terms, the most significant issue in this case is the plaintiffs' claim for interest. The plaintiffs' claim for damages has been particularised as the $6 million which would have been paid by the

defendant under the Contract of Sale, with interest at three alternative interest rates, calculated between 30 August 2018 and 10 October 2024 on a 'cash flow basis', with deductions for payments received from Britmar and NRR for their purchases of some of the Camp and Plant and Equipment, and with additions for payments made by the plaintiffs of legal costs related to the Federal Court proceedings. So calculated, the interest damages claimed range from $60,090 to $1,041,099 for the first plaintiff and $809,669 to $1,036,964 for the second plaintiff, totalling a loss to the plaintiffs together of between $869,759 and $2,077,063.

[71] Putting to one side the claim for interest, the plaintiffs' claim for damages is comprised of the following:

First plaintiff (Camp)

Amount owing under cl 15 on 30 August 2018	$5,000,000
Amounts paid by Britmar and NRR under asset sale deed	(6,000,500)
Legal costs in relation to Federal Court proceeding	174,929[44]
Total	**($825,571)**[45]

44 For the reasons set out in paragraph [149] below, this amount should be $185,457 (83.3% of $222,637).

45 For the reasons set out in footnote 44, that this amount should be $815,043.

Second plaintiff (Plant and Equipment)

Amount owing under cl 15 on 30 August 2018	$1,000,000
Amounts paid by Britmar under asset sale deed	(500,000)
Legal costs in relation to Federal Court proceeding	47,708[46]
Total	**$547,708**[47]

[72] Without interest, on the plaintiffs' case, the first plaintiff has not suffered loss from the defendant's breach of the Contract of Sale.

Interest on damages

[73] The plaintiffs' claim for interest was put on the basis of s 84 of the *Supreme Court Act 1979* (NT) ('SCA').[48] Section 84(1) provides that the Court may order that there be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of that sum for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

[74] The purpose of pre-judgment interest is to compensate a plaintiff for the loss or detriment which they have suffered by being kept out of their money during the applicable period.[49]

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46 For the reasons set out in paragraph [149] below, this amount should be $37,180 (16.7% of $222,637).

47 For the reasons set out in footnote 46, that this amount should be $462,820.

48 See Written Opening of the Plaintiffs for the trial on the assessment of damages dated 9 April 2024, [9]; oral submissions at Transcript, pp 178-179, 181; Plaintiffs' Further Outline of Submissions dated 16 April 2024, [29]-[30].

49 *Motor Accidents (Compensation) Commission v Motor Accidents Insurance Board (No 2)* [2023] NTSC 71 at [7] per Blokland J, citing *Territory Sheet Metal Pty Ltd v Australia and New Zealand Banking Group Ltd* (2010) 26 NTLR 1 at [192].

[75] Counsel for the plaintiffs argued that the plaintiffs are entitled to interest calculated in the way particularised because they were kept out of their money until payments were received from Britmar and NRR under sales entered into in mitigation of their loss.

[76] Section 84(1) of the SCA permits the Court to award interest *on* damages. It expressly, and only, permits the Court to order interest 'on the whole or any part of' 'the sum for which judgment is given'.

[77] If a plaintiff receives payments from a third party in mitigation of their loss, their damages are reduced accordingly. As set out in paragraph [45] above, a fundamental rule governing mitigation of damage is that a plaintiff cannot recover losses which are in fact avoided, whether or not there was an obligation to mitigate in that way.[50] It must follow that any judgment sum for damages is necessarily reduced by, and necessarily excludes, the amount of such payments. It must also follow that there is no power to order interest under s 84 of the SCA on an amount from which such payments are deducted in determining the judgment sum. The purpose of a statutory power to award interest like that contained in s 84 of the SCA is to compensate the plaintiff for being deprived, between the time the cause of action arose and the time of judgment, of

50 *Clark v Macourt* at [17]-[18] per Hayne J, citing *British Westinghouse Electric & Mfg Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 at 689 per Viscount Haldane LC.

the *damages* to which they were entitled.[51] Damages do not *include* amounts received in mitigation; damages are *reduced* by such amounts.

[78] The only authority relied on by the plaintiffs to support their calculation of interest was *Haines v Bendall* (1991) 172 CLR 60 ('*Haines v Bendall*'). In that case, the High Court allowed an appeal from a decision of the New South Wales Court of Appeal which had upheld a decision awarding damages for negligence at common law to a plaintiff employee. The trial court awarded statutory pre-judgment interest (under the New South Wales equivalent to s 84 of the SCA) on damages of $75,000 for past non-economic loss, taking no account of a sum of $49,037 which had been paid to the plaintiff as workers' compensation prior to judgment. The High Court held (at 72) that the amount of $49,037 should have been deducted from the sum of $75,000 in the interest calculation because the workers' compensation served the same purpose as the award of damages at common law and the plaintiff had enjoyment of the payment before judgment. The High Court held (at 73) that the appropriate interest calculation was to award interest on the $75,000 up to the date of the workers' compensation payment and interest on $75,000 less the $49,037 thereafter up to the date of judgment.

51 See, for example, *Haines v Bendall* (1991) 172 CLR 60 at 66-67 per Mason CJ, Dawson, Toohey and Gaudron JJ and the authorities there cited.

[79] Counsel for the plaintiffs argued that this award confirms that the plaintiffs are entitled, under s 84 of the SCA, to interest on the sum of $6 million which should have been paid under cl 15 of the Contract of Sale from the date of termination up to the dates of each of the Britmar and NRR payments and interest on the $6 million less those payments thereafter up to the date of judgment.

[80] *Haines v Bendall* does not support the plaintiffs' case. It does not concern an amount received by the plaintiff *in reduction of damages*. Rather, it concerns an amount received by the plaintiff which serves the same purpose as the award of damages. The High Court held (at 72) that, as the plaintiff had enjoyed the benefit of that amount before judgment, that enjoyment must be taken into account in ascertaining the amount on which interest should be awarded as compensation for being kept out of the money to which he was entitled by way of damages. It is clear that the calculation made by the High Court (at 73) did not reduce the overall award by the sum of $49,037, it only reduced the interest awarded. That is because the workers' compensation did not reduce the plaintiff's entitlement to damages. The workers' compensation legislation simply required the plaintiff worker to repay to their employer any workers' compensation which had been paid to them from any common law damages award they received.

[81] The case is not authority which supports the proposition that s 84 of the SCA permits statutory pre-judgment interest to be awarded on amounts

not recoverable as damages. The case is simply authority for the proposition that statutory pre-judgment interest on damages should not be awarded where the plaintiff has received a payment before judgment which serves the same purpose as the award of damages at common law, but does not reduce the award of damages. As the High Court observed (at 66-67), the rationale is that statutory pre-judgment interest is to compensate the plaintiff for being kept out of the damages to which they were entitled and should do no more than assist in the restoration of a plaintiff to the position they would have been in.

[82] An illustration of the effect and operation of a statutory provision like s 84 of the SCA is the case of *IM Properties Plc v Cape & Dalgleish* [1999] QB 297. The defendant accountants were found to have carried out negligent audits for the plaintiffs which led to fraudulent misappropriation of their funds by their chief executive. Before they commenced proceedings seeking damages, the plaintiffs recovered from the chief executive shares valued at £430,000. The trial judge assessed the plaintiffs' initial loss at £704,568, deducted the £430,000 and gave judgment for £274,568. He awarded interest under s 35A of the *Supreme Court Act 1981* (UK) of £249,876, which included interest from the date the cause of action arose on the £704,568 up to the date of recovery of the shares, and interest on £704,568 less £430,000 thereafter to the date of judgment. The defendant appealed and the High Court allowed the appeal, holding that s 35A did not empower a court to award interest on

a sum which had been recovered before proceedings were commenced, so the judge had erred in awarding interest on the £430,000 recovered by the plaintiffs before the action commenced. The High Court also held that s 35A did empower a court to award interest on a part-payment of damages made during the currency of the proceedings because the provision expressly provided therefor. (There is no such express provision in s 84 of the SCA.) Nevertheless, the express provision regarding part-payment of damages was held not to apply to recovery from a third party by way of mitigation.[52] As Waller LJ observed (at 306):

> ... [E]ven in the extreme case of recovery only being obtained from a third party some days prior to a hearing date, then if that recovery reduces the sum for which judgment can be obtained, I do not think that the court would have any power to award interest up to the date of recovery. ... [W]here recovery does reduce the sum for which a plaintiff can obtain judgment, then in my view the court would not have power to award interest up to the date of that recovery.
>
> ... Despite the injustice, on the wording of s 35A, in my view the judge did not have power to award interest up to the date of that recovery.

[83] Further, as Hobhouse LJ observed (at 308), insofar as they were able to recover money or its value from the chief executive, the plaintiffs had avoided their loss in fulfilling their duty to mitigate and (at 309) the trial judge was wrong to award interest under s 35A in respect of sums for which he was not giving judgment. The Court reduced the interest

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52 Ibid at 306 per Waller LJ (Robert Walker and Hobhouse LJJ agreeing), and at 307 per Hobhouse LJ.

awarded to interest on £274,568, being the difference between the initial loss to the plaintiffs and the recovered sum of £430,000.

[84] This case merely serves to illustrate the points made in paragraph [77] above, that there is no power to order statutory pre-judgment interest under s 84 of the SCA on an amount from which payments received in mitigation of damages are deducted in determining the judgment sum because the purpose of a statutory power to award interest like that contained in s 84 of the SCA is to compensate the plaintiff for being deprived, between the time the cause of action arose and the time of judgment, of the *damages* to which they were entitled and damages do not include amounts received in mitigation.

Interest as damages

[85] Given the operation and effect of s 84 of the SCA as set out above, the plaintiffs' claim for interest is properly characterised as a claim for interest *as* damages, not interest *on* damages.[53] The distinction between the two was expressed by Brennan and Deane JJ in *Hungerfords v Walker* (1988) 171 CLR 125 (at 152) as follows:

> There is, in our view, a critical distinction between an order that interest be paid upon an award of damages and an actual award of damages which represents compensation for a wrongfully caused loss of the use of money and which is assessed wholly or partly by reference to the interest which would have been earned by safe investment of the money or which was in fact paid upon borrowings which otherwise would have been unnecessary or retired. On the

53 See *Ajaimi v Giswick Pty Ltd (No 3)* (2022) 67 VR 529 at [28] per M Osborne J.

> one hand, there is no common law power to make an order for the payment of interest to compensate for the delay in obtaining payment of what the court assesses to be the appropriate measure of damages for a wrongful act. If such interest is to be awarded at common law, it must be pursuant to statutory authority. On the other hand, there is no acceptable reason why the ordinary principles governing the recovery of common law damages should not, in an appropriate case, apply to entitle a plaintiff to an actual award of damages as compensation for a wrongfully and foreseeably caused loss of the use of money.

[86] As this extract explains, where interest is awarded as damages, it is awarded not under statutory provision but at common law, and it is awarded for a proved loss.[54] To sustain a claim for interest as damages, the plaintiff's loss and its quantum are to be found as a fact and assessed on the evidence, not assumed from the withholding of the money and automatically assessed by the application of current market rates of interest.[55]

[87] Counsel for the plaintiffs initially expressly disavowed a claim for interest as damages under the principles enunciated in *Hungerfords v Walker*.[56] However, subsequently, counsel for the plaintiffs argued that a

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54 See *Northern Territory v Griffiths* (2019) 269 CLR 1 at [355] per Edelman J, citing *Hungerfords v Walker*; *Commonwealth v Chessell* (1991) 30 FCR 154 at 161-162 per Sheppard J and 163 per Wilcox J, citing *Hungerfords v Walker*; *Hobartville Stud Pty Ltd v Union Insurance Co Ltd* (1991) 25 NSWLR 358 at 364 per Giles J.

55 *Hobartville Stud Pty Ltd v Union Insurance Co Ltd* (1991) 25 NSWLR 358 at 364 per Giles J. See also *Commonwealth v Chessell* (1991) 30 FCR 154 at 161-162 per Sheppard J and 163 per Wilcox J. See also *Pooraka Holdings Pty Ltd v Participation Nominees Pty Ltd* (1991) 58 SASR 184; *Walker v FAI Insurance Ltd* (1991) Tas R 258; *State Bank of New South Wales v Yee* (1994) 33 NSWLR 618; *Commonwealth v Chessell* (1991) 30 FCR 154.

56 See Oral submissions at Transcript, p 179; Plaintiffs' Further Outline of Submissions dated 16 April 2024, [23]-[25].

claim for interest as damages (if that was what they had made) has been pleaded and proved.[57]

[88] The Further Amended Statement of Claim filed on 28 February 2024 pleaded as follows:

(a) Under the heading 'Loss and damage' – that on 11 September 2020, judgment in favour of the plaintiffs was delivered, with reasons finding that the plaintiffs' termination of the Contract of Sale was valid and the plaintiffs are entitled to have their damages for the defendant's repudiation assessed.

(b) Under the heading 'Damages for repudiatory breach of contract' – that the plaintiffs are entitled to be paid damages representing the loss suffered by the plaintiffs as a result of the defendant's breach, which is particularised as follows:

> The quantum of the plaintiffs' loss, and the basis upon which such loss is quantified, is set out in the expert report of Brian Morris ('Morris Report')...

(c) Under the heading 'The Camp and the Conveyor' – that the plaintiffs entered into the asset sales deeds with Britmar and the facts of Britmar's payments to the plaintiffs under those deeds are pleaded.

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57 See Plaintiffs' Further Outline of Submissions dated 16 April 2024, [33]-[35].

(d) Under the heading ‘Remedies’ – that the plaintiffs claim against the defendant: damages as set out in the Morris Report; interest; and costs.

[89] Theoretically perhaps, the pleading that the plaintiffs claim damages as set out in the Morris Report could be construed as a claim for interest as damages in the sense that the Morris Report calculates the plaintiffs’ claim with interest. However, there is no pleading of any actual loss to the plaintiffs as a consequence of being kept out of the $6 million. There is no plea, for example, of material facts to the effect that, as a consequence of being kept out of the money, the plaintiffs had to source money through borrowing at specific rates of interest, or were unable to repay debt at a specific rate of interest, or had to spend money they would otherwise have invested, whether into their businesses or elsewhere, at specific rates of interest.

[90] The only thing that might be considered to be a plea or evidence of a loss of the use of money such as to found a claim for interest as damages is contained in the evidence of Brian Morris.

[91] Mr Morris is a chartered accountant in the business of providing accounting and valuation services. He holds qualifications in accountancy, law, arbitration and mediation and has performed forensic accounting investigations and reports for courts for decades.[58]

58 Transcript, pp 75-77; Exhibit P3, Appendix 11.

[92] Mr Morris was asked by the plaintiffs' solicitors to calculate the difference between the actual cash flows of each plaintiff (comprising the initial sum received under the Contract of Sale, plus the actual amounts paid by Britmar and NRR under the asset sales deeds, less the actual amounts of legal costs paid by each plaintiff) and the hypothetical cash flows that would have been received if the defendant had performed its obligations under the Contract of Sale, and he did so, yielding the sums set out in paragraph [71] above.[59]

[93] Mr Morris was then asked by the plaintiffs' solicitors how he would measure the plaintiffs' losses based on the cash flows he had calculated.[60] He responded that the plaintiffs' losses should be calculated as the difference between the cash flows that would have been received if the defendant had performed its obligations under the Contract of Sale and the cash flows that the plaintiffs have received and will receive under the asset sales deeds entered in order to mitigate the loss.[61] He was then asked how he would 'calculate the plaintiffs' losses based on a claim for loss of use of money from 30 August 2018 to 10 October 2024'.[62] He responded that, at all relevant times, the amounts that the plaintiffs were entitled to receive from the defendant exceeded the amounts that the plaintiffs received in mitigation, and consequently, the

59 Exhibit P3, [2.1]-[2.14], [5.7]-[5.8], [6.6]-[6.7]. The payment times under the Contract of Sale was varied by the parties by a deed of variation executed on 28 September 2017 (Ex D1).

60 Exhibit P3, [2.15].

61 Exhibit P3, [2.16]-[2.17].

62 Exhibit P3, [2.18].

plaintiffs have been denied the opportunity to make use of the money that they were entitled to receive from the defendant pursuant to the Contract of Sale.[63]

[94] Mr Morris calculated the plaintiffs' loss of use of money measured by way of simple interest on the sums outstanding from time to time, on the basis of three potential interest rates which he was asked to adopt, namely 10% per annum (which is a rate referred to in the Contract of Sale for late payments of instalments), the Supreme Court's pre-judgment interest rates and the Supreme Court's post-judgment interest rates.[64] Those calculations yielded the sums referred to in paragraph [70] above.

[95] In cross-examination, Mr Morris agreed that he had not been given any instructions or information or documents about the actual cost of finance to either plaintiff, and he agreed that none of the interest rates he had been asked to apply would reflect that actual loss to the plaintiffs of not having the funds the defendant had contracted to pay.[65] He said that the manner in which the funds would be utilised is possibly relevant if the focus was what has been lost by the plaintiffs under the principle in *Hungerfords v Walker*.[66] He said that the 10% interest rate was a right

63 Exhibit P5, [2.19]-[2.21]; [2.25]-[2.26].

64 Exhibit P5, [2.22]-[2.23]; [2.27]-[2.28].

65 Transcript, p 106.

66 Transcript, p 108.

under the Contract of Sale so 'that's their loss of use'.[67] In re-examination, Mr Morris said that the particular financial arrangements or funding arrangements of the plaintiffs were not relevant to the interest calculations he made in his report.[68] Mr Morris's opinion was that a cash flow approach is the most appropriate way to measure the plaintiffs' loss because it takes into account the timing of the monies coming in and the monies going out.[69]

[96] Even if that is so from an accounting or commercial perspective, Mr Morris's evidence is insufficient evidence upon which to establish a claim for interest as damages under the principles in *Hungerfords v Walker*, which Mr Morris himself expressly disavowed. Effectively, the plaintiffs' claim for interest is for a loss: (a) *assumed* from the withholding of the money, not *proven* from evidence establishing the use to which the plaintiffs would have put the money; and (b) quantified by the application of various *possible* rates of interest which bore no established relation to the *actual* cost to the plaintiffs of being held out of the money.

Findings on interest claims

[97] It must follow from the above that the first plaintiff has not been proved to have suffered recoverable loss from the defendant's breach of the

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67 Ibid.

68 Transcript, p 111.

69 Transcript, pp 113-114.

Contract of Sale. Even if the first plaintiff's share of the legal costs are included as a loss to the first plaintiff, the first plaintiff has recovered more from the payments received from Britmar and NRR for parts of the Camp than would have been paid by the defendant for the Camp under the Contract of Sale. Consequently, the first plaintiff is only entitled to nominal damages.

[98] The position of the second plaintiff is different. Whether or not the second plaintiff's share of the legal costs are included as a loss to the second plaintiff, it has recovered less from the payments received from Britmar for some of the Plant and Equipment than would have been paid by the defendant for the Plant and Equipment under the Contract of Sale. As set out above, I have found that the second plaintiff cannot recover interest as damages as quantified by Mr Morris.

[99] However, that is not the end of the second plaintiff's claim for damages. The plaintiffs' pleaded case was for damages as set out in the Morris Report.[70] As set out in paragraph [93] above, Mr Morris expressed the opinion in his report that the plaintiffs' losses should be calculated as the difference between the cash flows that would have been received if the defendant had performed its obligations under the Contract of Sale, and the cash flows that the plaintiffs have received and will receive under the asset sales deeds entered in order to mitigate the loss. The Morris Report set out what those differences were. For the second

70 Further Amended Statement of Claim, [72].

plaintiff, the difference calculated was $547,708. While Mr Morris went on to add interest, which I have disallowed, I am satisfied that the plaintiffs have pleaded a claim for damages for the second plaintiff of $547,708. This amount comprises the amount owing to the second plaintiff under cl 15 of the Contract of Sale, less the amounts received from Britmar under the asset sale deeds, plus the legal costs incurred by the second plaintiff.

[100] I will now address that claim.

Assessment of second plaintiff's damages

[101] The defendant's case asserts that the prima facie measure of damages in s 52(3) of the SGA operates in respect of the plaintiffs' claim and, on that measure, no damages have been proven. I will address that position first.

Prima facie measures of damages

[102] Prima facie measures of damages have been explained as bases of assessment for certain breaches of contract developed over 150 years of case law on damages, which represent the conventional positions for courts to take in the application of the ruling principle.[71] The best known examples of prima facie measures are enshrined in the sale of goods

71 JW Carter, W Courtney and GJ Tolhurst, 'Issues of Principle in Assessing Contract Damages' (2014) 31 *Journal of Contract Law*, 171 at 185.

legislation, but they are repeated throughout the law of contract.[72] The prima facie measures standardise the evidence required to establish damages entitlements in terms which minimise and regularise proof.[73] The prima facie measures assume that certain steps have been taken by the promisee, such as going into the market.[74] Because the position assumed under a prima facie measure may be different from the actual position of the promisee, the measure operates for good or ill, and tensions arise whenever a promisee's actual loss is shown to be different from that addressed under the prima facie measure.[75]

[103] Where a prima facie measure is applicable on the basis of an available market, the onus is on the plaintiff to establish the relevant market price.[76] If a prima facie measure is applicable, but the promisee seeks to recover a different loss, the onus is on the promisee to displace the measure, and prove that the loss claimed arose naturally, or was within the contemplation of both parties.[77] Whether or not prima facie measures

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72 Ibid.

73 Ibid.

74 Ibid.

75 Ibid, at 186.

76 JW Carter, *Carter's Breach of Contract*, 2nd ed, 2018, LexisNexis Butterworths, [13-04], p 596.

77 Ibid, pp 596-697. See also JW Carter, W Courtney and GJ Tolhurst, 'Issues of Principle in Assessing Contract Damages' (2014) 31 *Journal of Contract Law*, 171 at 197: 'It goes without saying that prima facie measures may be displaced by the facts'. It is expressly acknowledged in *Clark v Macourt* that the prima facie measure can be displaced: see at [28], [30] per Crennan and Bell JJ, at [107], [132] per Keane J. See also at [68] per Gageler J.

embody conclusions about remoteness and mitigation, they do not prevent the recovery of additional losses.[78]

[104] The defendant's principal case was that the prima facie measure contained in s 52(3) of the SGA applied, the plaintiffs had not proved the market price of the Plant and Equipment on 30 August 2018 so they had not established loss, and the plaintiffs had not displaced the prima facie measure because they had not proved that there was no market for the Plant and Equipment on 30 August 2018.

Is s 52(3) of the SGA applicable?

[105] The SGA is divided into Parts which relate, *inter alia*, to preliminary matters such as the application of the SGA and interpretation (Part I), rights of an unpaid seller against the goods (Part V), and actions for breach of the contract (Part VI), which is divided into remedies of the seller (Div 1) and remedies of the buyer (Div 2).

[106] Section 4(2) of the SGA provides that the rules of the common law, save insofar as they are inconsistent with the express provisions of the SGA, shall continue to apply to contracts for the sale of goods.

[107] Section 6(1) of the SGA provides that a contract of sale of goods[79] is a contract whereby the seller transfers or agrees to transfer the property in

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78 JW Carter, W Courtney and GJ Tolhurst, 'Issues of Principle in Assessing Contract Damages' (2014) 31 *Journal of Contract Law*, 171 at 199.

79 The term 'goods' is defined to include all chattels personal other than things in action and money, and to include emblements and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale: s 5(1), SGA. No party

goods to the buyer for a money consideration called the price. Section 6(4) provides that where, under a contract of sale, the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. Given that the Contract of Sale provided that property in the Camp and the Plant and Equipment was not to pass until the respective Settlement Dates, when the defendant was due to make the final payments of the purchase prices for the Camp and the Plant and Equipment, the Contract of Sale was an agreement to sell within the meaning of the SGA.

[108] Section 6(5) provides that an agreement to sell becomes a sale when the time elapses or the conditions are fulfilled, subject to which the property in the goods is to be transferred.

[109] The remedies of the seller[80] in Div 1, Part VI comprise an action for the price under s 51 and an action for damages for non-acceptance of the goods under s 52.[81] Section 52 applies where the buyer[82] wrongfully neglects or refuses to accept and pay for the goods (s 52(1)).

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suggested that the Camp and Plant and Equipment were 'things attached to or forming part of the land'.

80 The term 'seller' is defined to mean a person who sells or agrees to sell goods: s 5(1), SGA.

81 Despite being located in Div 1, headed 'remedies of the seller', s 53 refers to an action for damages by the buyer for non-delivery of the goods.

82 The term 'buyer' is defined to mean a person who buys or agrees to buy goods: s 5(1), SGA.

[110] Counsel for the defendant argued that, as the defendant had refused to accept and pay for the Camp and the Plant and Equipment, ss 52(3) applied to the plaintiffs' claim for damages for the defendant's breach of the Contract of Sale. Counsel for the plaintiffs argued that the defendant had accepted the goods and refused to pay for them, so s 52(3) was not engaged.

[111] The word 'accept' is not a defined term in the SGA. However, s 38 of the SGA provides that the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them. The term 'delivery' is defined to mean voluntary transfer of possession from one person to another (s 5(1)).

[112] Counsel for the plaintiffs argued that the defendant accepted the Camp and the Plant and Equipment when possession passed on execution of the Contract of Sale. Counsel for the defendant argued that the defendant did not accept the goods at that stage, but only took possession, ie delivery, of them. Counsel for the defendant went on to argue that the defendant did not accept the goods at any point thereafter up to the plaintiffs' termination of the Contract of Sale because of: (a) 'the Britmar problem'; and (b) the defendant's position, as expressed in correspondence and subsequently in its defence to the Supreme Court

proceedings, that it had not received what it had contracted to receive under the Contract of Sale (namely, quiet possession without interference by Britmar).

[113] On the basis of the following facts, I find that the defendant did accept the Camp and the Plant and Equipment within the meaning of s 38 of the SGA, and did so upon execution of the Contract of Sale.

[114] On 27 March 2017, Mr Xie (the guiding and directing mind of the defendant) went to the WDR Mine, stayed at the Camp and inspected the mineral leases.[83] On 6 April 2017, Mr Xie and Mr Oldfield reached an in-principle agreement as to the price for the Camp and the Plant and Equipment.[84] On 20 July 2017, Mr Oldfield sent Mr Xie a draft contract of sale which included a schedule listing the Plant and Equipment.[85] On 16 August 2017, they executed the Contact of Sale, at which time the defendant took delivery and possession of the Camp and the Plant and Equipment, and all risk in relation thereto, passed to the defendant under the licence in cl 2.7.[86] On that date, the defendant took delivery of the goods (ie the Camp and the Plant and Equipment) within the meaning of the SGA.

[115] On 3 November 2017, some two and a half months after the Contract of Sale was executed and the defendant took delivery, Britmar raised with

83 Liability Reasons at [33].

84 Liability Reasons at [34].

85 Liability Reasons at [35].

86 Liability Reasons at [58].

Mr Oldfield Britmar's wish for some of the Plant and Equipment to be removed from the mineral leases and Mr Oldfield informed Mr Xie of this.[87] On 27 November 2017, Britmar became the owner of the mineral leases,[88] although the transfer was not registered until 18 December 2017.[89] On 30 November 2017, Mr Xie asked if the removal could be delayed until after the 'wet season' and committed to having all the Plant and Equipment removed from the mineral leases by the end of March 2018.[90] Britmar agreed to that extension for the removal of the Plant and Equipment and said that there was no urgency for the removal of the Camp.[91] Despite his commitment, Mr Xie did not take steps for the removal.[92] On 16 February 2018, Britmar's solicitors wrote to Mr Oldfield and Mr Xie demanding the removal of the Plant and Equipment and the Camp by 28 February 2018.[93]

[116] By the execution of the Contract of Sale after the inspection by Mr Xie, the defendant took delivery of the goods within s 38 of the SGA by taking possession of them. From that time, the risk of the goods was the defendant's. By accepting Britmar's requirements for the goods to be removed and committing to removing them, the defendant intimated to the plaintiffs that it had accepted the goods within s 38 of the SGA. By

87 Liability Reasons at [65].

88 Liability Reasons at [71].

89 Liability Reasons at [80].

90 Liability Reasons at [76].

91 Liability Reasons at [78].

92 Liability Reasons at [81].

93 Liability Reasons at [82].

the commitment to their removal, the defendant accepted responsibility for them, at least up to 28 February 2018. In that period between 16 August 2017 and 28 February 2018, the defendant retained possession of the goods and did not intimate to the plaintiffs that it had rejected them within s 38 of the SGA. That period of six months and 12 days was a reasonable time within which to reject the goods. Even after Britmar's demand of 28 February 2018, the defendant continued to indicate that it would remove the goods from the mineral leases, thereby continuing to accept responsibility for them.[94]

[117] Further, between late May and early July 2018, the defendant removed the Removed Items from the mineral leases without giving notice to the plaintiffs and refused to inform the plaintiffs of the items it removed or their new location.[95] Thus, after the goods were delivered to it, the defendant did acts in relation to the goods which are inconsistent with the ownership of the plaintiffs within s 38 of the SGA.

[118] Consequently, I find that the defendant had, prior to the termination of the Contract of Sale, accepted the Plant and Equipment and the Camp within the meaning of s 38 of the SGA.

[119] It must follow that the defendant did not wrongfully neglect or refuse to *accept <u>and</u> pay for* the goods within s 52(1) of the SGA, with the

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94 Liability Reasons at [85], [91], [96].

95 Liability Reasons at [154].

consequence that s 52(3) of the SGA is not applicable to the plaintiffs' claim for damages.

Prima facie measure at common law?

[120] Counsel for the defendant argued, on the basis of the observations in *Clark v Macourt*, that the prima facie measure applied to this case under the common law, as well as under s 52(3) of the SGA. A difficulty for the defendant in this regard is that it did not plead any prima facie measure of damages outside of s 52(3) of the SGA.

[121] In any event, I reject the defendant's submission that the observations of Keane J in *Clark v Macourt* at [109]-[110] (see paragraph [55] above) require the application of the prima facie measure to this case. All I take his Honour to be saying is that the desirability of finality of litigation, and certainty of commercial dealings, support the application of the prima facie measure in many cases. That is confirmed by his Honour's citation of *Johnson v Perez* (1988) 166 CLR 351 at 355-356. That case was an action in negligence for damages for personal injuries. On the pages cited by Keane J in *Clark v Macourt*, Mason CJ observed that there is 'a general rule' that damages for torts or breach of contract are assessed as at the date of breach or when the cause of action arises, but the rule is not universal and it must give way in particular cases to solutions best adapted to giving 'an injured plaintiff that amount in damages which will most fairly compensate him for the wrong he has

suffered'. Mason CJ noted the exception to the general rule in assessing damages for permanent injury, which are assessed at the time of trial rather than the date of accident in order to insulate plaintiffs from inflation. His Honour said that the general rule (that damages are assessed as at the date of breach or when the cause of action arose) has been applied more uniformly in contract than in tort, but even in contract cases courts depart from the general rule whenever it is necessary to do so in the interests of justice.

[122] For the reasons set out below, in the particular combination of the facts and circumstances in this case, the prima facie measure of damages (comprising the difference between the contract price and the market price at the time of breach of the Contract of Sale) is displaced as the measure of damages which would compensate the plaintiffs (specifically, the second plaintiff) in accordance with the ruling principle.

[123] First, in assessing damages for breach, the prima facie measure looks to the market value of the goods at the time provided for acceptance of the goods. However, under the Contract of Sale, the Plant and Equipment was accepted by the defendant upon execution of the Contract of Sale on 16 August 2017, some 12 months prior to the breach and termination of the Contract of Sale. The prima facie measure is directed to the situation (relevantly) where the seller of goods does not receive the contract price and retains possession of the goods and assumes coincidence between

the two. That is not the case here where the seller of the goods received part but not all of the contract price and conferred possession, but not ownership, of the goods on the buyer when the contract was executed.

[124] Second, the Plant and Equipment were accepted by the defendant where they were located, which was on mineral leases belonging to a third party in a remote location. Possession and removal of the goods from the mineral leases were therefore subject to the rights and obligations of the owner of the mineral leases (ultimately, Britmar) and the provisions of the *Mining Management Act*. The second plaintiff's capacity to resume full possession of the goods and put them into the market was necessarily curtailed.

[125] Third, generally speaking, the Plant and Equipment comprised items which had been in place for use in a mining operation since 2014. Many of the items were bulky, and were difficult and expensive to transport from their remote location on the mineral leases to locations where buyers might be found.

[126] Fourth, in July 2018, the defendant removed the Removed Items from the mineral leases and retained possession of them at a location not disclosed to the second plaintiff until 30 August 2018. Around half of those were recovered by the second plaintiff in February 2021, but the remainder remain where the defendant took them.

[127] These matters (the second, third and fourth just referred to) effectively denied the existence of an available market for the Plant and Equipment because buyers and sellers were not procurable at once and within a reasonable distance in sufficient numbers to constitute the relationship of supply and demand and the consequent establishment of a price.[96]

[128] Fifth, the sale of almost all of the Plant and Equipment that remained on the mineral leases to Britmar in situ and for use in a mining operation was a commercially rational way for the second plaintiff to mitigate its losses arising from the defendant's breach of the Contract of Sale and the second plaintiff received monies from that sale paid between July 2019 and January 2024. In accordance with the principles set out above, the second plaintiff cannot recover damages for its losses avoided by that sale. The monies received from Britmar under the G&C Asset Sale Deed cannot be adopted as a proxy for the market price of the Plant and Equipment in the way done in *Clark v Macourt* because Britmar purchased only around half of the Plant and Equipment as that was all that was on the mineral leases after the defendant removed the Removed Items.

[129] Consequently, I find the prima facie measure to be displaced, and I reject the defendant's arguments that the second plaintiff's claim for damages must fail because: (a) damages are to be assessed on the basis

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96 See, for example, *Joseph & Co Pty Ltd v Harvest Grain Co Pty Ltd* (1996) 39 NSWLR 722 at 726-727 per Moore DCJ, citing *Thompson (WL) Ltd v Robinson (Gunmakers) Ltd* [1955] Ch 177 at 187 per Upjohn J.

of the market price of the Plant and Equipment as at 30 August 2018, which has not been proved by the plaintiffs; or (b) the plaintiffs have failed to prove that there was no available market on that date.

The proper approach to assessing the second plaintiff's damages

[130] As set out in paragraphs [65] to [66] above, the starting point for the assessment of the second plaintiff's damages as the value of the unperformed promise is the $1 million payable to the second plaintiff under cl 15 of the Contract of Sale.

[131] Consequent upon the principle set out in paragraph [45] above, and my findings in paragraphs [98], [119] and [129] above, it is necessary to deduct the amounts actually paid by Britmar to the second plaintiff under the G&C Asset Sale Deed for the items of Plant and Equipment it purchased. The principal amount paid by Britmar was $500,000. In addition, interest totalling $6,765 (comprising $1,959, $1,142 and $3,664) was paid by Britmar.[97]

[132] Other interest payable by Britmar to the second plaintiff under the G&C Asset Sale Deed for late payments of the purchase price was not paid. That comprised $5,252 on the payment due in 2023,[98] and an unidentified amount on the payment due in 2024.[99] The second plaintiff had not, at the time of trial, formally pursued Britmar for that

97 Affidavit of Vivian Clarence Oldfield, 5 December 2023, [38.2], [38.3], [41].

98 Affidavit of Vivian Clarence Oldfield, 5 December 2023, [41].

99 Transcript, p 54.

outstanding interest, although it had not given up on it being paid.[100] These amounts are not required to be deducted from damages on the mitigation principle that a plaintiff may not recover losses actually avoided because, up to the date of trial, they were not losses actually avoided. Nor are they required to be deducted from damages on the basis of the second plaintiff's duty to mitigate its loss. This is so for two reasons. First, the defendant has not pleaded that the second plaintiff failed to mitigate its loss, meaning the issue does not arise. Secondly, the second plaintiff's duty to mitigate its losses is only to act reasonably and the standard of reasonableness is not high in view of the fact that it is the defendant who is in the wrong.[101] The duty did not extend to commencing what would undoubtedly be relatively expensive litigation against Britmar to recover a relatively small sum of money.

[133] Just as the amounts actually paid by Britmar to the second plaintiff should be deducted from the second plaintiff's damages, so too should any other amounts actually received by the second plaintiff on account of items of Plant and Equipment it sold. The second plaintiff sold to RRT four categories of Plant and Equipment in exchange for reduction in the cost of transportation of items of Plant and Equipment charged to the plaintiffs. The cost reductions were: $17,000 (exc GST) for a truck, $30,000 (exc GST) for three modular buildings, $25,000 (exc GST) for a

100 Transcript, p 56.

101 *Segenhoe v Akins* [1990] 29 NSWLR 569 at 582-583 per Giles J and the authorities there cited.

fuel pod, and $1,500 (exc GST) for a communications tower.[102] Those amounts also comprise losses actually avoided by the second plaintiff and the second plaintiff's damages must be reduced accordingly by a total of $73,500 (exc GST).

[134] Because the second plaintiff retained ownership of the Plant and Equipment to which the $1 million payable under cl 15 of the Contract of Sale related, it is necessary to consider the value (if any) of the Plant and Equipment not purchased by Britmar or RRT, and whether there should be a deduction from the $1 million to reflect in the assessment of damages that the second plaintiff retained ownership of those items. This is dealt with from paragraph [136] below.

[135] Consistent with the principle set out in paragraph [43] above, it is necessary to consider whether the $47,708 in legal costs apportioned to the second plaintiff in the plaintiffs' damages claim comprises damages that arose naturally, that is, according to the usual course of things from the defendant's breach of contract, or damages as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of the breach. This is dealt with from paragraph [147] below.

Plant and Equipment owned by the second plaintiff

[136] The Plant and Equipment not purchased by Britmar or RRT consisted of:

102 Transcript, pp 58-59.

(a) the six fuel pods transported to Mataranka and then to Alice Springs, being one x 20 feet (or five metres long) and five x 40 feet (or 12 metres long);

(b) the 24 Removed Items recovered by the second plaintiff and transported to yards in Alice Springs ('Table 4 Items');[103] and

(c) the 28 Removed Items remaining at the locations to which they were taken by the defendant.

[137] As regards the fuel pods and the Table 4 Items, Mr Oldfield deposed that the second plaintiff purchased those items of Plant and Equipment on 7 September 2016, then located on the mineral leases, for the amounts attributed to them in the Pickles Invoice.[104] Those amounts totalled from $106,863.62 to $108,499.98, the difference being attributable to items with the same descriptor in the Pickles Invoice having different amounts. After deducting the cost of transporting those items from where the defendant had taken them to the yards in Alice Springs ($26,778.51), the Pickles Invoice prices totalled from $80,085.11 to $81,721.47 (exc GST). Mr Oldfield deposed that it was his expectation that, during the almost two years between the second plaintiff's purchase and the date of breach of the Contract of Sale, the second plaintiff had not performed any works on the fuel pods and the Table 4 Items which

103 See Table 4, Affidavit of Vivian Clarence Oldfield, 5 December 2023. I note that Table 4 includes the six fuel pods, but I have separated them out given the separate reference to them earlier in these reasons.

104 Affidavit of Vivian Clarence Oldfield, 5 December 2023, Table 4 and [98].

could have increased their value, and they would have deteriorated in condition as they were left exposed to the weather and they were not maintained in any way, with the consequence that their value would have declined below the prices in the Pickles Invoice.[105]

[138] As regards the fuel pods, counsel for the defendant argued that each fuel pod had a value of $25,000 because that was the amount credited to the RRT invoice for one of the 40 foot fuel pods it took in exchange for transportation costs. Consequently, it argued that the six fuel pods had a total value of $150,000.[106]

[139] As regards to the Table 4 Items, counsel for the defendant argued that each of the Table 4 Items had a value that was 370% of the amount set out in the Pickles Invoice because that was the average difference between the amounts charged in the Pickles Invoice and the amounts credited to the RRT invoice for the truck, the three modular buildings and the communications tower. Counsel for the defendant argued therefore that the Table 4 Items had a value of around $300,000.

[140] In cross-examination, Mr Oldfield rejected the proposition that the amounts attributed in the RRT invoice to the 'modular buildings' of $10,000 was effectively five times the amounts attributed to 'shipping container buildings' in the Pickles Invoice ($1,818), saying that some of

105 Affidavit of Vivian Clarence Oldfield, 5 December 2023, [99].

106 The amount of the deduction put in argument was $175,000 for the seven fuel pods, but that was in error because the argument also deducted from the calculation of damages the amount effectively paid by RRT for the items referred to in paragraph [133] above, which included $25,000 for one of the seven fuel pods.

the buildings were in better condition and had a higher value than others, and RRT would have chosen the buildings that were in the best condition.[107] When shown that the truck acquired by RRT for $17,000 was priced at $5,000 in the Pickles Invoice, Mr Oldfield said that he took what he was offered by RRT for it, and that price was for the item located in RRT's yard.[108] As for the fuel pods, which were all priced at $8,636.36 in the Pickles Invoice, one of which was exchanged with RRT for $25,000, Mr Oldfield said again that RRT would have picked out the best of the seven tanks, only some of them had pumping units and some had dirty fuel in them.[109] Mr Oldfield agreed that the amount attributed to the communications tower in RRT invoice was around $100 more than the price in the Pickles Invoice.[110] Mr Oldfield agreed that the Table 4 Items (including the six fuel pods) had been in Alice Springs since February 2021, he had not done anything with them, had not sold or rented them, and it was his intention to do that once the litigation concludes.[111]

[141] In re-examination, Mr Oldfield said that[112] his expectations about selling or renting the Table 4 Items was that some of them, such as the vehicles, would be 'just trashed', some of the equipment would have reached the

107 Transcript, pp 59-60.

108 Transcript, p 60.

109 Transcript, p 60.

110 Transcript, p 61.

111 Transcript, p 62.

112 Transcript, pp 71-72.

end of its economic life and someone may buy it if they have a use for it, but the mine shut in 2014 and some of the equipment has not operated since then and has been sitting idle until the present time. Mr Oldfield said that leaving machinery in the elements all that time causes them to suffer break downs in the seals and contamination of the oils, hydraulics, filters and intakes, so that the chances of someone wanting to buy them can be remote unless they have a specific need and they are really desperate and want to use them for parts. He said that he did not have any great expectations for them. He said that he had had Pickles, Lloyds and Hassels auctioneers come and look at them and tell him these items have no commercial value. He said that there will be a range of where it sits, but some of them are basically a burden.

[142] I accept Mr Oldfield's evidence as set out above regarding the condition of the Table 4 Items, their deterioration and their consequent diminution in value from the starting point of the prices set out in the Pickles Invoice. I accept that Mr Oldfield's evidence explains why the amounts credited to the RRT invoice cannot be taken to represent the value of the other Table 4 Items, given that the items varied in condition, RRT would have chosen the items in the best condition, and the amounts were a credit against transportation costs of items already at RRT's yard in Mataranka rather than amounts paid upon a sale in an open market. I accept that Mr Oldfield's evidence about the effects of weather and lack of maintenance since 2014 also explains why the eight vehicles, three

items of machinery (including the drilling rig[113]), 11 shipping container buildings, six fuel pods, a communications tower and eight wheelie bins and four spill kits in the Table 4 Items had very little value, specifically less than the $26,778.51 in transportation costs paid by the second plaintiff to retrieve them, by the date they were returned to the second plaintiff's physical possession in February 2021. I consider that to be the relevant date for the purpose of assessing whether a deduction should be made on their account from the second plaintiff's damages because the defendant had removed them from the mineral leases in breach of the Contract of Sale, had refused to tell the second plaintiff of their location and did not do so until after the plaintiffs commenced proceedings in the Supreme Court, and had not taken any steps thereafter to return the Removed Items to the second plaintiff's physical possession.[114] I find, on the balance of probabilities, that the Table 4 Items (including the six fuel pods) were, at that date, of no material value after deducting the transportation costs.

[143] Consequently, no deduction to the second plaintiff's damages is necessary or appropriate to reflect the second plaintiff's retention of ownership and possession of the Table 4 Items.

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113 There was no evidence before me regarding the value or condition of the drilling rig distinct from the other Table 4 Items.

114 As referred to above, assessment of damages as at the date of breach is a general rule which may be displaced whenever it is necessary to do so in the interests of justice: *Johnson v Perez* (1988) 166 CLR 351 at 357 per Mason CJ; *Vieira v O'Shea* [2012] NSWCA 21 at [45] per Basten and Meagher JJA (Handley AJA agreeing); *Ng v Filmlock Pty Ltd* (2014) 88 NSWLR 146 at [56] per Gleeson JA (Tobias AJA agreeing).

[144] As regards the 28 Removed Items, those items remained at the locations at Mataranka, Pine Creek and Darwin to which the defendant removed them. They had not been in the physical possession of the second plaintiff since May to July 2018 and were in locations apparently the subject of control by entities other than the plaintiffs, for example, the yards of RRT or the Frances Creek Mine in Pine Creek. No steps had been taken by the defendant to place these 28 Removed Items into the second plaintiff's physical possession. The Pickles Invoice amounts for these 28 Removed Items totalled between $89,650 and $93,050 (inc GST).

[145] I consider that no deduction to the second plaintiff's damages is necessary or appropriate to reflect the second plaintiff's retention of ownership and right to possession of these 28 Removed Items because they were not, from late May to early July 2018, in the second plaintiff's physical possession as a consequence of the defendant's conduct in breach of the Contract of Sale. In any event, I infer, on the balance of probabilities, from the evidence relating to the Table 4 Items that the same conclusions would apply equally to these 28 Removed Items such that they were, by February 2021, of no material value after deducting likely transportation costs to relocate them to the second plaintiff's physical possession.

[146] To be clear, I reject the submissions put on behalf of the defendant that the second plaintiff's claim for damages must fail because the plaintiffs

failed to prove the value of the Removed Items at the date of termination of the Contract of Sale.

Legal costs

[147] Mr Oldfield deposed that nine invoices totalling $244,901.06 (inc GST) were issued for legal costs payable by the plaintiffs in connection with the Federal Court proceedings commenced by Britmar and the negotiation of the resolution of those proceedings and the sales under the asset sales deeds.[115] Those legal costs were paid by the second plaintiff on behalf of the plaintiffs.[116]

[148] In the Morris Report, the legal costs were allocated between the plaintiffs with $174,929 (exc GST) allocated to the first plaintiff and $47,708 (exc GST) allocated to the second plaintiff. The allocation of the legal costs between the plaintiffs was made on the basis of the relative proportionate entitlement of each plaintiff to the $6 million owing under the Contract of Sale, namely the first plaintiff's entitlement of $5 million and the second plaintiff's entitlement of $1 million.[117] On that basis, Mr Morris arrived at relative percentages of 78.6% for the first plaintiff and 21.4% for the second plaintiff.[118]

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115 Affidavit of Vivian Clarence Oldfield,5 December 2023, [31]-[34], Annexure VCO7.

116 Ibid, [35].

117 Exhibit P3, [4.17]-[4.18].

118 Ibid.

[149] The defendant did not take issue with the allocation of the legal costs as between the two plaintiffs. On the basis of Mr Morris's evidence, I accept that that is a reasonable approach to take to the apportionment of the legal costs incurred by the plaintiffs. However, I do not accept the percentages arrived at by Mr Morris taking that approach. By my calculations, the relative percentages are 83.3% for the first plaintiff[119] and 16.7% for the second plaintiff[120]. Applying those percentages to the total of $222,637, the first plaintiff's share of the legal costs are $185,457 and the second plaintiff's share of the legal costs are $37,180.

[150] Counsel for the defendant argued that there was insufficient evidence to show a causal connection between the incurrence of the legal costs and the defendant's breach of the Contract of Sale.

[151] The originating application was filed in the Federal Court on 15 March 2019. The respondents were Mr Oldfield and the plaintiffs. Britmar sought: (i) orders requiring the first plaintiff to remove, effectively, the Camp and the second plaintiff to remove, effectively, the Plant and Equipment, from the mineral leases; (ii) compensation or damages for loss from the plaintiffs; (iii) compensation or damages for misleading and deceptive conduct from Mr Oldfield; (iv) costs; and (v) an interlocutory order requiring the second plaintiff to remove the conveyor (which was part of the Plant and Equipment) from the mineral leases.

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119 $5,000,000 / $6,000,000 x 100.

120 $1,000,000 / $6,000,000 x 100.

The statement of claim included assertions that Mr Oldfield had, in around November 2017, made representations to Britmar that: (a) the Camp and the Plant and Equipment would be removed from the mineral leases as soon as possible; and (b) if the Camp and the Plant and Equipment was not sold shortly, he and the plaintiffs would fund that part of the environmental bond Britmar was obliged to pay the Government that was referable to the Camp and the Plant and Equipment. These representations were pleaded as misleading and deceptive conduct which Britmar relied upon to its detriment, causing it loss. The presence of the Camp and the Plant and Equipment on the mineral leases was pleaded to constitute trespass, nuisance or interference with Britmar's statutory rights to mine on the mineral leases, causing it loss and damage.

[152] In the liability trial, Southwood J found that Britmar's claims arose as a result of the defendant's conduct and its failure to meet with Britmar and coordinate the removal of the Camp and the Plant and Equipment within a reasonable time.[121] It is clear from the evidence which gave rise to that finding that the representations attributed to Mr Oldfield in the Federal Court proceedings were in the context of the Contract of Sale and the defendant's position as purchaser of the Plant and Equipment under the Contract of Sale and its failure to take steps to coordinate the removal.[122] Further, given its distinct prominence in the relief sought and the

121 Liability Reasons at [189].

122 Liability Reasons at [65]-[79].

undertakings about its removal given to the Federal Court on 20 March 2019,[123] the continued presence of the conveyor on the mineral leases most likely precipitated the commencement of the Federal Court proceedings in March 2019, which occurred after the defendant's repudiation of the Contract of Sale in August 2018. The conveyor was an item within the Plant and Equipment.

[153] Just as the possibility of Britmar becoming the owner of the mineral leases and requiring the defendant to remove the Camp and Plant and Equipment was one of the three scenarios in the contemplation of the parties to the Contract of Sale when they entered into it,[124] Britmar taking legal action against one or more of the parties to the Contract of Sale (both vendors and purchaser) to require removal of the Camp and Plant and Equipment from the mineral leases must also have been in the contemplation of the parties to the Contract of Sale when they entered into it. Consequently, the legal costs incurred by the plaintiffs in defending and/or resolving those legal proceedings, by negotiation of and entry into the settlement deed and asset sales deeds, may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of the defendant's breach.

[154] Consequently, I find that the second plaintiff is entitled to its share of the legal costs incurred in relation to the Federal Court proceedings. As

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123 Affidavit of Oldfield, 5 December 2023, Annexure VCO4, Recital F.

124 See Appeal Reasons, at [32]-[34].

set out in paragraph [149] above, I find that the second plaintiff's share of the legal costs is $37,180 exc GST).

Second plaintiff's damages award

[155] For the above reasons, the second plaintiff is entitled to an award of damages as follows:[125]

Amount owing under cl 15 on 30 August 2018	$1,000,000
Principal paid by Britmar under G&C asset sale deed	(500,000)
Interest paid by Britmar under G&C asset sale deed	(6,765)
Amount credited by RRT	(73,500)
Value of Plant and Equipment not sold	(0)
Legal costs in relation to Federal Court proceeding	37,180
Total	**$382,555**

The defendant's counter-claim

[156] The defendant counter-claimed seeking: (a) a declaration that the plaintiffs have repudiated and the defendant had validly terminated the Contract of Sale; (b) damages for the plaintiffs' breach of the Contract of Sale; and (c) alternatively, orders for restitution of the $1 million paid under the Contract of Sale, less any amount set off in accordance with its plea that any damages representing the plaintiffs' loss (if any) suffered as a result of the defendant's breach were subject to a set off of $1 million paid under the Contract of Sale.[126]

[157] The set-off as pleaded in paragraph 27C(c) of the Further Amended Defence and Counterclaim has been done in the assessment of the

125 These amounts do not take into account GST.

126 Further Amended Defence and Counterclaim filed on 14 December 2020, [27C(c)].

plaintiffs' damages as set out above. The payment of $500,000 under the Contract of Sale to each plaintiff is why the starting point for the value of the unperformed promise is not the $7 million comprising the total contract price, but the unpaid $6 million (comprising $5 million payable to the first plaintiff and $1 million payable to the second plaintiff).

[158] If the payment of $500,000 by the defendant had not already been taken into account, the second plaintiff's damages would have been $500,000 greater than as set out above. Thus, for the second plaintiff's assessed damages, the defendant's counterclaim of $500,000 less any amount set off in accordance with paragraph 27C(c) of the Second Further Amended Defence and Counterclaim comes to zero because the $500,000 has been fully set off in the calculation of damages. The defendant's counterclaim against the second plaintiff should therefore be dismissed.

[159] In relation to the assessment of the first plaintiff's damages, if the payment of $500,000 had not already been taken into account, the first plaintiff's damages too would have been $500,000 greater than as set out above. On that basis, the first plaintiff did not suffer a loss, but effectively made a gain of $315,043.[127] On that basis, the first plaintiff is still only entitled to nominal damages, with the consequence that there is no amount to set off against the $500,000 payment to the defendant under the defendant's counterclaim against the first plaintiff.

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127 For the reasons set out in paragraph [149] and footnote 45 above.

[160] The question then arises as to whether the defendant is entitled to recover the $500,000 it paid to the first plaintiff.

[161] It is clear that, in the absence of an express agreement giving the vendor of land an absolute right to retain them, instalments of the purchase price of property already paid may be recovered by a defaulting purchaser when the vendor elects to discharge the contract.[128] This principle applies equally to sales of goods.[129]

[162] There is nothing in the Contract of Sale to suggest, by the use of the word 'deposit' or otherwise, that the payments made to each plaintiff which were due on execution of the Contract of Sale were in the nature of a guarantee or earnest for the due performance of the Contract of Sale. Rather, they were a part payment of the price of the goods sold and were so described.

[163] Counsel for the plaintiffs argued that it was not open to the defendant to counterclaim for the instalments of the purchase price paid by the defendant because the defendant's counterclaim had been dismissed by Southwood J in the liability hearing. It was said that *res judicata,* issue estoppel or *Anshun* estoppel precluded this counterclaim being made and determined because the counterclaim has been dismissed and finally determined.

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128 *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 477-478 per Dixon J (Rich and McTiernan JJ agreeing). See also at 470 per Starke J.

129 See *Moffet Farms v Pauls Services & Sales Pty Ltd* (1991) 7 SR (WA) 351 at 355 per Hammond J, citing *Dies v British and International Mining & Finance Corp Ltd* [1939] 1 KB 724 at 742, 744 per Stable J.

[164] I reject these submissions.

[165] On 14 August 2018, the Supreme Court ordered that the issue of liability only be tried as a preliminary issue.

[166] In its Amended Defence and Counterclaim filed in Court on 11 December 2018, the first day of the liability hearing, the defendant alleged that the plaintiffs had breached and repudiated the Contract of Sale, the defendant had terminated the Contract of Sale and the plaintiffs were liable to the defendant for damages for breach of contract.[130] The damages were particularised as the loss of profit from the Contract of Sale of the plaintiffs (had they performed their obligations), plus the $1 million paid under the Contract of Sale and the other costs and expenses incurred in respect of the Contract of Sale or, alternatively, return of the $1 million paid under the Contract of Sale and other costs and expenses. The counterclaim also alleged that the plaintiffs had breached and repudiated the Contract of Sale, that the defendant had terminated the Contract of Sale, and that the plaintiffs were liable to the defendant for damages for breach of contract as claimed earlier in the defence.

[167] The order made by Southwood J after the liability trial, on 15 September 2020, was that there be judgment for the plaintiffs on the question of liability, with damages to be assessed. No order was made dismissing the defence and counterclaim.

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130 Amended Defence and Counterclaim filed on 11 December 2018, [16].

[168] The defendant's claim and counterclaim to repayment of the instalment payments, rested on the allegation that the plaintiffs had breached the Contract of Sale and the defendant had validly terminated it, entitling the defendant to damages. That is the way Southwood J understood the case.[131] Ultimately, Southwood J found that the defendant's termination of the Contract of Sale was invalid and constituted a repudiation, and that the plaintiffs' termination of the Contract of Sale was valid, holding that the defendant's Defence and Counterclaim must be dismissed and the plaintiffs are entitled to have their damages for the defendant's repudiation of the Contract of Sale assessed.[132]

[169] On 15 September 2020, Southwood J ordered the plaintiffs to file and serve an amended statement of claim dealing with its claim for damages and the defendant to file and serve an amended defence dealing with the plaintiffs' claim for damages.

[170] On 14 December 2020, the defendant filed a Further Amended Defence and Counterclaim, which included: (a) a plea that the plaintiffs' damages were to be assessed pursuant to s 52(3) of the SGA, a plea that the plaintiffs' damages could not exceed the loss (if any) suffered on resale of the Camp and the Plant and Equipment, and a plea that the plaintiffs' damages are subject to a set off of the sum of $1 million paid by the defendant under the Contract of Sale; and (b) an amended counterclaim

131 Liability Reasons at [12]-[13].

132 Liability Reasons at [181].

seeking orders for restitution of the $1 million paid under the Contract of Sale.

[171] No *res judicata* arose such that the right or cause of action claimed or put in suit (a claim in restitution) has passed and merged into judgment.[133] The defence and counterclaim determined by Southwood J did not include a claim for $1 million founded on restitution as the cause of action.[134] Rather, the cause of action as determined by Southwood J was breach of contract.

[172] Similarly, no issue estoppel arose because no state of fact or law is alleged or denied in the present counterclaim the existence of which was a matter necessarily decided by Southwood J's judgment.[135]

[173] Nor has an *Anshun* estoppel arisen. The principle of *Anshun* estoppel prevents a party from later relying on a claim or defence which it has unreasonably refrained from raising in earlier proceedings, being proceedings so closely connected with the later subject matter that it might reasonably have been expected that the claim or defence would have been raised in those earlier proceedings.[136] Even if the liability hearing and the assessment of damages hearing could be considered as

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133 See *Blair v Curran* (1939) 62 CLR 464 at 531-532 per Dixon J; *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 597 per Gibbs CJ, Mason and Aickin JJ.

134 As to what materials can be considered for determination of a *res judicata* or an issue estoppel, see *Willoughby v Clayton Utz (No 2)* (2009) 40 WAR 98 at [17]-[29] per Pullin JA (Wheeler and Miller JJA agreeing). The materials are the order of the Court, the pleadings and the reasons for decision.

135 Ibid.

136 *Shaw v Gadens Lawyers* [2014] VSCA 74 at [59] per the Court.

separate but closely connected proceedings to which the principle could apply (a matter I am not deciding), it is clear that the issues to be determined in the liability hearing were: (a) which side repudiated the Contract of Sale, and (b) which side validly terminated the Contract of Sale, so as to identify which side was liable to the other for damages for breach of contract. I do not accept that the defendant unreasonably refrained from raising the issue of recovery of instalments of the purchase price in the liability hearing because that claim is founded on the valid termination of the Contract of Sale *by the plaintiffs* and so would not reasonably have been expected to have been raised by the defendant in its case seeking damages for breach of contract by the plaintiffs. Furthermore, the principle of law referred to above is well-settled and the facts of payment by the defendant of instalments of $500,000 to each of the plaintiffs are not in dispute.

[174] Consequently, I find that the defendant is entitled to recover the sum of $500,000 paid to the first plaintiff in part payment of the purchase price for the Camp under the Contract of Sale.

Pre-judgment interest

[175] The first plaintiff is entitled to nominal damages only.

[176] The second plaintiff is entitled to damages from the defendant totalling $382,555 (subject to any impacts of GST).

[177] The defendant is entitled to restitution from the first plaintiff of $500,000.

[178] On these two amounts, I will award interest under s 84 of the *Supreme Court Act* from the date of termination of the Contract of Sale on 30 August 2018, being the date when the cause of action arose, to the date of judgment.

[179] I consider that a fair and reasonable rate of interest[137] is the rate applicable on a judgment of the Court under Order 59.02(3) of the *Supreme Court Rules 1987* (NT), which is the rate fixed for s 52(2)(a) of the *Federal Court of Australia Act 1976* (Cth) from time to time. That section refers to the *Federal Court Rules 2011* (Cth) and Rule 39.06 of those Rules fixes the rate under s 52(2)(a) as six percent above the cash rate last published by the Reserve Bank prior to 1 January to 30 June in any year and prior to 1 July to 31 December in any year.

Disposition

[180] Subject to the impacts of GST, I will make the following orders.

(1) The first plaintiff is entitled to judgment against the defendant for nominal damages only and the defendant is to pay the first plaintiff nominal damages of $1.

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137 See *Sherwin v Commens* [2008] NTSC 45 at [68] per Southwood J; *Motor Accidents (Compensation) Commission v Motor Accidents Insurance Board (No 2)* [2023] NTSC 71 at [7]-[9]; *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657 at 666 per the Court.

(2) The second plaintiff is entitled to judgment against the defendant for damages and the defendant is to pay the second plaintiff damages of $382,555, plus interest at the rate prescribed by Order 59.02(3) of the *Supreme Court Rules* for the period from 30 August 2018 to the date of judgment.

(3) The defendant is entitled to restitution against the first plaintiff on the counterclaim and the first plaintiff is to pay the defendant restitution of $500,000, plus interest at the rate prescribed by Order 59.02(3) of the *Supreme Court Rules* for the period from 30 August 2018 to the date of judgment.

(4) The defendant's counterclaim against the second plaintiff is dismissed.

[181] I will hear the parties as to costs and the terms of final orders, including the amounts of interest and the impacts of GST.
