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**UNNECESSARY AWKWARDNESS AND THE “NO
LOSS” ARGUMENT IN ALTIMARLOCH**

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Abstract

This paper discusses the “no loss” argument raised in Marlborough District Council v Altimarloch. Assessing the conventional principles relevant to assessing loss in negligence, it suggests that no extension of the principles should be made to include a third party claim for damages in the calculation of loss. The principle in The Liverpool (No 2), and the principles of mitigation are also discussed.

Key Words

Loss, Damages, Negligence, Contribution

I Introduction

Consider a situation where C, through negligent misrepresentation, induces A to enter into a contract with B. B, the contracting party, has made materially the same representation to A. A sues both B and C concurrently. The claim against B is governed by the Contractual Remedies Act 1979, and the representation is treated as if it were a term of the contract. The claim against C is in negligence. The question then arises, can C be said to have caused A “loss” when the claim for damages against B is greater than the difference between the contract price and the value received, and there appears to be no doubt that B will pay?

This was the question posed to the Supreme Court in *Marlborough District Council v Altimarloch Joint Venture Limited*.¹ The question raised a conceptual difficulty. While it was almost certain that A would recover from B, at the time of judgment A had not done so. Could the Court take into account the fact that A would almost certainly recover from B? How would it do so? Tipping J and Elias CJ held that the likely recovery could be

¹ *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.

accounted for by valuing A's claim for contractual damages and concluded that C had not caused A any loss. McGrath, Anderson and Blanchard JJ held that C had caused A loss. Four judges gave reasons for their decision and all followed different paths of reasoning.

That the issue split the Supreme Court so fundamentally indicates that the issue warrants discussion. This essay will focus on the minority approach and asks how the approach fits within the existing legal framework. It will conclude that the minority approach fits awkwardly with the principles relevant to calculating loss in negligence, and the rule in *The Liverpool (No 2)*². For this reason, the majority approach is preferred.

II The case

A The Facts

The *Altimarloch* litigation followed from a sale and purchase agreement for a farm property in Marlborough. The purchaser, Altimarloch Joint Venture Limited (Altimarloch), intended to establish a vineyard on the property. Representations were made to Altimarloch by the vendor's agents that certain water rights were available and would be transferred with the land. Prior to confirming the conditional agreement, Altimarloch obtained a Land Information Memorandum (LIM)³ from the Marlborough District Council ("the Council") which confirmed that these water rights were available.

The purchase price of the property was \$2.675m. After settlement, Altimarloch discovered that only some of the represented water rights were available, the others having been transferred in a previous subdivision of the property. The value of the property without the water rights was \$2.55m.

² *Steamship Enterprises of Panama Inc, The "Liverpool" (Owners) v "Ousel" (Owners)* [1963] P 64 (CA).

³ A Land Information Memorandum is a report issued by a territorial authority in relation to a particular property. See the Local Government Official Information and Meetings Act 1987, s 44A.

The result was a claim for damages by Altimarloch against the vendors based on misrepresentations made by their real estate agents and solicitors. Altimarloch also claimed damages against the Council for the alleged misrepresentations in the LIM.

B The High Court

In the High Court, Wild J found the vendors liable under s 6 of the Contractual Remedies Act 1979 (CRA). Section 6(1) provides that:⁴

If a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract –

(a) He shall be entitled to damages from that other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken.

Altimarloch was entitled to a contractual measure of damages against the vendor. A sum of \$1,055,907.16 was awarded, which represented the cost to Altimarloch of obtaining additional water rights, together with the cost of constructing a dam to remedy the shortfall.⁵

Applying the tests in *Rolls-Royce New Zealand Ltd v Carter Holt Harvey*⁶ and *Attorney-General v Body Corporate 200200*⁷ Wild J found that the Council owed Altimarloch a duty of care.⁸ This duty was breached by the error in identifying water rights in the LIM.⁹ These errors were material in Altimarloch confirming the contract as unconditional.¹⁰

⁴ Contractual Remedies Act 1979, s 6.

⁵ *Altimarloch Joint Venture Ltd v Moorhouse (No 2)* HC Blenheim CIV-2005-406-91, 23 March 2009 at [88]

⁶ *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 at [58]-[65].

⁷ *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 at [35]-[37]

⁸ *Altimarloch Joint Venture Ltd v Moorhouse* HC Blenheim CIV-2005-406-91 3 July 2008 at [115]-[140].

⁹ At [141].

¹⁰ At [142].

Wild J held that the appropriate measure of damages against the Council was \$400,000.¹¹ This represented the difference between the value of the property with the water rights as represented (\$2.95m) and the value of the property as received (\$2.55m).¹²

C The Court of Appeal

In the Court of Appeal, the liability of, and award of damages against, the vendors was upheld.¹³ The Court agreed with Wild J that the Council owed a duty of care in relation to the provision of the LIM.¹⁴

On appeal, the Council put forward the novel argument that its negligence had not caused Altimarloch any loss.¹⁵ Under the agreement, Altimarloch had paid \$2.675m. In return, it had received property worth \$2.55m, but also had a claim for breach of a deemed statutory warranty against the vendors (under s 6 CRA), worth more than the difference between price paid and value.¹⁶ Although the rights acquired by Altimarloch were not the same as those which it had expected to obtain, because of the ability to claim against the vendor, they were of the same value, and worth distinctly more than the purchase price.¹⁷

The Court of Appeal recorded that there was “considerable apparent force” in the Council’s argument, but held that Altimarloch had suffered loss as a result of entering into the transaction.¹⁸ Fundamentally, this was because the argument advanced by the Council was based on hindsight. Looking at the situation at the outset of the litigation, it

¹¹ *Altimarloch Joint Venture Ltd v Moorhouse*, above n 8, at [235].

¹² At [235].

¹³ *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104, (2011) 11 NZCPR 879.

¹⁴ At [97].

¹⁵ At [98].

¹⁶ At [98].

¹⁷ At [100].

¹⁸ At [100].

was not certain that Altimarloch would succeed in establishing liability against the vendor.¹⁹

In the Court's view, to accept the Council's argument would require the Court to look to the claim against the vendor first, before considering the Council's liability. The Court declined to adopt this approach, seeing "little intrinsic appeal in an approach which means that the MDC egg can insist the Moorhouse chicken comes first".²⁰ For reasons of common sense, and due to the causal significance of the LIM in leading to the contract becoming unconditional, the Court held that the Council's negligence had caused Altimarloch loss.²¹

The Court of Appeal disagreed that the quantum of the loss was \$400,000; Wild J had come to this figure by applying a contractual measure of damages inappropriate for the Council's liability in tort. The correct measure was the difference between the price paid for the property and the value of the property with the water rights as received; this amounted to \$125,000.²²

D The Supreme Court

1 "No Loss"

In the Supreme Court the Council again argued that it had caused Altimarloch no loss.

Tipping J and Elias CJ accepted this argument. For Tipping J, the issue could be resolved by applying conventional causation principles.²³ The Council's negligent LIM had induced the purchaser to confirm the contract as unconditional and prima facie, the purchaser had acquired something worth less than the price paid. However, it would be

¹⁹ *Vining Realty Group Ltd v Moorhouse*, above n13, at [107].

²⁰ At [108].

²¹ At [108].

²² At [113].

²³ *Marlborough District Council v Altimarloch Joint Venture Ltd*, above, n 1, at [106].

artificial and contrary to authority to look only at the state of affairs at the time of the purchasers entry into the contract - the real question was whether the contract was ultimately a loss making one.²⁴ In the present case Altimarloch had exercised its rights under the contract to claim damages against the vendor. This claim could be taken into account in assessing the net loss under the transaction.

Like Tipping J, Elias CJ considered that the ultimate net position of the purchaser under the contract was determinative.²⁵ All gains and advantages obtained through the transaction should be accounted for in determining the contractual position.²⁶

In the present case there was no doubt over the ability of the vendors to meet the judgment against them. As the amount of the judgment would be greater than the difference between the price paid for the property and its ultimate value, Tipping J and Elias CJ concluded that the Council had caused the purchaser no loss.

The majority of the Supreme Court rejected the Council's no loss argument. McGrath J (Anderson J concurring) applied ordinary principles of causation, and found that Altimarloch would not have confirmed the contract had the council's LIM been correctly supplied.²⁷ In such circumstances it would be artificial to treat the vendor's misrepresentation as the sole cause of the loss.²⁸ The Council was not entitled to have its liability for damages determined by taking into account Altimarloch's claim against the vendors; on that basis, the loss for which the Council was liable was to be assessed at the time the contract was entered into.²⁹

Blanchard J agreed. The Council could not say that it had not caused Altimarloch loss until Altimarloch had actually received payment for an amount at least equal to the

²⁴ *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 1, at [106].

²⁵ At [50].

²⁶ At [50].

²⁷ At [207].

²⁸ At [207].

²⁹ At [204].

diminution in value of the land (\$125,000).³⁰ While the rights under the contract created an expectation that the purchaser would recover from the vendors, the existence of those rights and a judgment for their enforcement could not be equated to actual performance of the contract breaker's obligation to pay them.³¹

Having found that the Council had caused Altimarloch loss, the majority upheld the Court of Appeal's award of \$125,000 against the Council.

2 Contribution

Also at issue in the Supreme Court was the question of whether the vendors were entitled to contribution from the Council toward their liability to Altimarloch. Entitlement to contribution arises when the defendants are under a shared liability to the plaintiff.³² It follows from the principle that "persons who are under co-ordinate liabilities to make good the one loss must share the burden pro rata."³³ The reason for this is that, "he who takes the benefit must bear the burden."³⁴ Thus, an action for contribution will be entertained if the claimant has paid to the victim an amount that exceeds their fair share of the liability, or if the claimant's liability has already been established and is more than the claimant's fair share of the liability.³⁵

In the lower courts, the Council and the vendor conceded that contribution was available.

³⁰ *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 1, at [69].

³¹ At [69].

³² Stephen Todd, John Burrows *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, 2013) at [24.3.04].

³³ *Albion Insurance Co Ltd v Government Insurance Office of New South Wales* (1969) 121 CLR 342 at 350.

³⁴ Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff and Jones: The Law of Unjust Enrichment* (8th ed, Sweet & Maxwell, London, 2011) at [20-94].

³⁵ Joanne R. Morris *Apportionment of Civil Liability: a discussion paper* (Legal Research Foundation, Auckland, 1987) at 4.

In the High Court Wild J made a 50/50 apportionment on the basis that “equality is equity”.³⁶ The council was required to pay \$200,000 contribution to the vendor, a sum which represented half of the \$400,000 common liability.³⁷ This apportionment was undisturbed in the Court of Appeal.³⁸ Taking into account the new level of damages, the Council’s contribution was set at \$62,500.³⁹

In the Supreme Court a majority (Elias CJ, Blanchard J and Tipping J) held that contribution was not available. This was because the defendants’ liabilities were not “of the same nature and to the same extent”.⁴⁰ The vendors were liable for failure to perform a promise inherent in a contractual term and were required to compensate the purchaser for the absence of the promised water rights (\$1.05m). The Council was liable for the consequences of a negligent misstatement and thus required to compensate the plaintiff for the amount that it was worse off as a result of entering into the contract (\$125,000).

The practical consequence of this was that Altimarloch could enforce judgment against either or both defendants, but neither defendant was liable to contribute to the damages paid by the other defendant. Thus, if Altimarloch chose to enforce judgment against the vendor, the Council would pay nothing. Conversely, if Altimarloch chose to recover against the Council, the Council could not claim any amount from the vendor. It was this “unsatisfactory outcome” which prompted Tipping J’s call for legislative reform.⁴¹

III Damages in Contract and Tort

A The principles

³⁶ *Altimarloch Joint Venture Ltd v Moorhouse (No 2)*, above n 5, at [61].

³⁷ At [63].

³⁸ *Vining Realty Group Ltd v Moorhouse*, above n 13, at [125].

³⁹ At [134].

⁴⁰ *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 1, per Blanchard at [75], per Tipping at [146]-[147], per Elias at [57].

⁴¹ At [152].

Contracts are about the mutual rendering of benefits.⁴² The general rule is that: ⁴³

...where a party sustains a loss by reason of a breach of contract he is, in so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.

The compensatory aim of tort damages is different. In tort, the aim of an award of damages is to:⁴⁴

...put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his or compensation or reparation.

In contract, Altimarloch was entitled to be placed in the position it would have been in had the contract been performed. In tort, Altimarloch was to be restored to the position it would have occupied had there been no reliance on the misrepresentation.

The apparent difficulty is that to award damages for both breach of a contract and for negligent misrepresentation involves putting the claimant in two places at once. The plaintiff obtains judgment to put it in the position it would be in if the contract had been performed *and* to compensate it for any detriment flowing from entry into the contract.

B The approaches

The majority accepted this result. Both the vendor and the Council had caused entry into the contract; the plaintiff had a separate cause of action against each. The plaintiff was therefore entitled to judgment against both defendants and entitled to recover against either, subject to not recovering more than its total loss.

⁴² Harvey McGregor, *McGregor on Damages* (18th ed, Sweet & Maxwell, London, 2009) at [2-002].

⁴³ *Robinson v Harman* (1848) 154 ER 363, [1843-60] All ER Rep 383 at 855.

⁴⁴ *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39.

The minority response was to make the plaintiff's recovery from the Council dependent on the plaintiff's likely recovery from the vendor. To do so they valued the plaintiff's contractual claim against the vendor. The following sections will discuss whether this can be reconciled with the current law.

IV Calculation of Loss

A Negligence

The Council was potentially liable in negligence. To make out the cause of action, a plaintiff must prove damage. Loss or damage is the "gist" of the tort.⁴⁵ As Lord Reading C.J said in *J.R Munday Ltd v London C.C* "[n]egligence alone does not give a cause of action, damage alone does not give a cause of action. The two must co-exist."⁴⁶ The damage suffered must be causally connected with the breach and recognised by law.⁴⁷ Furthermore, it must be within the scope of the duty owed by the defendant to the plaintiff.⁴⁸

Causation in tort is typically split into two enquiries. Factual causation asks whether the loss or damage would have occurred "but for" the defendant's negligence. A second enquiry into remoteness of damage is concerned with whether legal responsibility should be ascribed to the defendant's conduct; if the damage is too remote from the defendant's conduct, the defendant's conduct will not have caused the damage in law.⁴⁹

⁴⁵ *Williams v Milotin* (1957) 97 CLR 465 at 474.

⁴⁶ *J.R Munday Ltd v London C.C* [1916] 2 KB 331 at 334.

⁴⁷ Christopher Walton, *Charlesworth & Percy on Negligence* (12th ed, Sweet & Maxwell/Thomson Reuters, London, 2010) at [1-34].

⁴⁸ *South Australia Asset Management Corporation Respondents v York Montague Ltd. Appellants* [1997] AC 191 (HL).

⁴⁹ JF Clerk, MA Jones, WHB Lindsell, A Dugdale (ed) *Clerk & Lindsell on Torts* (20th ed, Sweet & Maxwell, London, 2010) at [2-01].

Three heads of damage are recognised as being actionable in negligence: personal injury, physical damage, and economic loss. Where the loss claimed is economic, actual damage is suffered when the claimant is “financially worse off”.⁵⁰ In *Forster v Outred*, financial loss was said to be:⁵¹

...any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has no control; things like loss of earning capacity, loss of a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases.

B Measuring Loss/Damage

In determining what loss has been caused by a defendant’s negligence the relevant comparison is between the plaintiff’s position had the defendant fulfilled its duty of care and the plaintiff’s actual position.⁵² Where the plaintiff has entered into a transaction as a result of the defendant’s negligence, the normal measure of the plaintiff’s loss is the value transferred, generally represented by the contract price, less the value received, whether of property or services or money.⁵³

In the present case, Altimarloch had paid \$2.675 million for property worth \$2.55 million. The Supreme Court unanimously held that this represented a loss. However the minority held that this loss was only a *prima facie* loss; what had to be calculated was the purchaser’s ultimate position under the transaction. Altimarloch’s later claim for damages, arising out of the contract, was relevant in assessing the net loss suffered.

An approach that takes into account the value of a subsequent claim for damages raises two issues of principle. The first is whether a subsequent event is relevant in assessing

⁵⁰ *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627 (HL) at 1639.

⁵¹ *Forster v Outred & Co* [1982] 1 WLR 86 (CA) at 94 and 98.

⁵² *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd*, above n 50, at 1631.

⁵³ *McGregor*, above n 42, at [41-050].

loss arising out of the transaction. The second is whether a claim for damages can properly be treated as a benefit under that transaction.

C Subsequent Events

Ordinarily, loss resulting from a defendant's negligence is calculated at the date of the breach.⁵⁴ Where the defendant's negligence induces entry into a contract, the relevant date is the date of entry into the contract. Applying the ordinary rule, the loss caused by the Council is the value transferred less the value received at the date of entry. That is, $\$2.675\text{m} - \$2.55\text{m} = \$125,000$.

However, the rule that loss is assessed at the date of the breach is not absolute; a number of cases have taken into account subsequent events. Courts have been willing to take into account subsequent events because of a belief that:⁵⁵

...damages are to be assessed in the real world. Compensation is a reward for real, not hypothetical loss. It is not to be made an occasion for recovery in respect of a loss which might have been, but has not been, suffered.

In *Kennedy v Van Emden*⁵⁶ the plaintiff paid a premium for the transfer of an under lease at a time when such premiums were unlawful. However, the law was then changed so that she could also sell the lease at a premium. The Court held that damages were to be assessed after the date of the law change and at that date the plaintiff could not be said to have suffered a loss.

In *McKinnon v e.Surv Ltd*,⁵⁷ Surveyors negligently failed to detect signs of possible movement in a property. At that time there were no means of telling whether movement

⁵⁴ Clerk, Jones, Lindsell, Dugdale, above n 49, at [10-144].

⁵⁵ *Kennedy v Van Emden* [1996] PNL 409 at 23.

⁵⁶ *Kennedy v Van Emden* [1996] PNL 409.

⁵⁷ *McKinnon v E.Surv Ltd*. [2003] EWHC 475, [2003] Lloyd's Rep PN 174.

might actually be taking place. Later it emerged that the premises had in fact stabilised. The Court held that the later events were relevant in assessing, and hence reducing, the claimant's damages.

That the claim for damages in *Altimarloch* arises after the transaction is therefore not a bar to the claim being valued. However, it does indicate that some care should be exercised in determining whether to include the claim in the calculation. In the aforementioned cases, the event going to reduce the plaintiff's loss had resulted in an actual reduction in loss at the time of judgment. It was not a situation where the court had to value the likelihood that the event would reduce the loss, as in *Altimarloch*.

D The nature of what is taken into account

No authority cited in *Altimarloch* directly addressed whether a claim for damages was relevant in assessing loss under a transaction. The minority thus relied on the case of *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)*⁵⁸, a case in which a borrower's covenant to repay a loan was valued for the purpose of assessing loss arising out of a loan transaction. One way of framing the issue in *Altimarloch* is therefore whether *Nykredit* should be applied to a claim for damages.

1 Covenant to repay

In *Nykredit*, the defendant surveyors had negligently overvalued a property, the security on which the plaintiff lenders had loaned money. Lord Nicholls said that, in one sense, the lender had suffered immediate detriment by paying money under the transaction, which it would not have done if properly advised.⁵⁹ However, the lender might not suffer any actual loss at this point if there was no certainty that the borrower would default.⁶⁰ In

⁵⁸ *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)*, above n 50.

⁵⁹ At 1631.

⁶⁰ At 1631.

a case involving the negligent valuation of a loan security, the basic measure of loss called for a comparison between:⁶¹

- a) the amount of money lent by the plaintiff, which he would still have had in the absence of the loan transaction, plus interest at a proper rate; and
- b) the value of the rights acquired, namely the borrower's covenant and the true value of the overvalued property

In *Nykredit*, the borrower's covenant to repay was worthless at the time of the lender's entry into the transaction and the amount lent at all times exceeded the true value of the property. The comparison therefore showed a loss immediately upon entry into the transaction. However, if the borrower's covenant had been valuable Lord Nicholls stated that "until default the lender may presently sustain no loss even though the security is worth less than the amount of the loan."⁶²

2 *Restitutionary rights*

The reasoning in *Nykredit* was applied to a restitutionary right by Rix LJ in *Haugesund Kommune v Depfa ACS Bank*.⁶³ The case involved a swaps transaction entered into between Depfa Bank and Norwegian municipalities, which, contrary to the advice of Depfa Bank's Norwegian solicitors, was ultra vires. The question in the case was whether Depfa Bank could recover the sum advanced from its solicitors. Or, as Rix LJ put it:⁶⁴

Is the solicitor liable to the bank for the whole of the sum transferred to the counterparty irrespective of every other consideration, save only to the extent that the bank succeeds in making an actual recovery from its counter party?"

⁶¹ *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)*, above n 50, at 1631.

⁶² At 1632.

⁶³ *Haugesund Kommune v Depfa ACS Bank* [2011] EWCA Civ 33, [2011] 3 All ER 655.

⁶⁴ At [1]

Importantly for present purposes, Rix LJ in an obiter statement held that Depfa Bank had not suffered loss by entering into the transaction; in place of a contractual right to repayment Depfa had instantaneously obtained a restitutionary right against the Kommunes. Although *Nykredit* concerned a borrower's covenant,⁶⁵

...there was nothing about the principles and the 'basic comparison' of which Lord Nicholls and Lord Hoffman spoke which in terms limited their approach to rights in contract, or rights in debt. They were addressing general principles.

Thus, if a borrower's covenant to repay was relevant in assessing a lender's loss under a loan transaction, a restitutionary right to recover ought to be relevant in assessing Depfa Bank's loss. Such a right which "rises up in place of the invalid contract is sufficiently close to the claim in contract, even though its theoretical basis is totally different."⁶⁶

3 *The minority approach*

Tipping J saw their Lordship's judgments in *Nykredit* as conveying a wider principle that was applicable in *Altmarloch*. Thus, Lord Nicholls' statement that the plaintiff could not recover if the valuation "in practice" had caused no damage, and Lord Hoffman's statement that the plaintiff could not recover if "on balance" he was in no worse a position, were taken to mean that "the contractual position between borrower and lender must be fully worked through before it can be said that the valuer's negligence had caused any loss to the lender."⁶⁷

Moreover, Tipping J and Elias CJ held that the subject matter of the cases could be treated in the same way. Elias considered that there was no distinction in principle

⁶⁵ *Haugesund Kommune v Depfa ACS Bank*, above n 63, at [51].

⁶⁶ At [72].

⁶⁷ *Marlborough District Council v Altmarloch Joint Venture Ltd*, above n 1, at [112].

between a claim for debt and a claim for damages; the only difference was in the difficulty of assessment.⁶⁸ Tipping stated that:⁶⁹

When a third party's negligence has induced the plaintiff's entry into a contract, the question being addressed should not depend on the nature and incidents of the plaintiff's cause of action under the contract. Rather, it should relate to the likelihood of recovery.

4 Discussion

The decision of the House of Lords in *Nykredit*, and that of Rix LJ in *Haugesund* show that it is possible to take into account rights under a contract, the monetary value of which is subject to change, and the quantification of which may be difficult. As Lord Nicholls states, "such difficulties as there may be are evidential and practical difficulties, not difficulties in principle."⁷⁰

Furthermore, the approaches in *Nykredit* and *Haugesund* are concerned with closely identifying the actual loss suffered, a commendable goal. Thus, *Clerk & Lindsell on Tort*, commenting on *Haugesund Kommune*, favour Rix J's approach on the basis that "[i]t should not be open to a party to construct a wholly artificial loss, merely by arguing that money lent, while repayable, is now recoverable on a technically different basis from that originally contemplated."⁷¹

However, there are differences between the situation in *Nykredit* and that in *Altimarloch* that indicate that caution should be exercised. First, *Nykredit*, involved a covenant to

⁶⁸ *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 1, at [53].

⁶⁹ At [104]

⁷⁰ *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd*, above n 50, at 1632.

⁷¹ Michael A. Jones and Anthony M. Dugdale, *Clerk & Lindsell on Torts* (20th ed. 2nd supplement, Sweet & Maxwell, London, 2012) at [10-140].

repay a debt, not a claim for damages. In *Eastgate v Lindsey Morden* Longmore J said that there was an:⁷²

...essential difference between a claim for a repayment of a debt (to which there can ordinarily be no substantive defence and in respect of which a claimant does not have to prove loss) and a claim for damages for breach of contract (to which there may be many defences and in respect of which the claimant must prove his loss).

Moreover, the Court in *Nykredit* was concerned with the question of when the cause of action accrued. The amount of the lender's loss had previously been calculated based on a market valuation at the date of the negligent overvaluation.⁷³ The Court was therefore valuing the borrower's covenant in a situation where the borrower had in fact defaulted, and what was being determined was the moment in time when the borrowers covenant together with the property security, were inadequate.

While it is possible to extend the decision in *Nykredit* to a claim for damages, it is not a logically necessary or easy step. Furthermore, as the following discussion indicates, to do so would be in tension with other principles of law.

V The Rule in The Liverpool (No 2)

One such principle is the rule that a plaintiff need not recover compensation from third parties who, in addition to the defendant, are liable to it.⁷⁴ This rule was glossed over by the Supreme Court.⁷⁵ However, it is submitted that the rule is a significant reason why the minority approach should not be adopted.

⁷² *Eastgate Group v Lindsey Morden Group Inc* [2002] 1 WLR 642 (CA) at 651.

⁷³ *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd*, above n 50, at 1629.

⁷⁴ *Steamship Enterprises of Panama Inc, The "Liverpool" (Owners) v "Ousel" (Owners)*, above n2.

⁷⁵ *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 1, per Tipping at [108], per McGrath at [201].

A The principle

In *The Liverpool (No 2)* the *Ousel* was sunk in the Port of Liverpool as a result of a collision with the *Liverpool*, whose owners admitted liability. The Harbour Board claimed against the owners of both vessels for the costs of clearing the wreck. The Board was statutorily entitled to £10,000 from the *Ousel*, and claimed against the *Liverpool* in negligence. The issue arose as to whether the Board was obliged to reduce its claim against the limitation fund of the *Liverpool* by giving credit for the £10,000 it was entitled to from the *Ousel*.

Harman J, delivering the judgment of the Court of Appeal, said that the board did not:⁷⁶

Let it be conceded that the if the board had recovered the £10,000 from the *Ousel* under its statutory power that would have been satisfaction pro tanto of the damages; still the fact is that the board has not recovered this sum, and, in our judgment, there is no duty upon it to do so...this case, in our judgment, has nothing to do with the duty to mitigate damages. It concerns the board's legal rights, and no duty rests on it at the demand of a tortfeasor to satisfy part of the damages by resorting to another tortfeasor; still less by resorting to an innocent party made liable merely by statute.

While *The Liverpool (No 2)* concerned statutory and tortious rights of recovery, the principle is general. In *International Factors v Rodriguez*⁷⁷ the principle was applied in a situation where the defendant had converted cheques that had been assigned to the plaintiff factors. The defendant argued that the plaintiff had not suffered any damage because it retained a right to recover from the debtors. Sir David Cairns rejected this argument:⁷⁸

⁷⁶ *Steamship Enterprises of Panama Inc, The "Liverpool" (Owners) v "Ousel" (Owners)*, above n2, at 82-3.

⁷⁷ *International Factors Ltd v Rodriguez* [1979] QB 351; 1 All ER 17, CA.

⁷⁸ At 359.

The position simply is that, assuming, as I will, that there is a right of action against the debtors, a plaintiff who has two causes of action cannot be met when he makes a claim against one defendant by the answer ‘Oh no; you’ve suffered nothing by my tort because you have a cause of action against someone else.’ That clearly cannot be right.

B The anterior question of loss

The rule in *The Liverpool (No 2)* provides that a plaintiff need not take steps to recover loss from parties who, in addition to the defendant, are liable to it. It follows that the right to recover against one defendant does not reduce the liability of another defendant in respect of the same damage. Prima facie, this is inconsistent with an approach that takes into account the value of a potential damages claim in assessing loss caused by a tortfeasor.

However, *The Liverpool (No 2)* was concerned with a state of affairs in which loss had already been determined. The principle is that rights against other third parties do not reduce the defendant’s existing liability. The logically anterior question is what that liability is. Tipping J disclaims any conflict with *The Liverpool*, stating that he is “not casting doubt on the ordinary rule that a plaintiff may choose whom to sue when more than one person is potentially liable. What is in issue here is whether one of those potentially liable parties has caused the plaintiff any loss.”⁷⁹

The inconsistency between *The Liverpool (No 2)* and an approach that values a claim for damages in assessing loss may therefore be overcome by conceptualising loss as an anterior question to the question of whom the claimant is entitled to recover that loss from. It is only when the tortfeasor can be said to have caused loss that they are liable in negligence. Until then, the rule in the *Liverpool* is not yet in play. This approach was adopted by Rix LJ in *Haugesund Kommune*. He said:⁸⁰

⁷⁹ *Marlborough District Council v Altmarloch Joint Venture Ltd*, above n 1, at [108].

⁸⁰ *Haugesund Kommune v Depfa ACS Bank*, above n 63, at [41].

In my judgment, the principle in *The Liverpool (No 2)* is not in doubt...However, all those cases proceed on the basis that the claimant's loss has been established and what is at issue is whether the right to proceed for a remedy against another party can operate to reduce or remove the claimant's right to judgment for his established loss against the defendant of his choice.

This approach is open to criticism on the basis that while it is logically possible to treat the investigation into loss as separate from the investigation as to who the loss is recoverable from, where to draw the line may be contentious. Thus, the majority in *Altimarloch* considered that the tortfeasor had caused an immediate loss on the purchaser's entry into the contract whereas the minority considered that loss should be assessed later, with reference to the contractual claim.

A second criticism is that the approach offends an underlying rationale of the rule. This rationale is that a plaintiff is entitled to choose from which defendant it recovers compensation from.⁸¹ An approach which values the plaintiff's contractual claim for damages in establishing the tortious loss, precludes this choice. To the extent that the claim against the contract breaker has been included in the tortious loss, that sum is only recoverable from the contract breaker.

VI Mitigation

A Avoidable loss

If *Altimarloch* had not sued the vendor, an issue may have arisen as to whether *Altimarloch* was required to do so in mitigation of its loss. A plaintiff must take all reasonable steps to mitigate its loss consequent on the breach, and cannot recover for any loss which it could have avoided but has failed, through unreasonable action or inaction, to avoid.⁸² The question of what amounts to reasonable mitigation is a question of fact.⁸³

⁸¹ See *Peters v East Midlands Strategic Health Authority* [2009] EWCA Civ 145; [2009] 3 WLR 737 at [41].

⁸² McGregor, above n 42, at [7-004].

Three members of the Supreme Court raised this issue. Elias CJ noted that what is reasonable may include steps to recover all or part of the loss, though in some instances litigation against third parties may be more than is reasonable to expect.⁸⁴ Blanchard J similarly observed that “[g]enerally a plaintiff is not required to take such a step in mitigation.”⁸⁵ McGrath J would not have required litigation against the vendors. He said that “[t]here is no duty on the purchaser to mitigate its loss arising from the Council’s negligence by first suing the vendor for breach of contract by its misrepresentations.”⁸⁶

1 Third party litigation

In *Pilkington v Wood*⁸⁷ it was said that “the so called duty to mitigate does not go so far as to oblige the injured party, even under an indemnity, to embark on a complicated and difficult piece of litigation against a third party”.⁸⁸ The decision in *Pilkington* is accepted as laying down a general rule that complicated and difficult litigation will not be required in mitigation.⁸⁹ However, McGregor on Damages states that:⁹⁰

...there is now a preparedness, appearing in professional negligence cases, for courts to see a failure to claim against a third party before suing the professional himself as a failure to mitigate.

Thus, in *Western Trust Savings Ltd v Travers & Co*⁹¹ the court held that in an action against its solicitors the plaintiff lender had failed to mitigate its loss by not bringing an

⁸³ *Payzu v Saunders* [1919] 2 KB 581 (CA) at 588 and 589.

⁸⁴ *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 1, at [55].

⁸⁵ *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 1, at [68].

⁸⁶ *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 1, at [201].

⁸⁷ *Pilkington v Wood* [1953] Ch 770; [1953] All ER 810 (CHD).

⁸⁸ At [777].

⁸⁹ McGregor, above n 42, at [7-081].

⁹⁰ At [7-083].

⁹¹ *Western Trust Savings Ltd v Clive Travers Co* [1997] P.N.L.R. 295 (CA).

action for possession of the mortgaged property. In *Walker v Medlicott & Son*⁹² a beneficiary under a will who sued the testator's solicitors was held to have failed to mitigate by not first pursuing a claim for rectification of the will.

In the writer's opinion these cases should be seen as narrow exceptions to the general rule that litigation against a third party will not ordinarily be required. In *Western Trust Savings Ltd v Travers* the proposed litigation was "no more than a possession action which is an ordinary feature of enforcing security."⁹³ In *Walker v Medlicott*, the court was influenced by the fact that an un-rectified is anomalous in conferring a benefit on someone who was not intended to benefit. Further, rectification was seen as the obvious remedy.⁹⁴

It is unlikely that, had *Altimarloch* only sued the Council, litigation against the vendor would be viewed as a necessary step in mitigation. First, the litigation against the vendor would likely be complicated and difficult. Second, the situation in *Altimarloch* does not involve special factors like those in *Travers* or *Medlicott*. That litigation would probably not have been required is illustrated by the case of *Cottingham v Attey Bower*,⁹⁵ in which claimants who sued their solicitors after purchasing defective house were not obliged to first sue the negligent surveyor, despite the surveyors being "on one view the most obvious defendant."⁹⁶

B Relationship with the normal measure of damages

Despite it being unlikely that third party litigation would be required in mitigation, if it were, the value of litigation against the vendor would be deducted from the damages payable by the Council. This creates the potentially anomalous result that had

⁹² *Walker v Medlicott & Son* [1999] 1 W.L.R 727 (CA).

⁹³ *Western Trust Savings Ltd v Clive Travers Co*, above n 91, at 303.

⁹⁴ At 742.

⁹⁵ *Cottingham v Attey Bower & Jones (A Firm)* [2000] Lloyd's Rep. P.N. 591.

⁹⁶ *Cottingham v Attey Bower & Jones (A Firm)* [2000] Lloyd's Rep. P.N. 591, at [29]

Altimarloch not sued the vendor, the principles of mitigation might have allowed a reduction in the damages payable by the Council but because they did sue, no reduction was permitted on the majority approach to calculation of loss.

It is suggested that this is not a true anomaly. The enquiry into mitigation is a different enquiry from that into the loss suffered.⁹⁷ Mitigation involves the court looking at what *would have happened* had the plaintiff taken the requisite steps in mitigation. The value of potential litigation can be taken into account because the purpose is to determine what amount of the loss was due to the plaintiff's failure to take reasonable steps to avoid it. By contrast, valuing the likely recovery from the vendor for the purposes of calculating loss would involve the court looking to *what will happen*. This is conceptually quite different.

The consequences of the two enquiries are also different. Where a plaintiff has suffered no loss the plaintiff has no cause of action in negligence. In contrast, where the plaintiff is found to have failed to mitigate to the extent of the whole of the primary loss suffered, the cause of action remains and the plaintiff may potentially recover for consequential loss.

C Relationship with the Liverpool (No 2)

A tension exists between the rule in *The Liverpool (No 2)*, and the cases in which litigation against a third party has been held to be reasonably necessary as a mitigating step.

The rule in *The Liverpool (No 2)* exists independently of mitigation, and strictly speaking, operates in different circumstances. Thus, mitigation may require a plaintiff to take the

⁹⁷ Though mitigation may not be discussed separately, instead being incorporated into the normal measure of damages. See McGregor, above n 42, at [7-033].

step of litigating against a third party; the rule in *The Liverpool (No 2)* provides that a plaintiff need not take steps to recover from a party that is *already liable* to it. However, there is no doubt that the relationship is, as Tettenborn states, “awkward”.⁹⁸ To this end, there is a suggestion that certain cases requiring third party litigation are wrongly decided. *Clerk & Lindsell on Torts* states that:⁹⁹

It should be remembered that a claimant has an unfettered choice as to who he turns to, to make good his loss. From which it follows that a lawyer may be liable for a loss however reasonable it might be to expect the client to look to some third party instead for reparation. To this extent, the suggestion in *Walker v Medlicott* that it was the duty of a *White v Jones* claimant to take steps to recoup his loss by rectifying the will must now be regarded as very doubtful.

To the extent that difficulties with regard to third party litigation already exist in the law, it is suggested that valuing a claim for damages at the calculation of loss stage would create more.

VII The Cause of Action

A Contractual primacy

Despite Tipping J’s statement that “[t]he reasoning which leads me to this conclusion is not based on any notion that contract has general primacy over tort”¹⁰⁰, the effect of the minority judgment is that the contractual claim is placed in a special position. To value a contractual claim for damages in calculating a tortious loss necessarily involves taking into account the contractual claim first. This was recognised by McGrath J, who found that the effect, if not the intent, of Tipping J’s judgment was to give primacy to

⁹⁸ David Tettenborn and David Wilby *The Law of Damages* (2nd ed, LexisNexis, London, 2010) at [5.49].

⁹⁹ Clerk, Jones, Lindsell, Dugdale, above n 49, at [10-140].

¹⁰⁰ *Marlborough District Council v Altmarloch Joint Venture Ltd*, above n 1, at [108].

contract.¹⁰¹ Underlying the minority approach is the notion that the tortious cause of action should fill the gaps left by the contractual cause of action. The question is whether the nature of the contractual cause of action justifies this.

B Is this justified?

A contract is “a promise or set of promises which the law will enforce”¹⁰². Torts are civil wrongs, a “breach of a legal duty which affects the interests of an individual to a degree which the law regards as sufficient to allow that individual to complain on his or her own account rather than as a representative of society as a whole.”¹⁰³

Two main distinctions can be drawn between tort and contract.¹⁰⁴ First, tortious duties are primarily fixed by law; contractual duties are based on the consent of parties. Second, tort duties are owed to persons generally (in rem); contractual duties are undertaken towards a specific person or persons (in personam).

The first of these distinctions provides a possible justification for taking account of a contractual duty before a tortious one. Because contractual duties are consented to by parties, the law should give these duties primacy. Thus, a concurrent duty of care in tort between contracting parties may be excluded if the contract expressly or impliedly excludes tortious liability.¹⁰⁵ This is justified on the basis that the law should uphold agreements consented to by the parties and prefer private ordering to imposed liability.

¹⁰¹ *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 1, at [206].

¹⁰² Frederick Pollock, *Pollock's Principles of Contract Law* (13th ed, Stevens, London, 1950) at 1.

¹⁰³ Peter Birks “The Concept of a Civil Wrong” in David G. Owen *Philosophical Foundations of Tort Law* (Oxford University Press, Oxford, 1995) at 51.

¹⁰⁴ Clerk, Jones, Lindsell, Dugdale, above n 49, at [1-03].

¹⁰⁵ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, [1994] 3 WLR 761.

However, the notion that “contract trumps tort”¹⁰⁶ is not a general one, and it will do so “only in the right circumstances and between the right parties.”¹⁰⁷ It is submitted that there is no reason why contract should be given primacy in this situation.

First, *Altimarloch* does not involve concurrent liability. It is a situation where two different defendants have each induced entry into a contract. The tortious duty of care imposed on the Council in *Altimarloch* was not inconsistent with any contractual duty owed by the Council or by the vendor.

A further objection is that both the representations made were in fact negligent misrepresentations. The vendor’s agents and the Council committed the same wrong. It was only by virtue of section 6 of the Contractual Remedies Act that the vendor’s misrepresentation was treated as a term of the contract. Indeed, s 6 does not constitute the misrepresentation a term of the contract, but treats the misrepresentation *as if* it were a term of the contract for the purposes of the remedy.¹⁰⁸ Liability is not tortious, but it is not necessarily contractual either. There was thus no justification for giving the vendor’s claim primacy in *Altimarloch*.

VIII The preferable approach

It is submitted that the majority approach should be preferred, as it is a more principled and practical approach to the issue.

¹⁰⁶ John G. Fleming “Tort in a Contractual Matrix” (1995) 33 Osgoode Hall LJ 661 at 663 citing Peter Cane *Tort Law and Economic Interests* (Oxford, Clarendon, 1991).

¹⁰⁷ Jeffrey S. Leon and Shara N. Wright “Contract trumps tort, but which one comes up spades?” (2008) 34 *Advocates’ Q* 475 at 475.

¹⁰⁸ See Francis Dawson and David McLauchlan *The Contractual Remedies Act 1979* (Sweet & Maxwell, Auckland, 1981) at 12-13.

1 Both defendants' acts were causes

Both the Council's misrepresentation and the vendor's representation were factual causes of Altimarloch's entry into the contract. If the Council had not been negligent Altimarloch would not have confirmed the contract and in the absence of the vendor's agents misrepresentations the contract would not have been entered into at all. Both the defendants were therefore causes of Altimarloch being a party to a loss-making contract.

2 No injustice in allowing judgment against both

There is no injustice in allowing Altimarloch to obtain judgment against the Council without reference to the claim against the vendor. Both defendants have committed a wrong, and the plaintiff should be entitled to judgment against both. Altimarloch does not gain a windfall; once it has recovered the full amount of its loss, no further enforcement proceedings can be brought.

That the plaintiff is entitled to enforce judgment against only one of the defendants may be perceived as being unfair to that defendant. But this is a consequence of the law preferring plaintiff compensation at the liability stage. Fairness between defendants should be worked out through a claim for contribution. While the availability of contribution between the defendants was also at issue in *Altimarloch*, it is suggested that the solution is for Parliament to reform the law of apportionment, rather than for Courts to devise rules that provide for a quasi-apportionment at the liability stage.

3 Difficulties of principle

Valuing a contractual claim for damages in assessing the loss caused by a tortfeasor is only tenuously supported by authority. Further, as shown above, the approach is in tension with the rule in *The Liverpool (No 2)*. Where a proposed rule of law is difficult to

reconcile with the surrounding law, there should be a good reason to follow it. It is suggested that there is not sufficient justification in an *Altmarloch* fact situation.

4 *Practical Difficulties and Fairness*

Adopting the minority approach would require courts to value a contractual claim for damages where one exists. Thus courts must first assess the likelihood that the plaintiff will obtain judgment against the contract-defendant, and second, the likelihood that the plaintiff will be able to enforce that judgment. The first assessment is made more difficult where the plaintiff sues the defendants in separate proceedings. The second could conceivably involve a complex investigation into the defendant or defendants' solvency.

Requiring courts to assess the value of a contractual damages claim will increase the length of proceedings and introduce an undesirable element of uncertainty into the calculation of loss. In *Wardley Australia Ltd. v Western Australia*¹⁰⁹, the High Court of Australia rejected the proposition that contingent liabilities should be treated as loss. To do so:¹¹⁰

would increase the possibility that the courts would be forced to estimate damages on the basis of likelihood or probability instead of assessing damages by reference to established events. In such a situation, there would be an ever-present risk of under compensation or over compensation.

It is suggested that the same reasoning applies here. First, because the valuation exercise is inherently inaccurate, the plaintiff will over or under recover to the extent that the court gets the value of the contract claim wrong. Moreover, even where a court is able to accurately estimate the value of the damages claim, post-judgment events may render the defendant unable to pay. As Blanchard J notes, the Christchurch earthquakes demonstrate

¹⁰⁹ *Wardley Australia Ltd v Western Australia* [1992] 175 CLR 514.

¹¹⁰ At 527.

that even defendants who are fully insured may find themselves without a full indemnity.¹¹¹

5 *Still a loss suffered*

In some instances, the financial risk that a defendant may not pay will amount to “loss” for the purpose of a cause of action. This is illustrated on the facts of *Altimarloch*.

If Altimarloch had not entered into the transaction, it would still have \$2.675m. As a result of entering into the transaction, it received property worth \$2.55m and a claim for contract damages. However closely the court is able to calculate the value of the claim for damages, it can never be completely certain that the plaintiff will recover under the damages claim. The chance of having money (however probable) can never be equal in value to actually having that money. Therefore the value of the claim can never be equivalent to the plaintiff’s actual loss and the plaintiff is financially worse off at the time of judgment, even taking into account the claim for damages. The residual loss resulting from the uncertainty of recovery will in some cases amount to financial loss for the purpose of a cause of action.

6 *Contribution*

A further objection to the minority approach is that it significantly reduces the possibility that contribution will be available between defendants. First, in many cases, valuing the contractual claim will lead to a finding that the tortfeasor has caused no loss. In negligence without loss there can be no liability, and thus, no liability to contribute. Secondly, where the loss caused by the tortfeasor is premised on the likely recovery from a contract breaker, it will be very difficult to say that the loss caused by the tortfeasor is of the same extent as that caused by the contract defendant.

¹¹¹ *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 1, at [72].

IX Conclusion

In *Altimarloch*, the Supreme Court grappled with a issue that, while narrow in scope, could only be resolved with reference to wider considerations of negligence and damages law.

The majority approach to the issue was to allow the claim against the Council without reference to the contractual claim for damages. The minority saw the loss caused by the Council as dependant on the likely recovery under the contractual claim. To fit this into the legal framework, the minority valued the Altimarloch's claim for damages against the vendor.

An investigation into the principled basis of the minority judgment reveals that the law in some areas is in an awkward state, with tension between the rules in different areas. Thus, taking a claim for damages into account in valuing loss caused is in some senses inconsistent with the principle in *The Liverpool (No 2)*. This principle in turn is in tension with decisions in which third party litigation has been held to be reasonable mitigation.

Fortunately, the majority approach avoids most of this tension by not straying from established principles. Although on the facts of Altimarloch it may appear odd to say that the Council had caused loss, the majority approach is the correct one. Courts should be cognisant of the practical reality of situations and should take into account all relevant facts at the date of judgment. However, courts should not look to the future to determine present liability. To do so places the plaintiff at risk of under recovery and detrimentally impacts on the availability of contribution between defendants.

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