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VALUING THE INCONVENIENCE RESULTING FROM THE TEMPORARY UNAVAILABILITY OF ONE'S PROPERTY

Abstract

A tort or breach of contract may temporarily deprive the owner of certain property of the use of the property, without the wrongdoer making use of the property themselves. Where the unavailability of the property to its owner has not generated tangible financial loss — which could be the subject of special damages — general damages for the loss of use, or the inconvenience of not having access to the property, may be awarded. The courts have used various methods to calculate such general damages, but they have often not explained why one particular method rather than a different one was used. This article examines the five methods that have been considered by the courts: (1) wasted expenditure; (2) depreciation; (3) interest on capital value; (4) letting value; and (5) the hypothetical cost of renting a substitute property. For each method, its acceptance or rejection by the Australian courts will be reviewed and its propriety as a matter of principle will be discussed.

I Introduction

A tort or breach of contract may temporarily deprive the owner of certain property (a chattel or real property)[1] of the use of the property,[2] without the wrongdoer making use of the property themselves.[3] For example, property

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1 In this article, the term 'property' encompasses both a chattel and real property.

2 This article assumes that the owner of the property would have been in possession of it in the absence of the defendant's wrong. A third party who has damaged a leased chattel is liable to compensate the hirer for any rent paid while the chattel was being repaired: *West Midlands Travel Ltd v Aviva Insurance UK Ltd* [2014] RTR 10, 135 [33] (Moore-Bick LJ) ('*West Midlands Travel*'); *Lee v Strelnicks* (2020) 92 MVR 366, 384 [72] (White JA) ('*Lee*').

3 This article is not concerned with a tortfeasor who has made unauthorised use of the plaintiff's property. In those circumstances, the court may award 'user damages', often calculated by reference to a reasonable hiring fee. For a discussion of the nature of such damages, see *Lewis v Australian Capital Territory* (2020) 271 CLR 192, 242–6 [144]–[148] (Edelman J) ('*Lewis*').

may be negligently damaged,[4] or a chattel sold may show defects, in each case requiring repair of the property and depriving the owner of its use while it is being repaired. Or a contractor may fail to complete building work on certain property by the contractually agreed date, thus depriving the owner of the property of its use during the period of delay. The property's temporary unavailability may cause its owner tangible pecuniary loss, which is in principle compensable. Thus, the owner can in principle claim damages for the loss of rental income,[5] the loss of other profit,[6] or the reasonable rent paid for a substitute property.[7]

Where the temporary unavailability of certain property has not generated tangible pecuniary loss for its owner,[8] general damages for the loss of use per se have been awarded,[9] as opposed to special damages for the tangible pecuniary consequences of the property's temporary unavailability.[10] This was first recognised by the House of Lords in *The Greta Holme*[11] and subsequent cases[12] in which a non-profit-earning ship was negligently damaged and could not be used during the time of repair. Australian and English courts have recognised the availability of general damages

4 Cases of nuisance will not be discussed in this article.

5 *Illawarra Hotel Co Pty Ltd v Walton Construction Pty Ltd* (2013) 84 NSWLR 410, 432 [127] (Barrett JA, Meagher JA agreeing at 411 [1], Ward JA agreeing at 435 [149]) ('*Illawarra Hotel*').

6 *Lonie v Perugini* (1977) 18 SASR 201, 205 (Bray CJ), 217 (King J).

7 *Arsalan v Rixon* (2021) 395 ALR 390, 398–9 [32]–[33] ('*Arsalan*').

8 General damages for the loss of use cannot be awarded in addition to special damages for the rent of a substitute property: *Calabar Properties Ltd v Stitcher* [1984] 1 WLR 287, 291 (Stephenson LJ, May LJ agreeing at 299) ('*Calabar*'); *Lee* (n 2) 370 [8] (Meagher JA).

9 Unless the loss of use had no impact on the plaintiff: *Alexander v Rolls Royce Motor Cars Ltd* [1996] RTR 95, 102 (Beldam LJ); or the plaintiff would have made a loss from using the property: *The Hebridean Coast* [1961] AC 545, 564 (Devlin LJ) ('*The Hebridean Coast*'); *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG* [2008] QSC 141, [938] ('*BHP Coal*').

10 This article uses the terms 'general damages' and 'special damages' with those meanings. The terms are used with very different meanings in other contexts: see Harold Luntz and Sirko Harder, *Assessment of Damages for Personal Injury and Death* (LexisNexis, 5th ed, 2021) 159–66 [1.8].

11 [1897] AC 596, 602 (Lord Halsbury LC) ('*The Greta Holme*').

12 *The Mediana* [1900] AC 113, 116 (Earl of Halsbury LC) ('*The Mediana*'); *The Marpessa* [1907] AC 241, 244 (Lord Loreburn LC) ('*The Marpessa*'); *The Chekiang* [1926] AC 637, 642 (Viscount Dunedin); *The Susquehanna* [1926] AC 655, 662 (Viscount Dunedin) ('*The Susquehanna*'); *The Hebridean Coast* (n 9) 551 (Lord Merriman P).

for loss of use in cases involving other types of chattel,[13] or real property.[14] General damages for the loss of use have also been awarded where a commercially used chattel became unavailable but no loss of profit was proved.[15] In Australia, they have been considered available not only in negligence actions but also in actions for breach of contract,[16] under the former *Trade Practices Act 1974* (Cth),[17] and under the *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*').[18]

In *Arsalan v Rixon* ('*Arsalan*'), discussed in Part II, the High Court of Australia rejected the term 'loss of use' and instead identified the (physical) inconvenience of not having access to the property and — in the case of an individual — loss of amenity in the sense of the loss of pleasure or enjoyment as the losses resulting from the temporary unavailability of certain property to its owner.[19] This article will use the term 'loss of use' when describing decisions in which that term was used, and will refer to the inconvenience of not having access to the property when discussing the law in the abstract.

While the availability of general damages for the inconvenience of not having access to certain property is now established in principle for chattels as well as for real property and — at least in Australia — for actions in contract as well as in tort, the measure of those damages is far from settled. Various methods have been entertained in the cases, but the choice of a particular method on particular facts has rarely been explained. An exception is *Leeda Projects Pty Ltd v Zeng* ('*Leeda Projects*'), where the Victorian Court of Appeal sought to justify a distinction between chattels and real property and between essential and non-essential property

13 See: *Millar v Candy* (1981) 38 ALR 299, 307–8 (Franki J), 312 (McGregor J) (car); *West Midlands Travel* (n 2) 127 [5] (public service bus); *Beechwood Birmingham Ltd v Hoyer Group UK Ltd* [2011] QB 357, 373 [49] (Potter P, Dyson and Maurice Kay LJJ agreeing at 375 [57]–[58]) ('*Beechwood Birmingham*') (car owned by motor dealer).

14 *Westwood v Cordwell* [1983] 1 Qd R 276, 279; *Bayoumi v Protim Services Ltd* (1998) 30 HLR 785, 791 (Swinton Thomas LJ, Mummery and Leggatt LJJ agreeing at 792); *Sweeney v R & D Coffey Pty Ltd* [1999] NSWCA 38, [26] (Mason P, Powell JA agreeing at [53], Fitzgerald AJA agreeing at [54]) ('*Sweeney*'); *Bella Casa Ltd v Vinestone Ltd* [2005] 108 Con LR 148, 157 [34] ('*Bella Casa*'); *Leeda Projects Pty Ltd v Zeng* (2020) 61 VR 384, 402–3 [58] (Kaye JA), 428–9 [174] (McLeish JA) ('*Leeda Projects*').

15 See: *Beechwood Birmingham* (n 13) and the cases cited in n 79.

16 *Yates v Mobile Marine Repairs Pty Ltd* [2007] NSWSC 1463, [85] ('*Yates*'); *Rider v Pix* (2019) 2 QR 205, 217 [34] (Flanagan J, Sofronoff P and Morrison JA agreeing at 208 [1]–[2]) ('*Rider*').

17 *Wyzenbeek v Australasian Marine Imports Pty Ltd (in liq)* (2019) 272 FCR 373, 407 [138] ('*Wyzenbeek*') (misleading or deceptive conduct).

18 *Vautin v By Winddown, Inc [No 4]* (2018) 362 ALR 702, 774 [316] (breach of consumer guarantees).

19 *Arsalan* (n 7) 394 [17]–[18].

in relation to the valuation of the loss of use.[20] For some of the methods that have been applied, it is not settled whether they are mutually exclusive or whether they can be applied cumulatively. Nor have the valuation methods found much attention in the literature.

This article will investigate the five different methods of valuing the loss of use that have been considered by the courts in various circumstances: wasted expenditure (Part III); depreciation (Part IV); interest on capital value (Part V); letting value (Part VI);[21] and the hypothetical cost of renting a substitute property (Part VII).[22] For each method, its acceptance or rejection by Australian courts will be reviewed and its propriety as a matter of principle will be discussed. It will also be examined whether all of the methods are mutually exclusive or whether some of them can be combined.

The individual arguments advanced in this article in relation to the various valuation methods make, taken together, three overall claims. First, it will be argued that there is no justification for choosing different valuation methods depending upon whether the cause of action is breach of contract or tort. While the aim of compensatory damages differs between contract and tort (placing the plaintiff in the position as if the contract had been performed as opposed to placing the plaintiff in the position as if the tort had not occurred),[23] this difference has no relevance to the valuation of the inconvenience of not having access to one's property. The task is to place a value on having possession of particular property during a particular period of time. It cannot make a difference to that value whether the defendant had breached a promise to provide the plaintiff with such possession or whether the defendant had forced the plaintiff out of an existing possession. A difference between contract and tort in the measure of general damages for the inconvenience of not having access to one's property should be present only where this is required on the facts

20 *Leeda Projects* (n 14) 402 [57] (Kaye JA), 429 [178], 430 [184], 431–2 [187]–[192] (McLeish JA).

21 This article uses the term 'letting value', rather than the more common term 'rental value', to denote the amount of rent that the plaintiff could have obtained from letting the subject property, in order to emphasise the difference between this amount and the amount of rent that the plaintiff would have had to pay for a substitute property.

22 Where one chattel of a fleet becomes unavailable and the plaintiff uses a standby kept for such an emergency, damages may be calculated by reference to the proportionate cost of maintaining the standby: *The Mediana* (n 12) 121–2 (Lord Shand), 123 (Lord Brampton); *The Susquehanna* (n 12) 662; *Beechwood Birmingham* (n 13) 372 [45]. This particular valuation method, which cannot be combined with any other method, will not be discussed.

23 See, eg: *McIntyre v Quality Roofing Services Pty Ltd* [2019] SASCFC 29, [61] (Tilmouth AJ, Parker J agreeing at [1], Lovell J agreeing at [2]), citing *Robinson v Harman* (1848) 1 Ex 850; 154 ER 363, 365 (Parke B) ('*Robinson*') (for contract); *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (Lord Blackburn) (for tort).

of the individual case by the difference between contract and tort in the rules on the remoteness of loss and the recoverability of non-pecuniary loss.[24]

Secondly, it will be argued that there is no justification for choosing different valuation methods for chattels and real property except where this is required by the difference in the nature of the property. Thus, the depreciation method is generally unsuitable for real property, which experiences little or no depreciation.

Thirdly, and most importantly, it will be argued that four of the five valuation methods (wasted expenditure, depreciation, interest on capital value, and letting value) are apt to express the value that the plaintiff placed on having access to the property during the period in which it was unavailable. The letting value method reflects the plaintiff's theoretical ability to let the property during that period, and the other three methods reflect the plaintiff's theoretical ability to sell the property at the beginning of the period and to reacquire it at the end of the period. It cannot be overemphasised that the ability to enter into those hypothetical transactions is purely theoretical. It is not assumed that a letting, or a sale and re-purchase, of the property could in practice have occurred. The transaction costs are usually prohibitive. There is no actual loss of opportunity to enter into those transactions.

II The Impact of *Arsalan v Rixon*

A *Tort*

In *Arsalan*,[25] privately owned luxury cars were negligently damaged and required repair. Since their owners needed to use a car during the time of repair, they each hired for that period a substitute car equivalent to the damaged car. The contentious issue was whether the owners were entitled to recover the entire hire charges or only the cost of hiring a substitute car that fulfilled the same functions as the damaged car but lacked the same luxury features. The High Court held that the owner of a negligently damaged vehicle is usually entitled to recover the reasonable cost of hiring, for the period of repair, a substitute vehicle that is broadly equivalent to the damaged vehicle.[26] The hire of a substitute vehicle aims to mitigate the loss resulting from the damage to the car and it is for the defendant to show that the costs incurred in mitigation were unreasonable.[27] The concept of need, which had been introduced in a previous case,[28] was rejected as being too uncertain.[29]

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24 For those differences, see Katy Barnett and Sirko Harder, *Remedies in Australian Private Law* (Cambridge University Press, 2nd ed, 2018) 28 [2.10] (non-pecuniary loss), 162 [5.92] (remoteness).

25 *Arsalan* (n 7). A joint judgment was given by Kiefel CJ, Gageler, Keane, Edelman and Steward JJ.

26 Ibid 391 [2].

27 Ibid 391 [3].

28 *Anthanasopoulos v Moseley* (2001) 52 NSWLR 262, 276 [80] (Ipp AJA).

29 *Arsalan* (n 7) 394 [17].

What is important for present purposes is the High Court's description of the loss suffered by the owner of a negligently damaged chattel. Previously, it had been common to describe that loss as the loss of use of the chattel.[30] The High Court rejected that term as 'inadequate because it does not identify the manner or extent of any loss to a plaintiff'.[31] The High Court identified two heads of loss suffered by the plaintiffs. One head of loss was the inconvenience of not having access to their cars during the period of repair, which the Court described as 'physical inconvenience' to distinguish it from 'mere inconvenience' such as annoyance, disappointment or vexation.[32] The other head of loss was 'loss of amenity, in the sense of loss of pleasure or enjoyment, in the use of a chattel',[33] here the loss of 'enjoyment of the safety features, pleasurable functions, and other specifications of those cars'.[34] It was common ground that physical inconvenience was a recoverable head of loss in actions for negligent damage to a chattel. The High Court held that loss of amenity should also constitute a recoverable head of loss in such actions,[35] because it has been recognised for negligent damage to land,[36] and because the boundary between physical inconvenience and loss of amenity 'is neither clear nor precise because "all inconvenience has to include some mental element"'.[37]

The statement that all inconvenience includes some mental element would strictly mean that a corporation, which has no mind, cannot suffer inconvenience as a result of temporarily losing access to its property. Since a corporation cannot suffer loss of amenity as defined by the High Court (because it cannot experience pleasure or enjoyment), a corporation could not recover damages for negligent damage to a chattel in the absence of tangible financial loss. However, this was not the High Court's view. The High Court cited, without disapproval, a number of English cases in which the corporate owner of a negligently damaged chattel obtained damages in the absence of tangible financial loss.[38] In particular, the High Court mentioned *The Mediana*,[39] where the Mersey Docks and Harbour Board obtained damages for the 'loss of the use' of one of its lightships during a period of repair in which the Board deployed a spare lightship. The High Court described the loss in that case as

30 See, eg: *Rider* (n 16) 217 [34]; *Wyzenbeek* (n 17) 407–8 [136]–[139].

31 *Arsalan* (n 7) 394 [18].

32 Ibid 396 [23].

33 Ibid 394 [17].

34 Ibid 400–1 [40].

35 Ibid 397 [27]. Cf Harry Sanderson and Kanaga Dharmananda, 'Needs and Wants: Recovering Loss of Enjoyment Damages in Australia' (2022) 138 (July) *Law Quarterly Review* 353, 356–7.

36 *Arsalan* (n 7) 397 [26].

37 Ibid 396 [23], quoting *Athens-Macdonald Travel Service Pty Ltd v Kazis* [1970] SASR 264, 274.

38 *Arsalan* (n 7) 395 [19]–[20].

39 *The Mediana* (n 12).

'the inconvenience of no longer having a spare lightship available during the period of repair'.[40]

It follows that the mental element of inconvenience is present whenever the owner of certain property temporarily loses access to the property, and the difference between 'loss of use of the property' and 'inconvenience of not having access to the property' is purely semantic. In any event, while the High Court rejected the term 'loss of use' to denote the non-tangible loss suffered as a result of temporarily losing access to one's property, the Court did not reject the methods judges had used to place a value on such loss. The Court mentioned, without disapproval, various methods employed in previous cases to place a value on the loss of use of a chattel.[41] The Court mentioned that interest on the capital value of the damaged property had been awarded in 'older cases involving the loss of use of a ship',[42] and that wasted expenses and an allowance for depreciation had been added in 'some modern cases'.[43] It can be inferred that the Court envisaged the continued application of these methods to value what the Court described as the inconvenience of not having access to one's property.

This does not conflict with the Court's statement that 'it is often convenient to quantify physical inconvenience and the loss of amenity of use of property together as part of a single award of general damages'.[44] The established valuation methods are apt to do this in most cases because features of the property from which an individual derives particular pleasure and enjoyment will often increase the cost of the acquisition or maintenance of the property and will then be captured by the valuation methods, as explained later in this article.[45] In some cases, an individual may be awarded an amount of damages (for loss of amenity) in addition to the amount generated by the methods discussed in this article. The amount of that extra award needs to be determined at common law in the same way as the amount of damages for non-pecuniary loss in other contexts, which will not be discussed in this article.

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40 *Arsalan* (n 7) 395 [19], where the Court added that the loss should be valued at the expense of having the spare ready, citing: *The Mediana* (n 12) 122 (Lord Shand); *The Susquehanna* (n 12) 662, 665–6, 668–9; *Beechwood Birmingham* (n 13) 369–72 [33]–[45]; *West Midlands Travel* (n 2) 132–3 [23].

41 *Arsalan* (n 7) 395 [20]. These methods had already been mentioned, without disapproval, by Edelman J in *Lewis* (n 3) 254–5 [166].

42 *Arsalan* (n 7) 395 [20], citing: *The Marpessa* (n 12); *The Susquehanna* (n 12) 664 (Lord Sumner); *The Hebridean Coast* (n 9) 578 (Lord Morton).

43 *Arsalan* (n 7) 395 [20], citing: *Consort Express Lines Ltd v J-Mac Pty Ltd [No 2]* (2006) 232 ALR 341, 356 [87] ('*Consort Express Lines*'); *West Midlands Travel* (n 2) 132–3 [23]; *Vautin* (n 18) 773 [314].

44 *Arsalan* (n 7) 397 [27].

45 In *Yehia v Williams* (2022) 99 MVR 393 ('*Yehia*'), the interest on capital value method was used to place a value on the plaintiff's 'inability to enjoy and appreciate his vehicle', stating that the High Court in *Arsalan* (n 7) had endorsed such an approach: at 418 [164].

B *Contract*

In *Arsalan*, the High Court did not address claims for breach of contract. However, the High Court's conceptualisation of the loss resulting from the unavailability of certain property to its owner must apply in contract too.[46] If the unavailability of property leads to physical inconvenience — and in the case of an individual, loss of amenity — where the unavailability results from damage to the property caused by the breach of a tortious duty of care, it must lead to the same losses where the unavailability results from damage to the property caused by the breach of a contractual duty of care or results from some other breach of contract such as delay in the repair of the property. The cause of the property's unavailability to its owner cannot make a difference to the types of loss resulting from the unavailability. Nor can it make a difference to the quantification of those types of loss.

What needs to be examined is how the High Court's conceptualisation of the loss resulting from the unavailability of certain property to its owner sits with the general proscription of contractual damages for non-pecuniary loss.[47] Prior to *Arsalan*, Australian courts sometimes awarded contractual damages for the loss of use of property to individuals, without mentioning the general rule.[48] The general rule was mentioned in two cases.

One of these cases is *Cappello v Hammond & Simonds NSW Pty Ltd*,[49] where substantial renovation work on the plaintiffs' home was completed about seven months late. The plaintiffs' claim for general damages for delay was rejected by the trial judge who, while noting that contractual damages for physical inconvenience can be awarded, was unable to find significant physical inconvenience on the facts and also took into account that the plaintiffs had been responsible for a substantial part of the delay.[50] The New South Wales Court of Appeal detected no error of law in the trial judge's reasoning and refused to disturb his Honour's findings because his conclusions were likely affected by the evidence at trial.[51] The decision may imply that general damages for the delay could be awarded only if the case fell within

46 The following discussion is concerned with compensation for consequential loss, as opposed to what Edelman J has described as 'compensation directly based on the performance interest', which is 'the difference between the value of what was promised and the value of what was received' and 'is not concerned with loss in any real or factual sense': *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326, 348–9 [64]. A discussion of this latter type of damages is beyond the scope of this article.

47 See, eg, *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 365 (Mason CJ).

48 See, eg: *Rider* (n 16) 217 [34] (catamaran); *Leeda Projects* (n 14) 401 [52] (Kaye JA) (apartment).

49 [2021] NSWCA 57 ('*Cappello Appeal*').

50 *Cappello v Hammond & Simonds NSW Pty Ltd* [2020] NSWSC 1021, [40].

51 *Cappello Appeal* (n 49) [86]–[93] (Leeming JA, Macfarlan JA agreeing at [1], McCallum JA agreeing at [97]). Leeming JA (at [92]) quoted a passage from *Lee v Lee* (2019) 266 CLR 129, 148–9 [55] (Bell, Gageler, Nettle and Edelman JJ) for the rules on appellate restraint.

an exception to the general proscription of contractual damages for non-pecuniary loss, but the plaintiffs do not seem to have challenged that position.

The second case in which the general rule was mentioned is *Vautin v By Winddown, Inc [No 4]* ('*Vautin*'),[52] where a vessel bought for pleasure had a latent defect since its construction and could not be used for three years. Justice Derrington in the Federal Court distinguished two heads of loss. The first was 'the loss of enjoyment of the vessel', which was captured by the general rule and thus was recoverable only if the object of the contract was the provision of enjoyment, pleasure or the like, which was not the case on the facts.[53] The second head of loss was 'the loss of use of a non-profit making chattel', which had been regarded as compensable as part of general damages.[54]

Justice Derrington's comments assist in characterising the types of loss recognised by the High Court in *Arsalan*. Loss of amenity, defined by the High Court as loss of pleasure or enjoyment, must be characterised as non-pecuniary loss and thus subject to the general proscription of contractual damages for such loss. Different considerations apply to the (physical) inconvenience of not having access to the property, as this loss can be suffered by a corporation as well as an individual. It should not be subject to the general proscription of contractual damages for non-pecuniary loss.

The remainder of this article analyses the various methods courts have used to place a value on the loss of use of property, which Australian courts may continue to use to place a value on what the High Court in *Arsalan* described as the (physical) inconvenience of not having access to the property and which often also capture the loss of amenity suffered by an individual.

III Wasted Expenditure

The wasted expenditure method identifies the expenses which the plaintiff incurred in keeping and maintaining the property during the period of unavailability, and which were wasted as the plaintiff was not able to use the property during that period. In the case of a chattel, this could be, for example, insurance premiums, registration fees or tax. In the case of real property, this could be, for example, council rates, utility charges or owners' corporation fees.[55] The cost of purchasing the property is not included, as this is captured by the depreciation and the interest on capital value methods to be discussed in Parts IV and V below.

52 *Vautin* (n 18).

53 Ibid 771–2 [308]–[309].

54 Ibid 772 [310], citing *Yates* (n 16).

55 See *Leeda Projects* (n 14) 401–2 [55] (Kaye JA).

In England, the wasted expenditure method has been approved in relation to chattels[56] and real property.[57] In Australia, it was applied to real property in *Leeda Projects*.[58] The completion of building work on an apartment intended to be used as a private art gallery and occasional residence was delayed by 130 weeks. The plaintiff claimed damages in the amount of $283,802.17, which was the sum of owners' corporation fees, council rates, electricity charges and water charges paid by her as the owner of the apartment for the period of delay.[59] The trial judge rejected the claim on the ground that the defendant's delay had not caused the plaintiff to incur those expenses.[60] The Victorian Court of Appeal awarded damages in the amount of the wasted expenditure. Justice of Appeal Kaye said:

> the respondent acquired the Eureka apartment for the purpose of her intended use and enjoyment of it as a private art gallery and occasional residence … The costs of ownership of the apartment — the rates, service charges and the like — were incurred to enable the respondent to have and use the Eureka apartment for that specific purpose. Thus, the proportion of those costs, that the respondent incurred during the delay period, are an appropriate measure of the loss and damage occasioned to her by reason of her inability to use the apartment for its intended purpose during the 130 week delay period …[61]

His Honour was saying that the plaintiff was not claiming damages directly for the expenses. To use the distinction between general damages and special damages, the plaintiff was claiming, not special damages for owners' corporation fees etc, but general damages for the inconvenience of not having access to the apartment for 130 weeks. This inconvenience had been caused by the defendant's breach of contract, and the wasted expenses were taken to place a value on it. They were not themselves losses to be compensated.

Justice of Appeal McLeish, with whom Tate JA agreed, said:

> Damages for 'wasted expenditure' are not true alternative heads of damage, but manifestations of the central principle in *Robinson v Harman*. It is therefore not to the point that there is a class of case where expenditure made in reliance on the contract being performed may be recovered, and that this case falls outside that class. The label 'wasted expenditure' does not work to circumscribe the

56 *The Marpessa* (n 12) 244–5; *The Susquehanna* (n 12) 664. Wasted expenditure was regarded as an item additional (rather than alternative) to interest on capital value and depreciation. This cumulation is discussed in Parts IV and V(A) below.

57 *Bella Casa* (n 14) 157 [32]–[34].

58 *Leeda Projects* (n 14) 402 [57] (Kaye JA), 431–2 [187]–[192] (McLeish JA).

59 Ibid 401 [55] (Kaye JA). This claim was the alternative to a claim for the letting value of the apartment, which was rejected. This aspect of the case is discussed in Part VI below.

60 Ibid 389 [11].

61 Ibid 402 [57].

> operation of the general principles for recovery of contract damages to particular kinds of case.[62]

His Honour was referring to the function of reliance loss in calculating damages for breach of contract. Such damages aim to place the innocent party in the position as if the contract had been performed properly.[63] It is the innocent party's expectation loss that is compensated. But the innocent party, who bears the onus of proof, needs to prove the amount of loss that would have been avoided, or the amount of profit that would have been made, had the contract been performed properly.[64]

Sometimes, the very fact that a performance promised by the defendant has not been provided makes it impossible to determine the amount of expectation loss. In those circumstances, if the innocent party has incurred a loss (that is, has incurred an expenditure or forgone income) in reliance on the other party's promise to perform, this reliance loss can be taken as the measure of the damages.[65] The reason is not that the breach of contract has caused the innocent party to incur the reliance loss; it would have been incurred in any event. The reason is that the innocent party incurred the loss in the expectation that the revenue to be obtained as a result of the other party's performance would exceed, or at least equal, the reliance loss. People do not generally spend money in expectation of receiving a contractual performance unless the expected benefit exceeds or at least equals the expenditure. The point is that the reliance loss is not independently compensable. It constitutes, through a presumption of profitability, the minimum amount of expectation loss, which could not otherwise be quantified.[66]

The reliance loss principle addresses uncertainty as to what would have happened without the defendant's wrong. It is not directly applicable to the valuation of the inconvenience of not having access to one's property because such uncertainty is not present. Nevertheless, as alluded to by McLeish JA in the passage quoted, the reliance loss principle can be seen as flowing from the wider principle that a person who has incurred expenditure, or foregone income, in order to obtain a particular benefit has a higher interest in obtaining that benefit than keeping the money or drawing the income. Thus, the value the person places on the benefit exceeds the amount of expenditure incurred or income foregone. This wider principle can be employed in the present context, whether the action is in contract or tort. A plaintiff who has incurred expenditure, or forgone income, in order to have the use of

62 Ibid 431 [189] (McLeish JA, Tate JA agreeing at 386 [2]).

63 *Robinson* (n 23) 365. Approved in, for example, *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 80 (Mason CJ and Dawson J), 98 (Brennan J), 116 (Deane J), 134 (Toohey J), 148 (Gaudron J), 161 (McHugh J) ('*Amann Aviation*').

64 *Amann Aviation* (n 63) 14–15 (Mason CJ and Dawson J), 27 (Brennan J).

65 See generally *Amann Aviation* (n 63).

66 Ibid 126 (Deane J); *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] 1 CLC 662, 709 [190]. See David McLauchlan, 'The Limitations on "Reliance" Damages for Breach of Contract' in Roger Halson and David Campbell (eds), *Research Handbook on Remedies in Private Law* (Edward Elgar, 2019) 86, 86.

particular property must value the benefit from using the property higher than the amount of expenditure incurred or income foregone.

The wider principle justifies the wasted expenditure method for both chattels and real property, although care must be taken in its application. In general, the value the plaintiff placed on having access to the property during the period of unavailability must exceed or at least equal the expenses the plaintiff incurred for the maintenance of the property during this period. However, it may be different where the amount of outgoings is not the same in every period of time but fluctuates. There may be an amount that is paid once a year for the whole year, for example the owners' corporation fee of a unit or the registration fee of a vessel. If the property is unavailable for a week and such an annual payment happens to fall within that week, it cannot be said that it represents the value of the property to the plaintiff in that week. The value of the property to the plaintiff will usually be the same every day of the year. Annual payments have to be averaged over the year. Similar considerations may apply where utility bills fluctuate with the seasons. It may be appropriate to take 1/52 of the annual outgoings for every week in which the plaintiff was not able to use the property.

IV Depreciation

The depreciation method identifies the decrease in value (if any) of the property during the period of unavailability. The value of the property at the end of the period is compared to its value at the beginning of the period, not to its value at the time the plaintiff acquired it.[67]

The courts do not seem to have entertained the depreciation method in relation to real property, which is unsurprising considering the small rate of depreciation of buildings.[68] In relation to chattels, English courts have applied[69] or approved[70] the depreciation method, and there has been support for the method in the following two Australian cases.

In *Vautin*,[71] a vessel bought for pleasure had a latent defect since its construction and could not be used for three years. It was held that the buyer was entitled to reject the vessel and obtain a refund of the purchase price and damages for wasted expenses. Justice Derrington in the Federal Court, added that if the buyer had not been entitled to a refund of the purchase price, damages for the loss of use of the

67 *The Marpessa* (n 12) 245.

68 Where, due to external factors, the value of the real property decreased significantly during the period of its unavailability, damages for this fall in value can be awarded only if the plaintiff would in fact have sold the property at the beginning of the period: *Cappello Appeal* (n 49) [76]–[85].

69 *Beechwood Birmingham* (n 13) 374 [52]; *West Midlands Travel* (n 2) 135 [33].

70 *The Marpessa* (n 12) 244–5; *The Susquehanna* (n 12) 663–4.

71 *Vautin* (n 18).

vessel would have been awarded in the amount of 10% of the purchase price over three years. This was based on evidence that the vessel decreased in value by about 50% over five to six years.[72]

In *Wyzenbeek v Australasian Marine Imports Pty Ltd (in liq)*,[73] the plaintiffs were induced to buy a motor yacht by the false representation that the yacht was an ocean-going vessel. Repair work was required, and the yacht was laid up for 629 days. The Full Court of the Federal Court held that the seller was liable for misleading and deceptive conduct and that the plaintiffs were entitled to be compensated on a 'no transaction basis', placing them in the position as if they had not bought the yacht. The Court added that if the plaintiffs had not been entitled to be compensated on a 'no transaction basis', they could have claimed damages for the loss of use of the yacht while it was in repair, in the amount of the depreciation in value of the yacht (at a rate of 6%) during the 629 days of repair.[74]

The depreciation method might be criticised with the argument that the property would have depreciated even without the defendant's wrong. As in relation to the wasted expenditure method discussed in Part III above, such an argument would overlook that the depreciation is not itself the loss to be compensated but is used as a measure of the inconvenience of not having access to the property, which was caused by the defendant's wrong.

The wasted expenditure method was justified on the ground that the value a person places on a particular benefit must exceed or at least equal the amount of expenditure incurred in obtaining the benefit. The same idea justifies the depreciation method. In order to be able to use depreciable property on a particular day, its owner has spent money not only on any ongoing expenses but also on being the owner of the property on that day. At some point in the past, the owner either purchased the property or, if it was a gift, decided not to sell it. If the property does not depreciate, the owner can always regain the whole amount spent, or income foregone, by selling the property: nothing is lost. But if the property depreciates, the amount the owner can gain by selling it decreases day by day. Money is lost every day. Thus, the benefit of having the use of the property on a particular day can be attributed to a proportion of the money spent, or income foregone, on being the owner on that day. The value the owner places on that benefit must exceed or at least equal that proportion of the cost of acquiring ownership.

It is therefore appropriate to use the depreciation method in measuring the inconvenience of not having access to depreciable property. Care must be taken in the application of the method. The relevant amount is not necessarily the decrease in the value of the property during the period of unavailability. Depreciation is not always linear. Some chattels (such as ordinary cars) lose more value in the first year of their existence than in a later year. But the owner will not necessarily place a higher value

72 Ibid 774 [316]–[317].

73 *Wyzenbeek* (n 17).

74 Ibid 407 [138].

on the availability of the property in its first year than in a later year. Depending on the circumstances, it may be appropriate to average the rate of depreciation over the entire period of the plaintiff's ownership of the property.

The depreciation method can be applied cumulatively with the wasted expenditure method; the two methods are not mutually exclusive.[75] The value the owner of depreciable property places on its availability on a particular day must exceed or at least equal the total of the relevant proportion of the total expenditure, both for acquiring ownership and for things such as maintenance, registration and tax.

V Interest on Capital Value

This method identifies an amount of interest on a particular amount of money over a particular period of time. The relevant period of time is the period of the property's unavailability to its owner. The amount of money is the value of the property at the beginning of that period, not the time the plaintiff acquired it. The rate of interest could be the market rate for a savings account; alternatively, the court's rate for pre-judgment interest could be chosen for convenience.[76] This method represents the plaintiff's cost of holding the property during the period of its unavailability, in the sense that money was tied up in the property and could not be invested elsewhere. It is not assumed that the plaintiff took out a loan for the acquisition of the property and was still repaying that loan during the period of the property's unavailability.

The authorities on whether this method can be used require a separate discussion of chattels and real property.

A *Chattels*

The interest on capital value method is established with regard to chattels in actions for negligence[77] or breach of contract.[78] It has been applied in a number of cases where a chattel was used in a business and the fact that the chattel could not be used

75 *The Marpessa* (n 12) 244–5. The depreciation method and the interest on capital value method can also be applied cumulatively: *Consort Express Lines* (n 43) 356 [87]; *Beechwood Birmingham* (n 13) 374 [52]; see below Part V(A).

76 It was chosen in *Pix v Suncoast Marine Pty Ltd* [2019] QSC 45, [27] ('*Suncoast Marine*'), affd *Rider* (n 16).

77 See, eg: *The Greta Holme* (n 11) 605 (Lord Hershell); *The Hebridean Coast* (n 9) 560 (Willmer LJ), 564 (Devlin LJ); *Beechwood Birmingham* (n 13) 372 [45]; *Yehia* (n 45) 418 [164].

78 See, eg, *Yates* (n 16) [77].

for some time affected the profit of the business but the plaintiff could not prove the amount of lost profit.[79]

The availability of the interest on capital value method for a privately used chattel was confirmed in *Rider v Pix* ('*Rider*').[80] A catamaran was bought for private use and then showed defects, requiring repair work for 230 days. The seller was liable for breach of contract. The trial judge awarded damages for the loss of use of the catamaran for 230 days in the amount of 10% per annum (the Practice Direction rate) of the value of the catamaran at the time the repairs began for 230 days.[81] On appeal, the seller argued that the depreciation method (which yielded a lower figure) should have been employed as the interest on capital value method can be used only for chattels that are profit-earning or fulfil a public function but not for a pleasure vessel. The Queensland Court of Appeal rejected that argument:

> This submission fails to appreciate the significance of additional loss in this area of law. The existence of additional loss justifies an additional award of damages; it does not justify the interest on capital value method. Rather, the true justification for the interest on capital value method is that the money invested in the chattel is tied up while the chattel remains out of use. That applies equally to personal chattels like the [catamaran].[82]

The interest on capital value method can be justified for any chattel on the same basis as the depreciation method. In theory, the plaintiff could have sold the chattel when the period of unavailability began and repurchased it when the period ended. During the period, the plaintiff would have had the proceeds of the sale and could have placed it in an interest-bearing bank account. That potential interest constitutes income foregone by the plaintiff in order to have the use of the chattel during that period, and the value the plaintiff placed on that use must exceed or at least equal the income foregone. It is not to the point that the plaintiff would not in fact have sold and repurchased the chattel, or that this would not have been feasible for some reason, or that the transaction costs would have been prohibitive. It is a purely hypothetical scenario employed to ascertain the holding cost of the chattel.

The argument of the seller in *Rider* –– that the depreciation method instead of the interest on capital value method ought to have been used –– was based on the premise that the two methods are mutually exclusive. The Queensland Court of Appeal did not reject that premise. However, the Court was only concerned with whether the interest on capital value method can be applied at all to a privately used chattel. The Court was not concerned with whether that method could be combined

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79 *Woodman v Rasmussen* [1953] St R Qd 202, 217 (Philp J) (planing machine in a sawmill); *Commissioner for Railways v Luya, Julius Ltd* [1977] Qd R 395, 398 (locomotive and other vehicles); *BHP Coal* (n 9) [919]–[949] (bucket wheel excavator in an open mine).

80 *Rider* (n 16).

81 *Suncoast Marine* (n 76).

82 *Rider* (n 16) 220 [45] (Flanagan J speaking for the Court).

with the depreciation method (the buyer not having argued for such cumulation), and the Court's decision should not be understood as regarding the two methods as alternatives. In other cases, it has been said that damages could be assessed in the total amount of lost interest, depreciation and wasted expenditure.[83]

Such a cumulative approach is correct on principle. A person who has spent a particular amount of money on acquiring depreciable property must value its availability during a particular period of time more than a person who has spent the same amount of money on acquiring non-depreciable property, everything else being equal. Similarly, a person who has spent money (apart from the purchase price) in order to have the use of particular property during a particular period must place a higher value on such use than a person who has spent no money, everything else being equal. Therefore, if the owner of a depreciable chattel incurred expenditure in order to have its use during a particular period, the owner has not only foregone interest on the value of the chattel but has also spent money on the chattel and has foregone the theoretical opportunity to sell the property at the beginning of the period and repurchase it for a lower price at the end of the period. There will be no double counting if damages are assessed at the total of the amounts generated by the three methods.

B *Real Property*

The interest on capital value method has rarely been applied in a case involving real property.[84] In *Leeda Projects*,[85] where the trial judge did not entertain this method as the plaintiff had invoked it too late in the proceedings,[86] Kaye JA in the Victorian Court of Appeal observed that this method could be applied to real property as well as chattels.[87] Justice of Appeal McLeish, with whom Tate JA agreed on this point,[88] preferred not to embrace this method 'as the appropriate measure of damages in cases where real property intended purely for personal use is rendered unavailable

83 *The Susquehanna* (n 12) 663–4; *West Midlands Travel* (n 2) 135 [33]. In *Wyzenbeek* (n 17) the Full Court of the Federal Court described depreciation as 'another measure of damages during the period of unavailability for use instead of an amount based on interest on the purchase price': at 403 [112]. However, the Court (at 402–3 [110]) also cited without disapproval Lord Sumner's statement in *The Susquehanna* that lost interest and depreciation could be added together.

84 It was applied by Derrington J in *Bamford v Albert Shire Council* (1996) 93 LGERA 335, where a dwelling could not be used because of a potential landslip that the defendant had negligently failed to detect. The issue was not considered on appeal: *Bamford v Albert Shire Council* [1998] 2 Qd R 125. The method was rejected for real property in *Bella Casa* (n 14) where a flat in London could not be used for some time as a result of defective refurbishment: at 165–7 [59]–[63].

85 *Leeda Projects* (n 14).

86 Ibid 406 [82].

87 Ibid 401 [52]–[53].

88 Ibid 386 [2].

by a breach of contract'.[89] His Honour acknowledged that the method is established in relation to chattels but said that 'the particular approaches taken to assessing damages in the chattel cases are not necessarily applied to cases involving land'.[90] Justice of Appeal McLeish gave three reasons. None of them are convincing.

First, McLeish JA observed that '[t]he authorities concerned with chattels reflect the position that loss is caused when an asset depreciates while it is wrongfully kept from the person entitled to it', and that land does not ordinarily depreciate.[91] It is not obvious why his Honour thought that the chattel cases reflect the position that the asset depreciates. The cases reflect the position that the plaintiff could not use the chattel for some time. References to depreciation are not often found in the chattel cases, and awards of damages calculated by reference to depreciation are rarer still. Furthermore, when real property is the subject matter of a claim for the inconvenience of not having access to one's property, it usually involves a building rather than naked land, and McLeish JA conceded that fixtures on land generally depreciate.[92] The fact that buildings last for a long time may well render the depreciation method irrelevant in cases involving real property because depreciation is negligible on the facts. But the interest on capital value method is not based upon depreciation. It reflects the fact that the plaintiff could in theory have elsewhere invested the money that is tied up in an asset. This applies to chattels and real property alike.

Secondly, McLeish JA said that '[r]eal property also stands in a special position because, when it is used for the purpose of a residence, it is used neither for profit nor for pleasure alone, but to meet a necessity'.[93] This argument is confined to real property used as a residence and cannot explain a special status of all real property. Where the property is the plaintiff's sole residence, the plaintiff will usually have to rent a substitute property and will claim damages for the rent paid. Where no substitute property is rented (because, for example, the plaintiff stays with family members or friends for free), the interest on capital value method can be used to value the plaintiff's inconvenience of not having access to the plaintiff's residence because the method is based on the purely theoretical ability to sell and repurchase the property and does not assume that this would have been feasible in practice.

Thirdly, McLeish JA said that '[t]he multiple purposes for which land may be owned make it hard to say that the measure of the loss of its use is ordinarily calculated by any one measure'.[94] His Honour then mentioned various purposes for which real

89 Ibid 429 [177].

90 Ibid 430 [180]. His Honour distinguished between chattels and real property in order to reject both the interest on capital value method and the letting value method for real property. Further arguments by McLeish JA specifically against the letting value method are considered below in Part VI.

91 Ibid 429 [178]. A similar argument was made in *Bella Casa* (n 14) 165–7 [59]–[63].

92 *Leeda Projects* (n 14) 429 [178].

93 Ibid 429 [179].

94 Ibid.

property may be used including letting and using it as a residence.[95] This does not explain a difference between chattels and real property. Chattels too can be used for various purposes including letting and using them as essential personal items.

On principle, there is no justification for rejecting the interest on capital value method for real property whilst applying it to chattels.

VI Letting Value

A plaintiff who would have let the property during the period of unavailability can claim special damages for the loss of rental income,[96] reduced by expenditure saved,[97] unless this loss is too remote on the facts.[98] The question here is whether the same amount can be taken as the measure of general damages for the inconvenience of not having access to the property where there is a market for the property, even though the plaintiff would not in fact have let the property. While the letting value method does not require that the plaintiff *would* have let the property during the relevant period, it does require that the plaintiff *could* have let it. If nobody would be willing to rent the property from the plaintiff, the property cannot be said to have any letting value. It will usually be possible to find a lessee for a building, but it may be different for some chattels.

The House of Lords has rejected the letting value method even for property that could easily have been let during the period of unavailability. In *The Susquehanna*,[99] an oil tanker belonging to the Admiralty was damaged and disabled for 32 days, during which time another of the Admiralty's oil tankers took the place of the damaged one. The Admiralty occasionally let its oil tankers on a mercantile charter, but this would not have been the case for the damaged tanker during the time of repair. The Registrar assessed general damages for the loss of use of the damaged tanker by reference to the amount that the Admiralty could have obtained by letting the tanker on hire. On appeal, the assessment of damages was referred back to the Registrar. The House of Lords upheld the latter decision. The only reason their Lordships gave for rejecting the letting value method is that the tanker would not, in fact, have been let.[100] But this merely explains why special damages for the loss of hire could not

95 Ibid.

96 See, eg, *Illawarra Hotel* (n 5) 432 [127]. A plaintiff who was forced to use another property which the plaintiff would otherwise have let can claim the loss of rent from that other property: *Sweeney* (n 14) [27]–[29].

97 See *Lahoud v Lahoud* [2009] NSWSC 623, [175] ('*Lahoud*').

98 See, eg, where a contractor was unaware of the letting purpose: *Bui v DB Homes Australia Pty Ltd* [2017] NSWCATAP 218, [24], [28] (Principal Member Seiden and Senior Member Currie). See also: *Illawarra Hotel* (n 5) 431 [123]; *Lahoud* (n 97) [163].

99 *The Susquehanna* (n 12).

100 Ibid 662 (Viscount Dunedin), 663 (Lord Sumner), 664–5 (Lord Phillimore).

be awarded. It does not explain why the letting value cannot constitute the value the Admiralty placed on the use of the tanker.

The Susquehanna involved negligent damage to a chattel. The English Court of Appeal has rejected the letting value method in a case where a flat could not be used by the tenant because of dampness for which the landlord was contractually liable.[101]

In Australia, there is some authority for the applicability of the letting value method where a building has been tortiously damaged. In *Westwood v Cordwell* ('*Westwood*'), where a dwelling occupied by its owner was negligently destroyed and rebuilding would have taken 20 weeks, McPherson J in the Supreme Court of Queensland awarded damages for the loss of use of the dwelling for 20 weeks and measured them by reference to the letting value of the dwelling.[102] In *Sweeney v R & D Coffey Pty Ltd*, where a contractor was liable in contract and tort for carelessly damaging a dwelling occupied by its owner, the New South Wales Court of Appeal observed that general damages for the loss of use of the dwelling, measured by reference to its letting value, could have been awarded if such damages had been claimed earlier in the proceedings.[103]

In *Ray Laurence Constructions Pty Ltd v Nolks*, Southwood J in the Supreme Court of the Northern Territory said, relying on *Westwood*, that '[t]here is some force in the argument' that the letting value method should be applied where the completion of building work was delayed, but his Honour left the question open.[104] An application of the letting value method in those circumstances was rejected in *Leeda Projects*.[105] Delay in the completion of building work caused the temporary loss of use of an apartment that would not have been let during the delay period. The Victorian Court of Appeal refused to assess damages for the loss of use of the apartment by reference to its letting value during the delay period, arguing that such an award would not place the plaintiff in the same position as if the defendant's breach of contract had not occurred, and was excluded by the remoteness doctrine because a potential letting of the apartment had not been in the reasonable contemplation of the parties at the time of the contract.[106] Neither argument is convincing.

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101 *Calabar* (n 8) 293 (Stephenson LJ, Griffiths LJ agreeing at 297, May LJ agreeing at 299).

102 *Westwood* (n 14) 278–9. For the measure of damages, McPherson J relied on United States cases: *Beetschen v Shell Pipe Line Corporation*, 248 SW 2d 66 (Mo Ct App, 1952); *Kentucky Mountain Coal Co v Hacker*, 412 SW 2d 581 (Ky Ct App, 1967). But the letting value method is not universally accepted in the United States. It was rejected, for example, in *Gee v Payne*, 939 SW 2d 383 (Mo Ct App, 1997).

103 *Sweeney* (n 14) [26], citing *The Mediana* (n 12) 116 (Earl of Halsbury LC) and *Westwood* (n 14) 278–9.

104 [2010] NTSC 37, [65].

105 *Leeda Projects* (n 14) 419 [140].

106 Ibid 400 [50] (Kaye JA), 430 [184] (McLeish JA).

The Court's first argument is that because the plaintiff would not have let the apartment during the period of delay, an award of damages in the amount of the letting value would overcompensate the plaintiff. But the plaintiff did suffer a loss. She suffered the inconvenience of not having access to the apartment during the delay period as well as loss of amenity. Since not awarding any damages in respect of that loss would undercompensate such a plaintiff, the court is required to place a money figure on the loss. How this is to be done is not a matter on which the compensatory principle can assist. An award of damages for the inconvenience and –– where present –– loss of amenity, however calculated, does place the plaintiff in the same position as if the delay had not occurred.

The Court's reference to the remoteness doctrine is equally misplaced. That doctrine is not concerned with the method of placing a monetary figure on a compensable head of loss. It is concerned with whether a particular head of loss is compensable at all, which in contractual actions depends upon the foreseeability of the loss as a serious possibility at the time of the contract.[107] It is the kind of loss that needs to be foreseeable, not its extent.[108] Still less does the valuation method applied by the court need to be foreseeable.[109] If the plaintiff had intended to let the apartment and had claimed special damages for lost rent, it would have been necessary to determine whether a letting of the apartment was reasonably foreseeable at the time of the contract. But the plaintiff was claiming general damages for the inconvenience of not having access to the apartment as well as loss of amenity. The only question in terms of remoteness was whether it was reasonably foreseeable at the time of the contract that the apartment would be unavailable for the plaintiff during a period of delay on the defendant's part. This was clearly foreseeable. How any consequential loss is to be quantified is not a matter with which the remoteness test is concerned.[110]

Justice of Appeal McLeish in *Leeda Projects* said that the letting value method 'rests on a fictitious assumption divorced from the value of the apartment to Mrs Zeng'.[111]

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107 See, eg, *Amann Aviation* (n 63) 91–2 (Mason CJ and Dawson J), 98–9 (Brennan J), 116 (Deane J), 135–6 (Toohey J), 174 (McHugh J). Loss of profit resulting from the loss of use of property may be too remote, as demonstrated by the very case that established the contractual remoteness test: *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 145. The loss of profit resulting from the standstill of the plaintiff's mill was too remote as the defendant carrier did not know that the loss of use of the new crankshaft would have that consequence.

108 See, eg, *Stuart Pty Ltd v Condor Commercial Insulation Pty Ltd* (2006) Aust Contract Reports 90–245, 477 [46] (Beazley JA, Tobias JA agreeing at 488 [124]).

109 This was overlooked by Kaye JA in *Leeda Projects* (n 14) who said that an *award* in the amount of the letting value had not been in the contemplation of the parties: at 400 [50].

110 See *J d'Almeida Araujo Lda v Sir Frederick Becker & Co Ltd* [1953] 2 QB 329 (different legal systems may govern the issue of remoteness and the quantification of damages); *Jackson v Royal Bank of Scotland plc* [2005] 1 WLR 377, 386–7 [33]–[36].

111 *Leeda Projects* (n 14) 430–1 [184], citing *Calabar* (n 8) 293 (Stephenson LJ, May LJ agreeing at 299).

The apartment in that case was one of several apartments in Melbourne owned by the plaintiff and was not her main residence.[112] She could easily have let it had she wanted to. It would not have been artificial to use the apartment's letting value as the value the plaintiff placed on having access to the apartment.

Paradoxically, McLeish JA regarded the letting value method as 'potentially applicable for loss of use of property intended to be used for profit or otherwise essential to its owner'.[113] Property that is essential to its owner (such as the owner's sole residence) could not have been let during the period of unavailability, and the hypothetical scenario of letting the property is more artificial than in the case of Mrs Zeng. If there is to be a distinction between essential and non-essential property, the letting value method ought to apply to the latter rather than the former.

A distinction between essential and non-essential property should not be made, however. Even though the hypothetical scenario of letting is unrealistic in the case of essential property, it is not less realistic than the hypothetical scenario of a sale and repurchase of the property, which underpins the depreciation and the interest on capital value methods, both of which are established in relation to chattels. In the case of real property, the hypothetical scenario of letting is actually less unrealistic than that of sale and repurchase where the transaction cost will always be prohibitive. If the interest on capital value method is applied to real property, as it is argued in this article that it should, there is even more reason to apply the letting value method to real property.

On principle, the letting value method ought to be available whenever there is a market for the property in question, regardless of the type of property and the cause of action. This method could not be applied cumulatively with any of the methods discussed before. The hypothetical letting of the property during the period of unavailability is not consistent with a hypothetical sale and repurchase of the property, and the hypothetical rent covers any expenses incurred in relation to the property.

VII Hypothetical Cost of Renting a Substitute Property

The final valuation method to be discussed is the hypothetical cost of renting a substitute property while the plaintiff's property is not available. It presupposes that a substitute property is available on the market. A plaintiff who has reasonably rented an equivalent property may recover the rent as the cost of a reasonable measure of mitigating the loss resulting from the subject property's temporary unavailability.[114] The question here is whether the rent to be paid for a substitute property may be taken as the measure of the inconvenience of not having access to

112 *Leeda Projects* (n 14) 408 [87].

113 Ibid 430 [184]. For a similar view, see James Edelman, Simon Colton and Jason Varuhas (eds), *McGregor on Damages* (Sweet & Maxwell, 21st ed, 2021) 987 [31-009].

114 *Arsalan* (n 7) 398–9 [32]–[33].

the subject property in circumstances in which it would have been reasonable to rent a substitute property but no substitute property has in fact been rented.

It is important to distinguish this method from the letting value method considered before. The letting value method identifies the amount of rent that the plaintiff could in theory have obtained from letting the subject property to someone. The method considered now identifies the rent that the plaintiff would have had to pay for renting a substitute property. Even if the subject property and the substitute are of the same value, the amount of rent that the plaintiff would have to pay to a commercial lessor for a substitute property is not necessarily the same as the amount of rent that the plaintiff as a lessor would be able to charge for the subject property, in particular where the plaintiff is not running a business.

The hypothetical cost of renting a substitute property has never been taken as the measure of the inconvenience of not having access to one's property. In relation to chattels, this method has been rejected by the House of Lords,[115] the English Court of Appeal,[116] and the High Court of Australia.[117] In relation to real property, the method was rejected by McLeish JA in *Leeda Projects*.[118]

The rejection of the method is convincing. It is difficult to see how the value that an owner of property places on its availability can be reflected by the hypothetical cost of renting a different property. Even if the two properties are very similar (for example, identical apartments in the same block of apartments or cars of the same make, model, age and specification), there is a difference in that the owner had purchased the subject property for use over a longer period than the period for which the substitute property would be rented. It cannot be assumed that the owner would have been willing to rent the subject property longer term instead of buying it. The opposite is suggested by the owner's decision to buy it, whatever the reasons for it.

Where the subject property fulfils an essential need of the owner (such as the need for a residence or the need for a mode of transport), the owner will generally need to rent a substitute property whenever the subject property is temporarily unavailable. While this may justify (depending upon reasonableness) the compensation of expenses incurred in renting a substitute property, it does not mean that the rent to be paid for a substitute reflects the value that the owner of the subject property places upon its availability during that period. The value of the subject property's availability does not suddenly change only because it becomes unavailable. Even if the cost of renting a substitute on occasion is seen as being included in the value of

115 *The Marpessa* (n 12) 244–5; *The Susquehanna* (n 12); *The Ikala* [1929] AC 196 (Lord Hailsham LC in dissent at 196, Lord Carson in dissent at 205); *The Hebridean Coast* (n 9).

116 *Bee v Jenson* [2007] 4 All ER 791, 798–9 [21]; *Beechwood Birmingham* (n 13) 372 [46].

117 *Arsalan* (n 7) 397–8 [20]. See also *Lewis* (n 3) 255 [167] (Edelman J).

118 *Leeda Projects* (n 14) 430–1 [184].

essential property, this cost will have to be averaged over the entire period in which the owner uses the property. The weekly amount will be negligible.

VIII Conclusion

Where the temporary unavailability of certain property as a result of a tort or breach of contract has not generated tangible pecuniary loss for its owner (who would have been in possession of the property in the absence of the defendant's wrong), damages may be awarded for the consequences of the property's unavailability to its owner. The High Court of Australia in *Arsalan* described these consequences as the (physical) inconvenience of not having access to the property and –– in the case of an individual –– loss of amenity in the sense of loss of pleasure or enjoyment.

In measuring the damages for such inconvenience, the court is required to determine, as best as it can, the value that the plaintiff placed on having access to the property during the period of unavailability. This must be done by reference to monetary values that can be said to provide some indication as to the value placed by the plaintiff. The exercise can never be precise and may well involve an element of artificiality.

Australian and English courts have refused to calculate damages by reference to the rent to be paid for a substitute property where none has been rented. This is justified on principle. The rent to be paid for a substitute property provides no indication of the value the plaintiff placed on the availability of the subject property. Even where the subject property and the substitute have the same market value, the cost of short-term rent will be higher than the proportionate cost of purchase. The fact that the plaintiff purchased the subject property indicates that the plaintiff would not have been willing to spend a higher amount for permanently renting it instead.

By contrast, the amount of rent that the plaintiff could have obtained from letting the subject property during the period of unavailability (provided that someone would have been willing to rent it) does provide an indication of the value the plaintiff placed on the property's availability during that period. The fact that the plaintiff would not in fact have let it is no obstacle. On the contrary, the fact that the plaintiff was prepared to forego the rental income in order to personally use the property indicates that the plaintiff valued the personal use at least at the amount of rental income. Nevertheless, the Victorian Court of Appeal in *Leeda Projects* rejected the letting value method in the context of the delay of building work. The Court's reliance on the compensatory principle and the contractual remoteness test was misplaced, and its suggestion of a distinction between essential and non-essential property is not convincing.

The use of the letting value as the measure of the inconvenience of not having access to one's property would exclude the additional use of any other figure. If the letting value is not used, there are potentially three other figures that can be used, and they can be used cumulatively. A cumulative use of the three figures can be justified by the hypothetical scenario of the plaintiff selling the property at the beginning of the period of unavailability and repurchasing it at the end of the period. It is a purely

theoretical model which does not presuppose that a sale and repurchase could in fact have occurred. The transaction costs are usually prohibitive.

The first figure is the interest on the capital value of the property during the period of unavailability. It represents the income that the plaintiff could in theory have obtained by placing the money on an interest-bearing bank account rather than using it to purchase the property. The fact that the plaintiff has foregone that income indicates that the plaintiff valued the availability of the property at least in that amount. Interest on capital value has been used as the measure of damages in cases involving a chattel. But there is no reason why it should not also be used in cases involving real property. It represents the holding cost of any property. Justice of Appeal McLeish's argument in *Leeda Projects* that interest on capital value can only be used in the case of depreciable property is not convincing. During the period of unavailability, the plaintiff could in theory have earned interest from placing the value of the property in a bank account regardless of whether the property depreciates. Any depreciation constitutes an additional figure to be taken into account.

This leads to the second figure: the rate of depreciation of the property during the period of unavailability. It represents the amount that the plaintiff could in theory have obtained by selling the property at the beginning of the period of unavailability and repurchasing it for a lower price at the end of the period. The fact that the plaintiff has forgone that income indicates that the plaintiff valued the availability of the property at least in that amount. Since real property does not depreciate over a short period, the rate of depreciation has practical relevance only for chattels, in relation to which Australian courts have recognised it as a possible measure of damages.

The third and final figure is the amount of expenses that the plaintiff incurred for the upkeep of the property during the period of unavailability and that are wasted as the plaintiff was not able to use the property. It includes items such as owners' corporation fees, utility bills and registration fees. The fact that the plaintiff spent that amount in order to have access to the property during a particular period indicates that the plaintiff valued the access at least at that amount. Wasted expenditure was used in *Leeda Projects* to value the inconvenience of not having access to an apartment. It is also an appropriate figure in cases involving a chattel and has been used in such cases in England.

Overall, in valuing the inconvenience of not having access to one's property, there is no justification for a principled distinction between chattels and real property, acknowledging that the depreciation method has little relevance to real property simply because real property experiences little or no depreciation. Nor is there a justification for a principled distinction between actions in contract and actions in tort, except that the difference in the rules on the remoteness of loss and the recoverability of non-pecuniary loss may produce different outcomes on the facts of individual cases. Apart from those particular differences between contract and tort, the value that the owner of particular property places on having access to it during a particular period does not depend upon whether the defendant breached a promise to provide the plaintiff with possession of the property during that period or whether the defendant forced the plaintiff out of an existing possession of the property.