Pages 820 and 824 (23.3.2) refers to the case of Alfred McAlpine Construction Ltd v. Panatown Ltd [2001] 1 AC 518. Extracts from the judgments of the court are set out below.

Lord Clyde

My Lords, Panatown employed McAlpine to build a building on land owned by UIPL. The work was defective. Panatown has sought to terminate the contract on the ground of McAlpine's failure in performance. Panatown has suffered no loss. UIPL owns a defective building, which requires a significant expenditure for its repair, and has been unable for a considerable period to put the building to a profitable use. Panatown now seeks to recover, by way of an arbitration, from McAlpine the loss which UIPL has suffered. The appeal thus concerns the circumstances in which the employer in a contract of services may claim from the contractor on the ground of breach of contract damages in respect of a loss which has been suffered by a third party.

I find no reason to question the general principle that a plaintiff may only recover damages for a loss which he has himself suffered. But there are exceptions to that principle. One is where the one party expressly enters a contract as agent or trustee for another. The existence of this category of case was recognized in *Woodar Investment Development Ltd* v. *Wimpey Construction UK Ltd* [1980] 1 WLR 277. In such a case the contracting party may be entitled to recover damages for all the loss which his principal has suffered. But a solution along the lines of a formal agency is not available in the present case. Although the duty of care deed expressly records that Panatown was acting on behalf of the building owner, that is UIPL, any relationship of agency was disowned by the respondents. . . .

The exception which is invoked by the respondents, Panatown, is the one which was identified in *The Albazero* [1977] AC 774 . . .

[he considered whether or not the claim could be brought within the principle laid down in *The Albazero* (on which see further p. 958, Chapter 25, Section 3(b)(iii)). He concluded that it could not and continued]

I turn accordingly to what was referred to in the argument as the broader ground. But the label requires more careful definition. . . . What it proposes is that the innocent party to the contract should recover damages for himself as a compensation for what is seen to be his own loss. In this context no question of accounting to anyone else arises. This approach however seems to me to have been developed into two formulations.

The first formulation, and the seeds of the second, are found in the speech of Lord Griffiths in the *St Martins* case [1994] 1 AC 85, 96. At the outset his Lordship expressed the opinion that Corporation, faced with a breach by McAlpine of their contractual duty to perform the contract with sound materials and with all reasonable skill and care, would be entitled to recover from McAlpine the cost of remedying the defect in the work as the normal measure of damages. He then dealt with two possible objections. First, it should not matter that the work was not being done on property owned by Corporation. Where a husband instructs repairs to the roof of the matrimonial home it cannot be said that he has not suffered damage because he did not own the property. He suffers the damage measured by the cost of a proper completion of the repair:

> 'In cases such as the present the person who places the contract has suffered financial loss because he has to spend money to give him the benefit of the bargain which the defendant had promised but failed to deliver.' (see p. 97.)

The second objection, that Corporation had in fact been reimbursed for the cost of the repairs was answered by the consideration that the person who actually pays for the repairs is of no concern to the party who broke the contract. But Lord Griffiths added, at p. 97:

> 'The court will of course wish to be satisfied that the repairs have been or are likely to be carried out but if they are carried out the cost of doing them must fall upon the defendant who broke his contract.'

In the first formulation this approach can be seen as identifying a loss upon the innocent party who requires to instruct the remedial work. That loss is, or may be measured by, the cost of the repair. The essential for this formulation appears to be that the repair work is to be, or at least is likely to be, carried out. This consideration does not appear to be simply relevant to the reasonableness of allowing the damages to be measured by the cost of repair. It is an essential condition for the application of the approach, so as to establish a loss on the part of the plaintiff. Thus far the approach appears to be consistent with principle, and in particular with the principle of privity. It can cover the case where A contracts with B to pay a sum of money to C and B fails to do so. The loss to A is in the necessity to find other funds to pay to C and provided that he is going to pay C, or indeed has done so, he should be able to recover the sum by way of damages for breach of contract from B. If it was evident that A had no intention to pay C, having perhaps changed his mind, then he would not be able to recover the amount from B because he would have sustained no loss, and his damages would at best be nominal.

But there can also be found in Lord Griffiths's speech the idea that the loss is not just constituted by the failure in performance but indeed consists in that failure. This is the 'second formulation'. In relation to the suggestion that the husband who instructs repair work to the roof of his wife's house and has to pay for another builder to make good the faulty repair work has sustained no damage Lord Griffiths observed, at p. 97:

> 'Such a result would in my view be absurd and the answer is that the husband has suffered loss because he did not receive the bargain for which he had contracted with the first builder and the measure of damages is the cost of securing the performance of that bargain by completing the roof repairs properly by the second builder.'

That is to say that the fact that the innocent party did not receive the bargain for which he contracted is itself a loss. As Steyn LJ put it in *Darlington Borough Council* v. *Wiltshier Northern Ltd* [1995] 1 WLR 68, 80: 'He suffers a loss of bargain or of expectation interest'. In this more radical formulation it does not matter whether the repairs are or are not carried out, and indeed in the *Darlington* case that qualification is seen as unnecessary. In that respect the disposal of the damages is treated as *res inter alios acta*.[1] Nevertheless on this approach the intention to repair may cast light on the reasonableness of the measure of damages adopted. In order to follow through this aspect of the second formulation in Lord Griffiths's speech it would be necessary to understand his references to the carrying out of the repairs to be relevant only to that consideration.

I find some difficulty in adopting the second formulation as a sound way forward. First, if the loss is the disappointment at there not being provided what was contracted for, it seems to me difficult to measure that loss by consideration of the cost of repair. A more apt assessment of the compensation for the loss of what was expected should rather be the difference in value between what was contracted for and what was supplied. Secondly, the loss constituted by the supposed disappointment may well not include all the loss which the breach of contract has caused. It may not be able to embrace consequential losses, or losses falling within the second head of *Hadley* v. *Baxendale* 9 Exch 341. The inability of the wife to let one

of the rooms in the house caused by the inadequacy of the repair, does not seem readily to be something for which the husband could claim as his loss. Thirdly, there is no obligation on the successful plaintiff to account to anyone who may have sustained actual loss as a result of the faulty performance. Some further mechanism would then be required for the court to achieve the proper disposal of the monies awarded to avoid a double jeopardy. Alternatively, in order to achieve an effective solution, it would seem to be necessary to add an obligation to account on the part of the person recovering the damages. But once that step is taken the approach begins to approximate to *The Albazero* exception. Fourthly, the 'loss' constituted by a breach of contract has usually been recognized as calling for an award of nominal damages, not substantial damages.

The loss of an expectation which is here referred to seems to me to be coming very close to a way of describing a breach of contract. A breach of contract may cause a loss, but is not in itself a loss in any meaningful sense. When one refers to a loss in the context of a breach of contract, one is in my view referring to the incidence of some personal or patrimonial damage. A loss of expectation might be a loss in the proper sense if damages were awarded for the distress or inconvenience caused by the disappointment. Professor Coote ('Contract Damages, *Ruxley* and the Performance Interest' [1997] *CLJ* 537) draws a distinction between benefits in law, that is bargained-for contractual rights, and benefits in fact, that is the enjoyment of the fruits of performance. Certainly the former may constitute an asset with a commercial value. But while frustration may destroy the rights altogether so that the contract is no longer enforceable, a failure in the obligation to perform does not destroy the asset. On the contrary it remains as the necessary legal basis for a remedy. A failure in performance of a contractual obligation does not entail a loss of the bargained-for contractual rights. Those rights remain so as to enable performance of the contract to be enforced, as by an order for specific performance. If one party to a contract repudiates it and that repudiation is accepted, then, to quote Lord Porter in *Heyman* v. *Darwins Ltd* [1942] AC 356, 399, 'By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded'. The primary obligations under the contract may come to an end, but secondary obligations then arise, among them being the obligation to compensate the innocent party. The original rights may not then be enforced. But a consequential right arises in the innocent party to obtain a remedy from the party who repudiated the contract for his failure in performance.

Both of these two formulations seek to remedy the problem of the legal black hole. At the heart of the problem is the doctrine of privity of contract which excludes the ready development of a solution along the lines of a *jus quaesitum tertio*[2] . . .

It seems to me that a more realistic and practical solution is to permit the contracting party to recover damages for the loss which he and a third party has suffered, being duly accountable to them in respect of their actual loss, than to construct a theoretical loss in law on the part of the contracting party, for which he may be under no duty to account to anyone since it is to be seen as his own loss. The solution is required where the law will not tolerate a loss caused by a breach of contract to go uncompensated through an absence of privity between the party suffering the loss and the party causing it. In such a case, to avoid the legal black hole, the law will deem the innocent party to be claiming on behalf of himself and any others who have suffered loss. It does not matter that he is not the owner of the property affected, nor that he has not himself suffered any economic loss. He sues for all the loss which has been sustained and is accountable to the others to the extent of their particular losses. While it may be that there is no necessary right in the third party to compel the innocent employer to sue the contractor, in the many cases of the domestic or familial situation that consideration

should not be a realistic problem. In the commercial field, in relation to the interests of such persons as remoter future proprietors who are not related to the original employer, it may be that a solution by way of collateral warranty would still be required. If there is an anxiety lest the exception would permit an employer to receive excessive damages, that should be set at rest by the recognition of the basic requirement for reasonableness which underlies the quantification of an award of damages.

The problem which has arisen in the present case is one which is most likely to arise in the context of the domestic affairs of a family group or the commercial affairs of a group of companies. How the members of such a group choose to arrange their own affairs among themselves should not be a matter of necessary concern to a third party who has undertaken to one of their number to perform services in which they all have some interest. It should not be a ground of escaping liability that the party who instructed the work should not be the one who sustained the loss or all of the loss which in whole or part has fallen on another member or members of the group. But the resolution of the problem in any particular case has to be reached in light of its own circumstances. In the present case the decision that Panatown should be the employer under the building contract although another company in the group owned the land was made in order to minimise charges of VAT. No doubt thought was given as to the mechanics to be adopted for the building project in order to achieve the course most advantageous to the group. Where for its own purposes a group of companies decides which of its members is to be the contracting party in a project which is of concern and interest to the whole group I should be reluctant to refuse an entitlement to sue on the contract on the ground simply that the member who entered the contract was not the party who suffered the loss on a breach of the contract. But whether such an entitlement is to be admitted must depend upon the arrangements which the group and its members have decided to make both among themselves and with the other party to the contract. In the present case there was a plain and deliberate course adopted whereby the company with the potential risk of loss was given a distinct entitlement directly to sue the contractor and the professional advisers. In the light of such a clear and deliberate course I do not consider that an exception can be admitted to the general rule that substantial damages can only be claimed by a party who has suffered substantial loss.

I agree that the appeal should be allowed.

Lord Goff of Chieveley [dissenting]

I wish to state that I find persuasive the reasoning and conclusion expressed by Lord Griffiths in his opinion in the *St Martins* case [1994] 1 AC 85 that the employer under a building contract may in principle recover substantial damages from the building contractor, because he has not received the performance which he was entitled to receive from the contractor under the contract, notwithstanding that the property in the building site was vested in a third party. The example given by Lord Griffiths of a husband contracting for repairs to the matrimonial home which is owned by his wife is most telling. It is not difficult to imagine other examples, not only within the family, but also, for example, where work is done for charitable purposes—as where a wealthy man who lives in a village decides to carry out at his own expense major repairs to, or renovation or even reconstruction of, the village hall, and himself enters into a contract with a local builder to carry out the work to the existing building which belongs to another, for example to trustees, or to the parish council. Nobody in such circumstances would imagine that there could be any legal obstacle in the way of the charitable donor enforcing the contract against the builder by recovering damages from

him if he failed to perform his obligations under the building contract, for example because his work failed to comply with the contract specification.

At this stage I find it necessary to return to the opinion of Lord Griffiths in the *St Martins* case. In the passage from his opinion . . . he gave the example of a husband placing a contract with a builder for the replacement of the roof of the matrimonial home which belonged to his wife. The work proved to be defective. Lord Griffiths expressed the opinion that, in such a case, it would be absurd to say that the husband has suffered no damage because he does not own the property. I wish now to draw attention to the fact that, in his statement of the facts of his example, Lord Griffiths included the fact that the husband had to call in and pay another builder to complete the work. It might perhaps be thought that Lord Griffiths regarded that fact as critical to the husband's cause of action against the builder, on the basis that the husband only has such a cause of action in respect of defective work on another person's property if he himself has actually sustained financial loss, in this example by having paid the second builder. In my opinion, however, such a conclusion is not justified on a fair reading of Lord Griffiths's opinion. This is because he stated the answer to be that

> 'the husband has suffered loss because he did not receive the bargain for which he had contracted with the first builder and the measure of damages is the cost of securing the performance of that bargain by completing the roof repairs properly by the second builder.'

It is plain, therefore, that the payment to the second builder was not regarded by Lord Griffiths as essential to the husband's cause of action.

The point can perhaps be made more clearly by taking a different example, of the wealthy philanthropist who contracts for work to be done to the village hall. The work is defective; and the trustees who own the hall suggest that he should recover damages from the builder and hand the damages over to them, and they will then instruct another builder, well known to them, who, they are confident, will do the work well. The philanthropist agrees, and starts an action against the first builder. Is it really to be suggested that his action will fail, because he does not own the hall, and because he has not incurred the expense of himself employing another builder to do the remedial work? Echoing the words of Lord Griffiths, I regard such a conclusion as absurd. The philanthropist's cause of action does not depend on his having actually incurred financial expense; as Lord Griffiths said of the husband in his example, he 'has suffered loss because he did not receive the bargain for which he had contracted with the first builder' . . .

[Lord Goff cited a number of academic writings and examined the case-law, including the judgment of Oliver J in *Radford* v. *De Froberville* [1977] 1 WLR 1262 and the decision of the House of Lords in *Ruxley Electronics and Construction Ltd* v. *Forsyth* [1996] AC 344 and continued]

I do not regard Lord Griffiths's broader ground as a departure from existing authority, but as a reaffirmation of existing legal principle. Indeed, I know of no authority which stands in its way. . . . Even if it is not thought, as I think, that the solution which I prefer is in accordance with existing principle, nevertheless it is surely within the scope of the type of development of the common law which, especially in the law of obligations, is habitually undertaken by appellate judges as part of their ordinary judicial function . . .

The present case provides, in my opinion, a classic example of a case which falls properly within the judicial province. I, for my part, have therefore no doubt that it is desirable, indeed essential, that the problem in the present case should be the subject of judicial solution by providing proper recognition of the plaintiff's interest in the performance of the contractual obligations which are owed to him . . .

The DCD

I now turn to the second issue in the case, which relates to the possible impact of the DCD on Panatown's remedy against McAlpine in damages.

It was the submission of McAlpine that the existence of the building owner's remedy under the DCD had the effect of precluding Panatown from recovering damages from McAlpine under the building contract. I have to say that this is, on its face, a remarkable submission; it is a strange conclusion indeed that the effect of providing a subsidiary remedy for the owner of the land (UIPL), on a restricted basis (breach of a duty of care), is that the building employer, who has furnished the consideration for the building, is excluded from pursuing his remedy in damages under the main contract, which makes elaborate provision, under a standard form specially adapted for this particular development, for the terms upon which the contractor has agreed to design and construct the buildings in question.

[he considered *The Albazero* where the fact that the third party has his own claim prevents the contracting party from recovering damages on behalf of the third party and continued]

This reasoning has, however, no application to Lord Griffiths's broader ground, under which the employer is seeking to recover damages for his own account in respect of his own loss, i.e. the damage to his interest in the performance of the building contract to which he, as employer, is party and under which he has contracted to pay for the building. The mere fact that the building contractor, McAlpine, has entered into a separate contract in different terms with another party with regard to possible defects in the building which is the subject of the building contract cannot of itself detract from its obligations to the employer under the building contract itself. In other words, it is plain that the exception identified by Lord Diplock in *The Albazero* [1977] AC 774 is confined to the circumstances of the special rule in *Dunlop* v. *Lambert* as formulated by him. There is no basis for extending it to the circumstances of the present case.

For the reasons I have given, I would dismiss McAlpine's appeal from the decision of the Court of Appeal.

Lord Jauncey of Tullichettle

The greater part of Lord Griffiths's reasoning was directed to reject the proposition that entitlement to more than nominal damages was dependent upon the plaintiff having a proprietary interest in the subject matter. His examples predicated that the husband/employer required to pay for repairs rendered necessary by the breach. He did not require to address the situation where, as here, Panatown has neither spent money in entering into the contract nor intends to do so in remedying the breach and has therefore suffered no loss thereby. Had he had to do so I very much doubt whether he would have expressed the same views in relation thereto.

Since writing this speech, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Goff of Chieveley. I respectfully agree with his rejection of the proposition that the employer under a building contract is unable to recover substantial damages for breach of the contract if the work in question is to be performed on land or buildings which are not his property. In such a case the employer's right to substantial damages will, in my view, depend upon whether he has made good or intends to make good the effects of the breach. . . . This produces a sensible result and avoids the recovery of an 'uncovenanted' profit by an employer who does not intend to take steps to remedy the breach.

However, there is a further matter to be considered in this case, namely the DCD in favour of UIPL. This, in my view, is equally relevant to the broader as to the narrow ground. The former as does the latter seeks to find a rational way of avoiding the 'black hole'. What is the

justification for allowing A to recover from B as his own a loss which is truly that of C when C has his own remedy against B? I would submit none. . . . I therefore consider that Panatown is not entitled to recover under [the] broader ground not only because they have suffered no financial loss but also because UIPL have a direct right of action against McAlpine under the DCD. As I have come to the conclusion that neither the narrow nor the broader ground is applicable to the facts of this case I would allow the appeal.

Lord Browne-Wilkinson

In my judgment the direct cause of action which UIPL has under the DCD is fatal to any claim to substantial damages made by Panatown against McAlpine based on the narrower ground . . . I will assume that the broader ground is sound in law and that in the ordinary case where the third party (C) has no direct cause of action against the building contractor (B) A can recover damages from B on the broader ground. Even on that assumption, in my judgment Panatown has no right to substantial damages in this case because UIPL (the owner of the land) has a direct cause of action under the DCD.

Lord Millett [dissenting]

My Lords, Lord Griffiths was not proposing to depart from the general rule that a plaintiff can only recover compensatory damages for breach of contract in respect of a loss which he has himself sustained. He was insisting that, in certain kinds of contract at least, the right to performance has a value which is capable of being measured by the cost of obtaining it from a third party . . .

[he considered the academic literature in which Lord Griffiths' approach was analysed and continued]

To my mind the most significant feature of the academic literature is that no one has suggested that the adoption of the broad ground would have any adverse consequences on commercial arrangements. Nor, despite every incentive to do so, has McAlpine been able to suggest a situation in which it would cause difficulties or defeat the commercial expectations of the parties. In my view it would help to rationalise the law and provide a sound basis for decisions like *Ruxley Electronics and Construction Ltd* v. *Forsyth* [1996] AC 344 and *Jackson* v. *Horizon Holidays Ltd* [1975] 1 WLR 1468. If it is adopted, it will be for future consideration whether it would provide the better solution in cases such as *St Martins* also.

In the *Ruxley* case your Lordships' House refused to allow the full costs of reinstatement on the well-recognized ground that reinstatement would be an unreasonable course to take. But it was not constrained to withhold substantial damages on the ground that the value of the property was unaffected by the breach. It expressly rejected the view that these were the only two possible measures of damage in a building case. It awarded an intermediate sum for 'loss of amenity'. The evidence, however, showed that, viewed objectively, there was no loss of amenity either. The amenity in question was entirely subjective to the plaintiff; and its loss could equally well, and perhaps more accurately, be described as a defeated expectation.

In *Woodar Investment Development Ltd* v. *Wimpey Construction UK Ltd* [1980] 1 WLR 277 Lord Wilberforce was prepared to support the *Jackson* case [1975] 1 WLR 1468 either as a broad decision on the measure of damages or as an example of a type of contract calling for special treatment. Other examples which he instanced were persons contracting for family holidays, ordering meals in restaurants for a party, or hiring a taxi for a group. He observed that there are many situations of daily life which do not fit neatly into conceptual analysis but which require some flexibility in the law of contract.

It must be wrong to adopt a Procrustean approach which leaves parties without a remedy for breach of contract because their arrangements do not fit neatly into some precast contractual formula. When such arrangements have been freely entered into and are of an everyday character or are commercially advantageous to the parties, it is surely time to re-examine the position.

This is the product of the narrow accountants' balance sheet quantification of loss which measures the loss suffered by the promisee by the diminution in his overall financial position resulting from the breach. One of the consequences of this approach is to produce an artificial distinction between a contract for the supply of goods to a third party and a contract for the supply of services to a third party. A man who buys a car for his wife is entitled to substantial damages if an inferior car is supplied, on the assumption (not necessarily true) that the property in the car is intended to vest momentarily in him before being transferred to his wife, whereas a man who orders his wife's car to be repaired is entitled to nominal damages only if the work is imperfectly carried out. This is surely indefensible; the reality of the matter is that in both cases the man is willing to undertake a contractual liability in order to be able to provide a benefit to his wife.

The idea that a contracting party is entitled to damages measured by the value of his own defeated interest in having the contract performed was not new in 1994. A strong case for its adoption in the case of consumer contracts was made in an important article 'Contract Remedies and the Consumer Surplus' (1979) 95 *LQR* 581, in which the authors explained that this would make a significant difference only in a minority of cases. As I shall show, the language of defeated expectation has been employed in the context of building contracts, at least in ordinary two-party cases like *Ruxley*, since the 19th century. As for three-party cases like the present, Lord Keith adverted to it as a possible solution in the *Woodar* case [1980] 1 WLR 277, and in the same case both Lord Salmon and Lord Scarman expressed the view that the question required consideration by the House. Lord Scarman said, at pp. 300–301:

> 'Likewise, I believe it open to the House to declare that, in the absence of evidence to show that he has suffered no loss, A, who has contracted for a payment to be made to C, may rely on the fact that he required the payment to be made as prima facie evidence that the promise for which he contracted was a benefit to him and that the measure of his loss in the event of non-payment is the benefit which he intended for C but which has not been received. Whatever the reason, he must have desired the payment to be made to C and he must have been relying on B to make it. If B fails to make the payment, A must find the money from other funds if he is to confer the benefit which he sought by his contract to confer upon C. Without expressing a final opinion on a question which is clearly difficult, I think the point is one which does require consideration by your Lordships' House.'

Whether the law should take account of the performance interest when considering the measure of damages for breach of contract arose clearly in the seminal case of *Radford* v. *De Froberville* [1977] 1 WLR 1262. The landlord of premises let to tenants had obtained a covenant from the owner of neighbouring land to build a garden wall on the neighbour's side of the boundary. The wall was not built. The landlord sued on the covenant for damages, claiming the cost of building a similar wall on his own side of the boundary. Oliver J found that the absence of the wall caused no reduction in value to the landlord's reversionary interest, and that the landlord (as opposed to his tenants) would derive no amenity or other advantage from having the wall built. The defendant contended that, since the landlord had suffered no loss, he was entitled to nominal damages only. The judge found that the landlord

intended to apply the damages in building the wall in order to provide his tenants with the amenity which the promised wall would have done, and that this was a reasonable course for him to take. On these findings Oliver J awarded the landlord the cost of building the wall. He said, at p. 1270:

> 'Now, it may be that, viewed objectively, it is not to the plaintiff 's financial advantage to be supplied with the article or service which he has stipulated. It may be that another person might say that what the plaintiff has stipulated for will not serve his commercial interests so well as some other scheme or course of action. And that may be quite right. But that, surely, must be for the plaintiff to judge. Pacta sunt servanda. If he contracts for the supply of that which he thinks serves his interests––be they commercial, aesthetic or merely eccentric––then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit.'

This is the language of Lord Griffiths's broad ground. Moreover, Oliver J raised the question of the tenants' interest, recalling the defendant's argument that the landlord was merely a landlord with an investment property and that he was not entitled to damages for a loss suffered by his tenants who were strangers to the contract. He dealt with the point, at p. 1285:

> 'Whilst I see the force of this, I do not think that it really meets the point that, whatever his status, the plaintiff had a contractual right to have the work done and does in fact want to do it. I refrain from expressing any view about what the position would be if his motives were merely capricious, for there is no suggestion of anything of that sort. As it seems to me, the fact that his motive may be to confer what he conceives to be a benefit on persons who have no contractual rights to demand it cannot alter the genuineness of his intentions. The recent case of *Jackson* v. *Horizon Holidays Ltd* [1975] 1 WLR 1468 demonstrates that the plaintiff may obtain damages for breach of a contract entered into for the benefit of himself and other persons not parties to the contract.'

This is the language of defeated expectation with substantial damages being awarded for the loss of the performance interest.

My Lords, Oliver J's judgment has been very influential. His test of reasonableness was approved and applied by your Lordships' House in *Ruxley Electronics and Construction Ltd* v. *Forsyth* [1996] AC 344. I believe that it provides the key to the present case. The similarity of the two cases is striking. Both are concerned with building contracts in circumstances where performance would benefit a third party to the contract but not the promisee. I would draw particular attention to the fact that in *Radford* v. *De Froberville* [1977] 1 WLR 1262 the proper measure of damages was taken to be the cost of doing the promised work (i.e. fulfilling the landlord's contractual expectation) and not the tenants' loss of amenity. No independent attempt was made to evaluate this.

The seed was planted more than 20 years ago. It has been long in germination, but it has been watered and nurtured by favourable judicial and academic commentators in the meantime. I think the time has come to give it the imprimatur of your Lordships' House. I am not impressed by the argument that such a radical change, with the attendant risk of opening the floodgates to capricious and complex claims to damages in unforeseen situations of every

kind, should be left to Parliament. In the first place, I do not think that it is a radical change. I respectfully agree with Steyn LJ in *Darlington Borough Council* v. *Wiltshier Northern Ltd* [1995] 1 WLR 68 that it is based on orthodox contractual principles. And in the second place, the development of the remedial response to civil wrongs and the appropriate measure of damages are matters which have traditionally been the province of the judiciary. For the present I would restrict the broad ground to building contracts and other contracts for the supply of work and materials where the claim is in respect of defective or incomplete work or delay in completing it. I would not exclude the claim for damages for delay, since the performance interest extends to having the work done timeously as well as properly. There is no difficulty in quantifying the loss due to delay, at least in the family or group context. In the case of building contracts the broad ground is in line with the principle that the prima facie measure of damages is the cost of repair rather than the reduction in the market value of the property or any loss of amenity, even where the cost of repair is substantially greater, subject only to the qualification that the carrying out of the repairs must be a reasonable course to adopt . . .

The rationale which underlies this measure of damages is instructive. It is best summed up in a passage in the judgment of Wetmore J in an old Canadian case (*Allen* v. *Pierce* (1895) 3 Terr LR 319, 323) cited with approval in Hudson's Building and Engineering Contracts, 11th ed. (1995) vol. 1, p. 1047:

> 'It is not a mere matter of difference between the value of the material supplied and that contracted for, or of the work done and that which ought to have been done, or of the house as it stands and that which ought to have been built under the contract. If these were the standards of damages, there would be no point in a man contracting for the best materials. The owner of the building is, therefore, entitled to recover such damages as will put him in a position to have the building he contracted for.'

Again this is the language of defeated expectation. Of course, as the last sentence cited shows, Wetmore J was speaking of the ordinary two-party case where the building employer is also the building owner. But his reasoning applies equally, and perhaps with even greater force, to the case where the building employer is not the building owner. If it did not, there would be no point in the building employer entering into the contract at all. It would be strange logic to allow the building employer to recover the cost of achieving his contractual expectations even where these do not affect the value of his land, and insist at the same time that he must own the land in question if he is to recover more than nominal damages. In my opinion, it is not a departure from orthodoxy to say, adapting Wetmore J's words, that the building employer, whether or not he is also the owner of the building, is entitled to recover such damages as will put him in a position to have the building he contracted for.

Moreover, the question must be considered from a wider perspective than merely defective work. As my noble and learned friend, Lord Goff, observes, unless the law recognizes the performance interest it can provide no remedy to the building employer if the contractor repudiates the contract before he has done any work at all, and the building employer has to engage another contractor to do the work at a higher price. This would be manifestly unjust, and to defend it by saying that the loss is suffered by the building owner (who in fact has suffered none) and not by the building employer is nothing short of absurd.

The broad ground may be more readily applicable where the contracting party had a legitimate interest, though not necessarily a commercial one, in placing the order for the services to be supplied to the third party. Where there is a family or commercial relationship between them, as in the present case, any such requirement is easily satisfied, though it would not

be right to limit the application of the principle to cases where such a relationship exists. The charitable donor has a legitimate interest in the object of his charity. But I do not think that the existence of such an interest should be seen as a separate or necessary requirement. It is rather an aspect of the test adopted by Oliver J., that is to say, reasonableness. There is much to be said for the view expressed by Lord Scarman in the *Woodar* case that the fact that a contracting party has required services to be supplied at his own cost to a third party is at least prima facie evidence of the value of those services to the party who placed the order.

Must the building employer intend to carry out the work?

Where the broad ground applies, the plaintiff recovers damages for his own loss, and accordingly in my opinion there can be no question of requiring him to account for them to the third party. In the *St Martins* case Lord Griffiths drew attention to the fact that the person who places the contract suffers loss because he has to spend money to obtain the benefit of the bargain which the defendant had promised but failed to deliver. He added that the court would wish to be satisfied that the repairs had been or would be carried out. Professor Treitel has argued that Lord Griffiths was merely saying that the plaintiff could recover damages in respect of his own loss in making alternative arrangements. I do not think that this can be right. If the making of such arrangements were a precondition of recovery, it would follow that in their absence no such damages would be recoverable. But a plaintiff is bound to mitigate his loss. He cannot increase it by entering into other arrangements. I respectfully agree with Steyn LJ in the *Darlington Borough Council* case [1995] 1 WLR 68 that what the plaintiff proposes to do with his damages is of no more concern to the party in breach in a three-party case than it is in a two-party case. In my opinion, it may be evidence of the reasonableness or otherwise of the plaintiff 's claim to damages, but it cannot be conclusive.

In the present case, the development of the site was a group project financed by group money. Panatown was chosen to be the building employer, but it did not use its own money to fund the cost. This was provided to it from within the group, almost certainly (if implicitly) on terms that it should be applied in paying for the works and for no other purpose. UIPL was the building owner, and must be taken to have known and approved of the works and allowed Panatown to grant McAlpine permission to enter the land and carry out the works, presumably on the basis that they would be carried out properly and in accordance with the building contract. It would be inconsistent with these arrangements if Panatown were simply to retain the damages for its own benefit. They will almost certainly be held on trust to apply them at the direction of the group company which provided the building finance . . .

Does the existence of the DCD bar recovery?

. . . I agree with the Court of Appeal that the existence of the DCD does not demonstrate an intention that any damages caused by defective or incomplete performance of McAlpine's obligations under the building contract should be recoverable by UIPL under the DCD and not by Panatown under the building contract. I do not, however, agree with their formulation of the question: whether the parties contemplated that the DCD would 'replace' the more detailed provisions of the building contract. It is not correct to ask whether Panatown would have had a claim under the building contract if there had been no DCD and then ask whether the parties intended to replace that claim by a claim by UIPL under the DCD. If it be relevant to impute intention to the parties, the correct approach is to examine the whole complex of contracts and ask whether they contemplated that the building contract could be enforced by Panatown.

But the broad ground does not rest on imputed intention . . . [It] is based on ordinary contractual principles. It has nothing to do with the privity rule. The plaintiff is a contracting party who recovers for his own loss, not that of a third party. Whatever arrangements the third party may

have entered into, these do not concern the plaintiff and cannot deprive him of his contractual rights. He is not accountable for the damages to anyone else, and he cannot be denied a remedy because 'it is not needed'. I respectfully agree with my noble and learned friend, Lord Goff of Chieveley, that the exception identified by Lord Diplock in *The Albazero* [1977] AC 774 is confined to the narrow ground and that it is inappropriate to apply it to the broad ground.

The real significance of the DCD is different. By giving the third party a cause of action, it raises the spectre of double recovery. Even though the plaintiff recovers for his own loss, this obviously reflects the loss sustained by the third party. The case is, therefore, an example, not unknown in other contexts, where breach of a single obligation creates a liability to two different parties. Since performance of the primary obligation to do the work would have discharged the liability to both parties, so must performance of the secondary obligation to pay damages. Payment of damages to either must *pro tanto* discharge the liability to both. The problem, in my view, is not one of double recovery, but of ensuring that the damages are paid to the right party.

There can be no complaint by the building employer if the damages are recovered by the building owner, since he was the intended beneficiary of the arrangements in the first place. The building employer's performance interest will be satisfied by carrying out the remedial work or by providing the building owner with the means to pay for it to be done. This provides the key to the proper approach in the converse case like the present where the action is brought by the building employer despite the existence of a cause of action in the building owner. Since the building employer's expectation loss reflects and cannot exceed the loss suffered by the building owner, and would be satisfied by any award of damages to the latter, his claim should normally be subordinated to any claim made by the building owner. While, therefore, I do not accept that Panatown's claim to substantial damages is excluded by the existence of the DCD, I think that an action like the present should normally be stayed in order to allow the building owner to bring his own proceedings. The court will need to be satisfied that the building owner is not proposing to make his own claim and is content to allow his claim to be discharged by payment to the building employer before allowing the building employer's action to proceed.

My noble and learned friend, Lord Browne-Wilkinson, has postulated the case where the breach does not occur (or the defects are not discovered) until after completion of the work and sale of the building to a purchaser who has taken an assignment of a collateral warranty.

I do not share his concern that such a case will cause difficulty in practice. The position will be the same as in the ordinary case where the building owner and the building employer are one and the same. In such a case, the building employer/owner suffers no financial loss if he disposes of the building before the breach occurs or the defects are discovered. It cannot make any difference that the building owner and the building employer are different. The purchaser will have a cause of action under the collateral warranty. Whether this bars the remedy of the building employer depends on whether the *St Martins* case is properly regarded as covered by the narrow ground or, now that it is available, the broad ground. If the former, it is an exception to the privity rule, and the building owner's action is barred (because it is not needed) by the existence of the purchaser's cause of action. If the latter, then the building owner is in theory entitled to bring proceedings in respect of his own defeated expectation interest, but they are likely to be stayed since in practice the purchaser will normally prefer to bring his own.

All the supposed difficulties disappear once it is grasped that the building employer's performance interest merely reflects the interest of the building owner and that his loss cannot exceed that of the building owner.

Conclusion
In the present case UIPL is fully aware of the present proceedings and supports Panatown's claim to substantial damages. It has no wish to be forced to invoke its own subsidiary and inferior remedy under the DCD. There is no need to join it in the proceedings or require it to enter into a formal waiver of its claim under the DCD. Any claim it may have under the DCD will be satisfied by the payment of damages to Panatown.

I would dismiss the appeal.

Incorporated Council of Law Reporting: extracts from the *Law Reports: Appeal Cases* (AC).