

*Revisiting Compensation for Loss: Blake and  
Contractual Damages*

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# I

## *Introduction*

A spy for the Secret Intelligence Service (SIS) signs a contract with the Crown, undertaking to keep any official information he obtains confidential. This spy becomes a double agent, betraying his country by providing valuable intelligence to the Soviet Union. Post conviction and subsequent escape from prison, this spy writes an autobiography disclosing official information, and is set to receive a substantial sum for his efforts. Clearly this is in breach of contract, however the information disclosed is no longer confidential. The Crown cannot point to any direct financial loss resulting from the breach. Should the spy be free to enjoy his royalties? Or should the Crown have some claim against him for breaching his contract?

The spy is, of course, George Blake, the notorious defendant at the heart of *Attorney General v Blake*,<sup>1</sup> where the House of Lords famously answered ‘yes’ to the latter question, awarding an account of profits for a breach of contract. This case has invigorated academic debate as to what is the appropriate response to a breach of contract where a defendant has made a gain, but a plaintiff appears to have suffered no loss. The aim of this paper is to explore the rationale behind the exceptional award in *Blake*, and discuss when it might be available in the future. We cannot understand when, however, without first understanding why. The juridical nature of the account in *Blake* is a turbulent issue, which we must necessarily visit before we can attempt to forecast its future application.

The account in *Blake* was an exceptional extension of an already established principle, which allowed a plaintiff in certain circumstances to recover a proportion of a defendant’s profits despite suffering no direct financial loss. Whether these awards are loss or gain based thus decides the same for *Blake*, and either award’s availability is thus closely linked. As we shall see, by failing to appreciate that ‘loss’ is not limited to direct financial loss, courts and academics ventured down innovative yet

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<sup>1</sup> [2001] AC 268 (“*Blake*”).

troublesome paths to guide them to what was, instinctively, a just result where compensation seemed inadequate. Chapter III will look at three ways we have been misled. Restitution<sup>2</sup> has been the path most trodden and has, until recently, swung our focus around to the defendant, unable to resist giving in fully to the necessary inquiry into the defendant's gain. Following the decision of the English Court of Appeal in *World Wide Fund for Nature v World Wrestling Federation Entertainment Inc*,<sup>3</sup> we have been once again set on the compensatory path, and can begin to assess when an account of profits will be appropriate for a breach of contract. In order to do this however, we must reassess our narrow understanding of loss, and appreciate that there are, in fact, two types of loss, only one of which is concerned with direct financial loss.

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<sup>2</sup> 'Restitution' is used here as a generic term referring to the law of gain-based recovery, whether in response to an unjust enrichment or a legal wrong. For discussion as to its possible narrower meanings see Chapter III.

<sup>3</sup> [2007] EWCA Civ 286 ("*WWF*").

## *II*

### *Two Types of Loss*

The majority of academic writing on this topic begins with Parke B's observation in *Robinson v Harman*<sup>4</sup> that the aim of contract damages is to put a plaintiff in the position he would have been, had a defendant not breached the contract. Applying this to our contractual situations we can immediately see a problem. As in *Blake*, and *WWF*, there are a number of 'strange cases'<sup>5</sup> where we see a defendant make a profit from his breach, but to no direct financial detriment to a plaintiff. Instinctively, this does not seem right. Birks' poignant hospital example<sup>6</sup> provides such illustration. Unfortunately, a number of authors see no way to correlate the compensatory approach with these contractual situations. Instead, they look for solutions elsewhere. And it is easy to see why restitution seemed such an attractive option. True, in one sense we are concerned here with gains, not losses. True, it would be unjust in some circumstances to allow a defendant to retain the fruits of his wrongdoing. And true, a restitutionary approach does correlate with the account of profits awarded in *Blake*. But, as we shall see in Chapter III, this association with restitution, whether through unjust enrichment or wrongs, has led us astray.

Let us then, start with a different observation. Lord Nicholls said in *Blake* that

[i]t is equally well established an award of damages, assessed by reference to financial loss, is not always 'adequate' as a remedy for breach of contract. The law recognises that a party to a contract may have an interest in performance which is not readily measurable in terms of money. On breach the innocent party

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<sup>4</sup> (1848) 1 Ex 850, 855.

<sup>5</sup> For example *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798; *Esso Petroleum Co Ltd v Niad Ltd* [2001] EWHC Ch 458; *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323.

<sup>6</sup> See Peter Birks, "Profits of Breach of Contract" [1993] 109 LQR 518 ("Profits of Breach of Contract"). "Suppose that a great hospital contracts out certain of its cleaning needs, specifying rigorous standards in the interests of hygiene and hence of safety. Knowing the dangers but hoping for the best, the successful firm decides to take a 20 per cent excess profit by ignoring those standards. After, say, two years, the hospital discovers what is going on. In the meantime the firm has been lucky. Its gamble has paid off, in the sense that no deaths or other bad consequences can actually be attributed to its sub-standard performance."

suffers a loss. He fails to obtain the benefit promised by the other party to the contract. To him the loss may be as important as financially measurable loss, or more so. An award of damages, assessed by reference to financial loss, will not recompense him properly. For him a financially assessed measure of damages is inadequate.<sup>7</sup>

This passage preceded discussion of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*,<sup>8</sup> the “solitary beacon”<sup>9</sup> which had already awarded damages,<sup>10</sup> despite there being no direct financial loss, against a developer who built houses in breach of a restrictive covenant. Yet there was obviously “a loss”, as we can see from the passage above. In *WWF*, the Court of Appeal held that the award in *Wrotham Park*, and the account in *Blake* were “juridically highly similar”,<sup>11</sup> both compensatory in nature. So what have the plaintiffs lost in these situations? And why were we so willing to switch our focus from loss to gain?

There must be more to loss than we originally thought. What we shall see, is that our conventional conception of loss, which serves us well until we meet a case such as *Blake*, is in fact “impoverished”,<sup>12</sup> and loss can actually have a wider meaning.<sup>13</sup> There are in fact, two types of loss, one traditional, and another concerned with loss in a wider, non directly-financial, context. Let us call these *core loss* and *extensive loss*.

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<sup>7</sup> *Blake*, 282, at paras [B]-[C], above n 1.

<sup>8</sup> [1974] 1 WLR 798 (“*Wrotham Park*”).

<sup>9</sup> *Blake*, 283, at para [H], above n 1.

<sup>10</sup> Brightman J awarded the plaintiffs five per cent of the defendant’s profit. The amount was a “quid pro quo for relaxing the covenant.” *Wrotham Park*, 815, above n 8.

<sup>11</sup> *WWF*, at para [60], above n 3.

<sup>12</sup> Steve Hedley, “Experience Hendrix v. PPX Enterprises (CA)”, online posting, 24 March 2003, Restitution Discussion Group <<http://www.ucc.ie/law/restitution/disc.htm>>, accessed 11 September 2008.

<sup>13</sup> See Janet O’Sullivan, “Reflections on the Role of Restitutionary Damages to Protect Contractual Expectations” in D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge University Press, Cambridge, 2002), 327-347 (“O’Sullivan”), 338 “it is in the definition of loss that the defect in *City of New Orleans* [a case factually similar to Birks’ hospital example, see above n 6] is found, and that definition which should therefore be the target of reform.”

## A. CORE LOSS

*Core loss* is what Lord Nicholls refers to as “financial loss”, although as we shall see this phrase is deceptive, what he really means is *direct* financial loss. It is what we usually mean when we simply talk of ‘loss’. *Core loss* is measured by either a plaintiff’s expectation, reliance or restitution<sup>14</sup> interest. The expectation interest awards a plaintiff their lost profits (the market value of what was contracted for), whereas the reliance interest compensates the plaintiff for what he has already spent in reliance on the contract being performed. The restitution interest compensates a plaintiff to the extent that their direct financial loss corresponds with the unjust enrichment of the defendant.

Usually, concerning ourselves only with *core loss* is unproblematic. Generally, upon breach a plaintiff does lose in the traditional sense and can be adequately compensated according to the above three interests. But this is not always the case. Sometimes, a court still compensates a plaintiff, even though he has suffered no *core loss*.<sup>15</sup> At this point many would argue that a court should only ever compensate *core loss*, and any awards outside *core loss* are concerned not with the plaintiff, but the defendant. It is the defendant’s enrichment, or wrongdoing which warrants the award, and indeed necessarily so if one limits loss to *core loss* only. This view is precipitated by a failure to appreciate that *core loss* is not the only loss we are interested in.

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<sup>14</sup> ‘Restitution’ is in this context synonymous with unjust enrichment by subtraction, see L.L. Fuller and William R. Perdue, “The Reliance Interest In Contract Damages” (1936) 46 Yale LJ 52 (“Fuller and Perdue”).

<sup>15</sup> See Lord Hobhouse in *Blake*, 298, at paras [A]-[B], above n 1 “[t]he error is to describe compensation as relating to a loss as if there has to be some identified physical or monetary loss to the plaintiff. In the vast majority of cases this error does not matter because the plaintiff’s claim can be so described without distortion. But in a minority of cases the error does matter and cases of the breach of negative promises typically illustrate this category.”

## B. *EXTENSIVE LOSS*

*Extensive loss* is not directly financial. ‘Directly’ is an important qualifier here as the plaintiff’s loss can be quantified monetarily.<sup>16</sup> Where a defendant owes a negative contractual obligation to a plaintiff, and he breaches that obligation to make a profit, the plaintiff, despite suffering no *core loss*, is nonetheless compensated. That plaintiff has suffered *extensive loss*. What the plaintiff loses is his ability to negotiate with the defendant.<sup>17</sup> By breaching the contract, the defendant takes for himself something he should have renegotiated for. So, in *Wrotham Park*, the developer who built in breach of a restrictive covenant had to pay the reasonable sum that Wrotham Park Estate Co Ltd (Wrotham Park) might have demanded to relax that obligation.

Likewise in *Experience Hendrix LLC v PPX Enterprises Inc*<sup>18</sup> a record company who licensed Jimi Hendrix recordings in breach of a negative contractual obligation was forced to pay what might have been demanded had they bothered to renegotiate. In these situations, the court will force the defendant to retrospectively renegotiate. Unfortunately, *extensive loss* does not enjoy widespread favour. Two factors have made it difficult to accept. These are the temptation of gain, and the trouble of quantification.

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<sup>16</sup> This is because besides equitable remedies such as specific performance or injunctions, money is all the court has to give. Everything can be quantified monetarily, it is just a question of what interest the court quantifies in accordance with. Steve Hedley comments “[m]oney being all the court has to give, then everything must be reduced to money, whatever the artificiality.” Above, note 12. See also M McInnes, “Gain, Loss and the User Principle” [2006] RLR 76, 85 “[t]he law has no other way to articulate its concern [other than assigning monetary value to a right]”.

<sup>17</sup> See RJ Sharpe and SM Waddams, “Damages for Lost Opportunity to Bargain” (1982) 2 OJLS 290, 290 “[t]he defendant’s wrongful conduct has deprived the plaintiff of the opportunity to bargain with the defendant, and to set his own price on his consent. The legal position can be explained by saying that the defendant should be prevented from circumventing the bargaining process, and where prevention fails, damages should be awarded to compensate the plaintiff for his lost opportunity.” See also *Cash Handling Systems Ltd v Augustus Terrace Developments Ltd* (1996) NZ ConvC 192,398, 427 “[w]hether damages are characterised as compensation for loss of the opportunity to bargain for release or, as I prefer, for loss of the right to have the bargain performed, seems to me to express the same point in different words and not to matter in the result. Both compensate for true loss”.

<sup>18</sup> [2003] EWCA Civ 323 (“*Experience Hendrix*”).

## 1. The Temptation of Gain and the Trouble of Quantification

Why is it that a majority of authors see compensatory damages as redundant, ignoring the potential that we have only narrowly understood loss, and look for solutions elsewhere? The reason is the temptation of gain. In nearly every case<sup>19</sup> (actual or hypothetical) proffered so far to illustrate these contractual conundrums, we are introduced to a plaintiff who has suffered no *core loss* and a defendant who has made a gain. What is more, in quantifying the plaintiff's *extensive loss*, we have regard to what the defendant has gained. For most, this interest in the gain recommends all too clearly a restitutionary response.

Birks taught us that compensation and restitution are partners.<sup>20</sup> The former is loss-based, while the latter is gain-based. And while Birks' strict taxonomy allowed us to achieve a level of comprehension that would have otherwise evaded us, at times we become preoccupied with categorisation to our own detriment.<sup>21</sup> The reality is that these cases have a restitutionary flavour, but they are in essence compensatory. When a court forces a party to retrospectively renegotiate, they are compensating the plaintiff for the amount that they may have required to alter the contract. In quantifying that amount, the court acknowledges that "it is natural to pay regard to any profit made by the wrongdoer".<sup>22</sup> Had the renegotiation taken place when it should have, the plaintiff would no doubt have made reference to what the defendant stood to gain.<sup>23</sup>

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<sup>19</sup> Mance LJ affirms in *Experience Hendrix* at para [26], *ibid*, that "a wrongdoer surely cannot always rely on avoiding having to make reasonable recompense by showing that despite his wrong he failed, perhaps simply due to his own incompetence, to make any profit." This is correct, and indeed actual profit (or lack of) cannot determine whether or not a plaintiff has suffered *extensive loss*.

<sup>20</sup> Peter Birks, *Unjust Enrichment* 2<sup>nd</sup> ed (Oxford University Press, Oxford, 2005) ("*Unjust Enrichment*"), 11.

<sup>21</sup> See *Latimer Holdings Ltd v Sea Holdings New Zealand Ltd* [2005] 2 NZLR 328, at para [62] "[c]ategorisation is not always useful or even appropriate (because it can obscure underlying principle)".

<sup>22</sup> *Experience Hendrix*, at para [26], above n 18.

<sup>23</sup> *Ibid*, at para [45] "the approach adopted by Brightman J has the merit of directing the court's attention to the commercial value of the right infringed and of enabling it to assess the sum payable by reference to the fees that might in other contexts be demanded and paid between willing parties." See also Peter Smith J in *Bocardo SA v Star Energy UK Onshore Ltd* [2008] EWHC 1756 (Ch), at para [104] "[i]t is true as he said that there is no question of the Crown's royalties being shared and that it was common ground that an estate cannot obtain a royalty but that does not mean that compensation cannot be assessed as a Licence based on percentage of the income received. That is not a royalty as such because one must appreciate that there is a difference between a royalty which is an extraction of a percentage of the income and compensation for the imposition of the ancillary rights on Bocardo's land."

One common criticism of the compensatory approach is that it is too speculative, and forces courts to arbitrarily fix a percentage, upsetting commercial certainty. However, as one commentator has identified, “contrived means of measuring loss are hardly unusual, and often do a great deal of good.”<sup>24</sup> This statement may even be a bit harsh – it is not necessarily ‘contrived’ to measure a plaintiff’s loss according to a defendant’s gain. Perhaps this is a more appropriate adjective for an account of profits (rather than a mere percentage) but we will see later that an account has sound compensatory justifications of its own.

Retrospective renegotiation is arguably no more uncertain than a negotiation itself. As the High Court in *Bocardo SA v Star Energy UK Onshore Ltd*<sup>25</sup> noted, fixing a retrospective release price “is not a scientific analysis but then the reality is that negotiations very rarely are.”<sup>26</sup> This has been explicitly recognised in New Zealand in *Cash Handling Systems Ltd v Augustus Terrace Developments Ltd*,<sup>27</sup> where the High Court was asked to value the lost opportunity to bargain for the release of a commercial lease, following the landlord’s wrongful repudiation of the lease contract. Commenting on the apparent artificiality of the approach, Elias J (as she then was) said

[t]he right to bargain is a component of the bundle of the lessee’s rights. It is no more a fiction than the measure urged by the defendant here for valuation of the lease-inquiry as to market price based on a willing buyer and seller, where the property comes on to the market notionally and only because of the unilateral action of one party.<sup>28</sup>

Really, a defendant makes it easier for a plaintiff to quantify their loss when they unilaterally relax their contractual obligations. Rather than deal with projected profit, the plaintiff can instead receive a proportion of actual gain.

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<sup>24</sup> Andrew Tettenborn, “Gain, Loss and Damages for Breach of Contract: What’s in an Acronym?” [2006] RLR 112, 113.

<sup>25</sup> [2008] EWHC 1756 (Ch) (“*Bocardo*”).

<sup>26</sup> *Ibid*, at para [100].

<sup>27</sup> (1996) NZ ConvC 192,398 (“*Cash Handling*”).

<sup>28</sup> *Ibid*, 192,427.

In one sense, what we are doing is cohabitating expectation with restitution interests. This might sound ominously chimeric, but in fact, as Fuller and Perdue argued so expertly, our distinctions between contractual interests are perhaps not as steadfast as we may think them to be. In their seminal article “The Reliance Interest in Contract Damages”,<sup>29</sup> Fuller and Perdue identify three principal contractual interests: expectation, reliance and restitution, and systematically show how their division is not absolute, that they in fact bleed into each other. They argue that despite the comforting divide, both the expectation and restitution interests can actually be submerged into an expanded notion of the reliance interest.

For our purposes, it is not necessary to examine this in detail, what is important to appreciate is that there is nothing unnatural, or foreboding, about accepting that while we are primarily concerned with a plaintiff’s loss, the defendant’s gain is also at the forefront of our inquiry. Where there are such strong opinions on either side of a debate, and both sides present convincing arguments, the reality is that there is likely to be truth on both sides.<sup>30</sup> This is precisely what has happened here. And as will be seen, being comfortable with the collaborative nature of this inquiry will be extremely helpful when we apply compensatory reasoning to the account in *Blake*.

### *New Zealand Context*

New Zealand courts have already indicated that they are willing to take a less rigid, and more flexible approach to damages. Section 9(2)(b) of the Contractual Remedies Act 1979 gives the court discretion to award damages as it thinks fit. Although subsection (4) gives general guidelines,<sup>31</sup> courts have read the section widely,

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<sup>29</sup> Above n 14.

<sup>30</sup> SM Waddams, “Gains Derived from Breach of Contract” in R Cunnington and D Saidov (eds), *Contract Damages* (Hart Publisher, Oxford; Portland, Or., 2008), 187-206 (“Gains Derived from Breach of Contract”), 189.

<sup>31</sup> Section 9(4) provides

“In considering whether to make an order under this section, and in considering the terms of any order it proposes to make, the Court shall have regard to –

- (a) The terms of the contract; and
- (b) The extent to which any party to the contract was or would have been able to perform it in whole or in part; and
- (c) Any expenditure incurred by a party in or for the purpose of the performance of the contract; and
- (d) The value, in its opinion, of any work or services performed by a party in or for the purpose of the performance of the contract; and
- (e) Any benefit or advantage obtained by a party by reason of anything done by another party in or for the purpose of the performance of the contract; and

considering it to free them from common law rules.<sup>32</sup> It appears the section was never intended to confer such a broad discretion,<sup>33</sup> but courts have nonetheless viewed it as doing just that. In *Newmans Tours Ltd v Ranier Investments Ltd*,<sup>34</sup> Fisher J gave an extensive judgment on the scope of s 9. Although adopting Fuller and Perdue's tripartite classification, he held that quantifying damages under the section was a "global exercise which takes into account all the performances, breaches, gains and losses of all the parties to that contract."<sup>35</sup> The Court of Appeal affirmed this in *Thomson v Rankin*,<sup>36</sup> where Cooke P said "[a]ll in all the legislature has in s 9 endowed the Courts with a valuable instrument for achieving justice, of course on declared and rational principles, which need not be trammelled by common law restrictions."<sup>37</sup>

Compensation for *extensive loss* is already, and should continue to be, available at common law, but in New Zealand courts have been empowered by s 9 to get to this position on notions of justice, without getting suffocated by the rigid classifications that the common law favours. Now, of course, 'justice' tells us little about when these damages should be available, and undoubtedly the English cases will prove influential in guiding the court's discretion, however a certain flexibility is already statutorily introduced, and judicially embraced in New Zealand.

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(f) Such other matters as it thinks proper."

<sup>32</sup> See generally *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68; *Thomson v Rankin* [1993] 1 NZLR 408; *Gallagher v Young* [1981] 1 NZLR 734.

<sup>33</sup> Section 9 was primarily intended to mitigate the harshness to a defendant following the new statutory remedy of cancellation. Its three primary functions were to relax the common law requirements for the former remedies of rescission and restitution, allow courts to provide interim relief, and allow the party in breach to have a compensatory claim measured according to the reliance interest. See generally Campbell Walker, "Section 9 of the Contractual Remedies Act 1979: Opening Pandora's Box" (1992-1995) 7 Auckland U L.Rev 527; F Dawson and DW McLauchlan, *The Contractual Remedies Act 1979* (Sweet & Maxwell (NZ) Ltd, Auckland, 1981); Brian Coote, "Remedy and Relief under the Contractual Remedies Act 1979 (NZ)" (1993) 6 JCL 141; Contracts and Commercial Law Reform Committee, *Report on Misrepresentation and Breach of Contract*, Wellington, 1978.

<sup>34</sup> [1992] 2 NZLR 68.

<sup>35</sup> *Ibid*, at para [80].

<sup>36</sup> [1993] 1 NZLR 408.

<sup>37</sup> *Ibid*, at para [90].

## 2. *Blake and Extensive Loss*

So far we have seen that a court will compensate a plaintiff for *extensive loss* through retrospective renegotiation. This usually means that a plaintiff gets a proportion of the defendant's profits, reflecting the amount that the plaintiff could have demanded. Although, as Chapter III explores, some academics still view this proportional award as restitutionary, once we understand the concept of *extensive loss* these cases conform neatly to a compensatory approach.

But in *Blake*, the Court went further than this. The Crown did not get a proportion of Blake's profits, but an account of profits. If the award in *Blake* is compensatory (as *WWF* tells us it is), why is it that the defendant's profit just so happens to match the plaintiff's loss? Problems arise here when we ask the wrong questions.<sup>38</sup> Unable to resist the coincidental explanation<sup>39</sup> restitution can give, a gain-based analyst would ask 'when does a defendant breach a contract in such a way that he must give up all of his profits?'. But this is the wrong question, and moves us away from contract law, and into the troublesome, and ultimately misleading area of gain-based awards.

The question we should ask is 'when is the nature of a contract such that the only available measure of a plaintiff's loss is all of the defendant's gain?' This is not a simple question to answer, and is the subject of Chapter IV. What we do know is that in *Blake* the contract was one such that the only measure the Court could use to quantify the Crown's *extensive loss* was Blake's profit. Lord Hobhouse, in his dissenting judgment, could not see how the award could be compensatory. He was content to accept that proportional awards adequately compensate *extensive loss*, but was not willing to make the connection to an account.

In *WWF*, the Court of Appeal made this connection for us. Usually, we measure *extensive loss* by the amount the plaintiff would have required to relax the contract. However in *Blake*, given the exceptional nature of the circumstances, the Court could not possibly entertain the possibility that the Crown would have renegotiated. To

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<sup>38</sup> *Blake*, 299 [C]-[D], above n 1, per Lord Hobhouse "[t]he supposed problem arises from asking the wrong question not from receiving the wrong answer."

<sup>39</sup> See O'Sullivan, 341, above n 13.

force the Crown to retrospectively renegotiate such an exceptional contract would be against public policy. As the Court observed

[t]he concept of a notional bargain between the Crown (as employer) and a double agent – under which the Crown was to be taken as having agreed (for a suitable sum) to release the agent from an undertaking not to publish official secrets – was, perhaps, too bizarre to contemplate.<sup>40</sup>

There is a very high standard as to what will be ‘too bizarre’, or too ‘exceptional’<sup>41</sup> to renegotiate. The fact that a plaintiff may never have wished to renegotiate is irrelevant.<sup>42</sup> So far, only two cases met the standard. *Blake*, which set the standard, and few would think it was not exceptional enough to warrant an account, and *Esso Petroleum Co Ltd v Niad Ltd*,<sup>43</sup> a High Court case which allowed an account in a commercial context. Whether there is ever a commercial contract, which would be exceptionally non-negotiable, is a contentious issue and one we shall return to in Chapter IV.

So we can see how the connection was made from the proportional to the full award. But a question remains in a *Blake* type case – why is the quantification of the plaintiff’s *extensive loss* an account of the defendant’s profit? The answer is found by looking at what the court has at its disposal to measure. When a defendant breaches a contract, that is by its very nature non-negotiable, the defendant creates a situation where the plaintiff’s loss is very difficult to measure. The plaintiff still suffers *extensive loss*, but we are no longer in a situation where we can support a retrospective renegotiation. Should the defendant benefit from putting himself in this position?<sup>44</sup> Not where there is an alternate measure of damages available. Measuring loss according to our different categories of interest is not an exact science, and in exceptional circumstances an account of the defendant’s profit will be the most accurate measure, purely because it is the *only* measure available to the court.

<sup>40</sup> *WWF*, at para [46], above n 3.

<sup>41</sup> *Blake*, 285, at paras [F]-[G], above n 1.

<sup>42</sup> *Experience Hendrix*, paras [22] and [54], above n 18.

<sup>43</sup> [2001] EWHC Ch 458 (“*Esso*”).

<sup>44</sup> See “Gains Derived from Breach of Contract”, 200, above n 30.

Despite *WWF* confirming that both awards are compensatory, the temptation of gain and the trouble of quantification invited others to seek alternate ways to justify a remedy, and confused our understanding as to the juridical nature, and thus availability, of compensation for *extensive loss*. There are three ways that we have been misled, and before we can look at *Blake* in detail, we must trace judicial and academic responses in the past in order to clear the way for a compensatory approach in the future.

### *III*

## *Three Ways We Have Been Misled*

Recognising unjust enrichment as a cohesive and autonomous area of law, Professor Birks noted that its past elusiveness was largely attributable to it being “tucked under the edges of contract and trust.”<sup>45</sup> Although in no way as sensational as unjust enrichment’s excavation, on a smaller scale we can see that a similar thing has happened with compensation for *extensive loss*. Instinctively, courts are willing to find a remedy for a plaintiff who, following a defendant’s profit-yielding breach, suffers no direct financial loss.<sup>46</sup> As seen above, where contention has arisen is in identifying the correct jurisprudential basis of such an award.

An unnecessarily narrow understanding of loss has forced both courts and academics to seek remedies through unconventional channels, switching the focus from the claimant to the defendant and ushering in a preference for gain-based relief. This has put awards of compensatory damages for *extensive loss* in an awkward position. They have been forced to take refuge under the protection of property law, unjust enrichment, and restitution for wrongs, and their association with these three areas of law has caused lingering harm. In the wake of *Blake*, these damages have been rightly relocated within the rubric of an autonomous law of contract, and we can now recognise an account of profits as being compensatory in nature. Although tempting, we cannot simply move forward from this point. In order to avoid potentially harmful hangovers from previous associations, and to ensure that we are not tempted to view the exceptional account in *Blake* as gain-based, we need to understand how these contractual situations were treated in the past, tracing judicial and academic responses

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<sup>45</sup> *Unjust Enrichment*, 3, above n 20.

<sup>46</sup> See Brightman J in *Wrotham Park*, 812, at para [H], above n 8 “is it just that the plaintiffs would receive no compensation and that the defendants should be left in undisturbed possession of the fruits of their wrongdoing? Common sense would seem to demand a negative answer to this question.” And Mance LJ in *Experience Hendrix* at para [26], above n 18 “[i]n a case such as the *Wrotham Park* case the law gives effect to the instinctive reaction that, whether or not the appellant would have been better off if the wrong had not been committed, the wrongdoer ought not to gain an advantage for free, and should make some reasonable recompense.”

through associations with interferences with property rights, unjust enrichment, and restitution for wrongs.

### A. ASSOCIATION WITH PROPERTY RIGHTS

Lord Nicholls reasoned to an account of profits for breach of contract primarily through an extension of damages available for proprietary torts. Noting that the common law “pragmatic as ever”<sup>47</sup> was capable of awarding damages even where a plaintiff suffered no direct financial loss, he applied this in a contractual setting. Despite suggesting that these damages (both in a tortious and contractual setting) are gain-based,<sup>48</sup> Lord Nicholls nevertheless delivered a coup for contract in making it clear that independent from a proprietary claim, a breach of contract is capable of accommodating this remedy.

In the context of *Blake* itself, (where there was no potential to attribute the result to anything other than the breach of contract)<sup>49</sup> associating contractual rights with property rights may not seem so dangerous, but where there is the potential for dual analysis, one must be more cautious. The temptation is to characterise a plaintiff’s interest in these cases as proprietary, rather than contractual.<sup>50</sup> After looking at how courts customarily protect proprietary interests, this section will show how courts in the past have given into this temptation, and misled us to the nature and scope of compensation for *extensive loss*.

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<sup>47</sup> *Blake*, 278, at para [E], above n 1.

<sup>48</sup> *Ibid*, 279, at paras [C]-[F] but see also 278, at paras [E]-[G] where Lord Nicholls introduces interference with proprietary rights explaining that “*compensation* for the wrong done to the plaintiff is measured by a different yardstick” (emphasis added). For the purposes of this section it is not relevant whether these damages are classified as loss or gain based, however it is still maintained that both in a tortious and contractual application, they are loss based. For further support to this view see M McInnes, “Gain, Loss and the User Principle” [2006] RLR 76; Lloyd J in *Ministry of Defence v Ashman* (1993) 66 P & CR 195; *Bocardo*, above n 25; and in New Zealand Elias J in *Cash Handling*, above n 27.

<sup>49</sup> Although there are academic murmurings that *Blake* was in fact a fiduciary, and that relationship warranted the award, see for example Hanoch Dagan, “Profit from Breach of Contract: Reconsidering *Blake*”, online posting, 28 November 2001, Restitution Discussion Group <<http://www.ucc.ie/law/restitution/disc.htm>> accessed 18 March 2008. For further discussion see John Glover, “Is Breach of Confidence a Fiduciary Wrong? Preserving the Reach of Judge-made Law” (2001) 21 Legal Stud. 594.

<sup>50</sup> John McCamus, “Disgorgement for Breach of Contract: A Comparative Perspective” (2002-2003) 36 Loyola LA L Rev 943 (“McCamus”), 954.

## 1. The User Principle

When a person wrongfully interferes with a claimant's property, damages are available not only for direct financial loss, but also on the basis of the so called 'user principle'.<sup>51</sup> In brief, this allowed a claimant who appeared to have suffered no loss to nonetheless recover the amount they could have charged the defendant for the use of the property, had the defendant been in lawful possession. The early wayleave cases firmly establish that where a defendant uses a plaintiff's land, regardless of it causing no direct financial loss, he is required to make reasonable payment for the use of that land.<sup>52</sup> This was later extended to any trespass against land. Thus, in *Penarth Dock Engineering Company Ltd v Pounds*,<sup>53</sup> Pounds trespassed by refusing to remove a pontoon it had bought from the plaintiff. Lord Denning ordered him to pay a reasonable fee for trespassing on the plaintiff's land – calculating the amount payable according to the market rate for hire of a berth at a similar dock.

From the wayleave cases, the principle was extended to patent infringements and instances of trespass to goods. In *Strand Electric and Engineering Co. LD v Brisford Entertainments LD*<sup>54</sup> a vendor of a theatre was required to pay reasonable hire for lighting switchboards it refused to deliver up to Strand Electric, despite Strand Electric incurring no direct financial loss. Somervell LJ asked "[w]hy is not the plaintiffs' loss the value in the market of the user?"<sup>55</sup> Drawing an analogy with mesne profits, he concluded that "the defendant must pay what the plaintiff would have obtained if the defendant had lawfully been in possession."<sup>56</sup>

### *The User Principle and Contract Law*

More controversially, the user principle has been applied to breach of contract. In *Wrotham Park*, Brightman J awarded damages against a developer who built 14 houses in breach of a restrictive covenant. Both parties were successors to the restrictive covenant requiring any development to be done only in accordance with a

<sup>51</sup> Nicholls LJ in *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 3 All ER 394.

<sup>52</sup> See *Martin v Porter* (1839) 5 M & W 351, and also *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538.

<sup>53</sup> [1963] 1 Lloyd's Rep 359.

<sup>54</sup> [1952] QB 246.

<sup>55</sup> *Ibid*, 252.

<sup>56</sup> *Ibid*.

vendor-approved layout plan. Without seeking approval, and in breach of the existing layout plan, Parkside Homes built 14 houses on an undeveloped area of wasteland. Wrotham Park sought an injunction, which came to trial after the houses had been built and on-sold.<sup>57</sup> Brightman J refused to grant an injunction given that “the erection of the houses, whether one likes it or not, is a *fait accompli* and the houses are now the homes of people.”<sup>58</sup>

However, Wrotham Park was not left without a remedy. Despite the fact they had suffered no direct financial loss and had made it clear that they would have never been prepared to relax the covenant, Brightman J awarded damages. He reasoned that “if, for social and economic reasons”<sup>59</sup> a court declines to exercise its equitable discretion, the plaintiffs are entitled to compensation of a reasonable sum as a “*quid pro quo* for relaxing the covenant.”<sup>60</sup>

In reaching that reasonable sum, Brightman J noted that in hypothetical negotiations Wrotham Park would have made reference to the developer’s projected profit.<sup>61</sup> With the benefit of hindsight, Wrotham Park were awarded five per cent of the developer’s actual profit. As we saw above, in a proprietary setting, the user principle will not allow a defendant to appropriate a property right for free. Extending this to contract law, Brightman J held that a defendant is likewise unable to take a contractual right for free – that is, the plaintiff’s right to demand payment in exchange for a relaxation of the defendant’s contractual obligations.

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<sup>57</sup> Wrotham Park declined to seek an interim injunction for various reasons - they did not want to accept the risk of paying damages themselves; they erroneously believed that they did not have a strong enough *prima facie* case; and in the past issuing a writ had proved sufficient.

<sup>58</sup> *Wrotham Park*, 811, at paras [A]-[B], above n 8.

<sup>59</sup> *Ibid*, 812, at para [H].

<sup>60</sup> *Ibid*, 815, at para [D].

<sup>61</sup> *Ibid*, 815-816, at paras [G]-[A].

## 2. Attempts to Extinguish the ‘Solitary Beacon’

In *Blake*, Lord Nicholls regarded *Wrotham Park* as a “solitary beacon”<sup>62</sup> that in contract, as well as tort, these damages are available. However, *Wrotham Park* has not always been accommodated so graciously. No sooner had the user principle found its way into contract law was it marginalised by courts and academics<sup>63</sup> attempting to limit Brightman J’s damages to proprietary underpinnings.

The most concentrated effort came in *County Council of Surrey v Bredero Homes*.<sup>64</sup> The Council had sold land to Bredero subject to a covenant that they would develop according to the planning permission current at time of sale. That first planning permission allowed construction of 72 houses. In breach of covenant, Bredero built in accordance with a later planning permission, allowing for 77 houses. Relying heavily on *Wrotham Park*, the Council argued for the reasonable sum that they might have demanded in order to relax the covenant. However, unlike in *Wrotham Park*, they did not seek an injunction at any stage in the proceedings, recognising that there never was a real possibility of obtaining one.

The Court of Appeal determinedly rejected any application of *Wrotham Park*, albeit for very different reasons. Dillon LJ drew a sharp distinction between damages available at common law for breach of contract, and damages available in lieu of an injunction (equitable damages) conferred by section 2 of the Chancery Amendment Act 1858, commonly referred to as Lord Cairns’ Act.<sup>65</sup> Limiting *Wrotham Park* to the latter, he held that as the Council never sought an injunction, they were committed to pursuing only common law damages, which he saw capable of producing only a nominal sum. Not only limiting *Wrotham Park* to damages sought under Lord Cairns’ Act, Dillon LJ also questioned whether equitable damages should even have been awarded in a Lord Cairns context. Favouring the more conservative view of

<sup>62</sup> *Blake*, 283, at para [H], above n 1.

<sup>63</sup> See for example M Jackman, “Restitution for Wrongs” (1989) 48 CLJ 302 (“Jackman”), 318-319; Andrew Burrows, *The Law of Restitution* 2<sup>nd</sup> ed (Croydon, Butterworths, 2002) (“*The Law of Restitution*”), 483; Jack Beatson, *The Use and Abuse of Unjust Enrichment* (Oxford University Press, Oxford, 1991) (“*Use and Abuse*”), 15; M McInnes, “Gain-Based Relief for Breach of Contract: *Attorney-General v Blake*” (2001) 35 Can. Bus. LJ 72, 77 and Graham Virgo, “Clarifying Restitution for Wrong” [1998] RLR 118.

<sup>64</sup> [1993] EWCA Civ 21 (“*Bredero*”).

<sup>65</sup> *Ibid*, 1366-1368.

*Johnson v Agnew*,<sup>66</sup> Dillon LJ appeared to support that even under Lord Cairns' Act, where common law damages would be nominal, so too should equitable damages.

Steyn LJ also marginalised *Wrotham Park*, regarding it as a “useful development in our law”<sup>67</sup> for the protection of property rights. Influenced by the proprietary nature of a negative covenant, he distinguished *Wrotham Park*<sup>68</sup> from the case before him in that the former involved an invasion of proprietary rights, whereas the latter was simply a positive contractual obligation. Although Steyn LJ was more explicit in his reasoning, both judges<sup>69</sup> reasoned *Wrotham Park* away as proprietary in nature. As seen above, proprietary interests have long been afforded special protection by the courts. In addition to common law damages, equity offers special protection in the form of equitable orders for specific performance and injunctions.<sup>70</sup> Thus when limiting *Wrotham Park* to damages under Lord Cairns' Act, Dillon LJ was impliedly limiting *Wrotham Park* damages to instances where courts would exercise their equitable jurisdiction to order an injunction – most often instances involving proprietary interests.

Despite the concerted effort of the Court of Appeal, *Wrotham Park* was not to be snuffed out quite so easily. *Bredero* was subjected to much criticism, most notably in *Jaggard v Sawyer*<sup>71</sup> and *Blake*. *Jaggard* went a little way to revive *Wrotham Park* by revisiting when Lord Cairns' Act could apply, but *Blake* truly emancipated *Wrotham Park* from proprietary chauvinism by separating it completely from Lord Cairns' Act, classifying it beyond question as a claim at common law for contractual damages.

*Jaggard* involved a disgruntled neighbour determined to prevent the Sawyers from breaching a covenant not to develop their land or grant access over a private road

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<sup>66</sup> [1980] AC 367.

<sup>67</sup> *Bredero*, 1369, at para [H], above n 64.

<sup>68</sup> He likewise distinguished *Bracewell v Appleby* [1975] Ch 408; *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 1 WLR 922; and *Griffiths v Kingsley Stubbs* Court of Appeal (Civil Division), (Transcript: Association), 3 June 1986, Dillon, Croom-Johnson LJJ; all which had applied *Wrotham Park* as being “cases where the plaintiff's cause of action lay in tort, either trespass of nuisance, where the defendant had interfered with the plaintiff's property rights.” Per Dillon LJ, *ibid*, 1367, at para [D].

<sup>69</sup> Rose LJ also rejected the Council's claim, giving a short judgment with reasons broadly similar to Dillon LJ.

<sup>70</sup> McCamus, 958, above n 50.

<sup>71</sup> [1994] EWCA Civ 1 (“*Jaggard*”).

shared by existing residents on a cul-de-sac. Jaggard was appealing against the County Court's decision refusing injunctions to restrain further trespassing. The Court of Appeal dismissed the appeal, applying *Wrotham Park* and awarding Jaggard the amount she could have received, had the Sawyers sought a relaxation of the covenant. The Court disagreed with *Bredero's* approach to Lord Cairns' Act (that where common law damages would be nominal so too should equitable damages),<sup>72</sup> and Steyn LJ's view that the damages were restitutionary.<sup>73</sup>

While this was all somewhat liberating for *Wrotham Park*, the Court went on to assess how damages at common law interact with Lord Cairns' Act, and displayed some unsettling presuppositions. Millett LJ, explaining how equitable damages are indeed compensatory, argued that what a plaintiff is being compensated for is the "diminution in value of the land occasioned by the breach."<sup>74</sup> He went on to say that one aspect of the value of the land is the ability to turn a covenanted right to account, through demanding payment for relaxation of that right. Such a right, however, only has value to the extent that it could be protected by an injunction.<sup>75</sup> This leads to the natural conclusion that "damages can be awarded at common law in accordance with the approach adopted in *Wrotham Park*, but in practice only in the circumstances in which they could also be awarded under the Act."<sup>76</sup>

Pre-*Blake*, courts were comfortable for common law rights to run parallel with equitable rights only insofar as a case still had a proprietary flavour. A hugely important aspect of *Blake* therefore is the way it set *Wrotham Park* apart from anything proprietary. Acknowledging that Lord Cairns' Act "takes the matter now under discussion no further forward",<sup>77</sup> Lord Nicholls dealt with *Wrotham Park* and *Blake's* case under the heading "Breach of Contract"<sup>78</sup> making it clear that damages in these circumstances exist independent of the proprietary undercurrents which influenced previous decisions.

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<sup>72</sup> *Ibid*, at paras [64] to [68].

<sup>73</sup> *Ibid*, at para [69].

<sup>74</sup> *Ibid*, at para [70].

<sup>75</sup> *Ibid*. See also Lord Nicholls in *Blake*, 281, at para [H], above n 1 "[a] property right has value to the extent only that court will enforce it or award damages for its infringement."

<sup>76</sup> *Jaggard*, at para [70], above n 71.

<sup>77</sup> *Blake*, 281, at para [G], above n 1.

<sup>78</sup> *Ibid*, 282-286.

### 3. Lessons learned

This disassociation with property rights has enabled us to comprehend two things: there is no need to be in a position to get an injunction in order to point to *extensive loss* and, less obviously, it also allows a situation (as was realised in *Blake*) where a plaintiff can have their loss measured by the *full* amount of the defendant's gain – not just the percentage that the court was willing to protect. This was one of the issues that seriously bothered Lord Hobhouse in *Blake*. In his dissent, he argued that the account sought was “a remedy based on proprietary principles when the necessary proprietary rights are absent.”<sup>79</sup> While he was prepared to accept that damages were justified in *Wrotham Park*,<sup>80</sup> his intrigue with proprietary rights rendered him unable to extend that principle to its fruition in *Blake*.

Thus we can see how associating *extensive loss* with property rights formerly caused us to overlook the contract. Drawing analogies with property rights in fact both aided and blinded us at the same time. Although helping us recognise *extensive loss* in general, it also compromised our ability to recognise extensive loss in a purely contractual setting. In the wake of *Blake*,<sup>81</sup> courts are content to recognise that hypothetical release damages can compensate for a breach of contract *simpliciter*. In *WWF*, Chadwick LJ confirmed this position absolutely stating that “in a case where a covenantor has acted in breach of a restrictive covenant, the court may award damages on a *Wrotham Park* basis, notwithstanding that there is no claim for an injunction; and notwithstanding that there could be no claim for an injunction...The power to award damages on a *Wrotham Park* basis does not depend on Lord Cairns's Act: it exists at common law.”<sup>82</sup>

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<sup>79</sup> *Ibid*, 299, at para [A].

<sup>80</sup> *Ibid*.

<sup>81</sup> In New Zealand this issue was actually addressed before *Blake* by the High Court in *Cash Handling*, 192,427, above n 27 where Elias J said “[b]ut I consider that the basis upon which such recovery is available is a compensation principle of wide application, not limited to cases where injunctive relief is refused for a continuing wrong or where the wrong is actionable trespass.”

<sup>82</sup> *WWF* at para [54], above n 3.

## B. ASSOCIATION WITH UNJUST ENRICHMENT

Associating contractual damages with property rights did not necessarily tamper with the jurisprudential origin of the award, rather it prejudiced our understanding of loss and limited the availability of compensation. Locating the remedy within unjust enrichment (and later restitution for wrongs) however, has had a devastating effect on our understanding of compensation for loss. This section will look at Birks' first theory of restitution,<sup>83</sup> showing how, through his perfect quadrature thesis, problematic cases were submerged into a wider law of unjust enrichment, moving to a defendant-focussed, gain-based approach.

### 1. Perfect Quadrature and Wrongdoing

To date, Professor Birks has undoubtedly had the greatest impact on the "rational evolution" of the law of restitution.<sup>84</sup> He taught us that correct taxonomy is the prerequisite for, and indeed indicator of, rational legal thought. From Birks' perspective, legal analysis can be broadly divided into two categories: causative events and legal responses. In his *Introduction to the Law of Restitution*, Birks argued that restitution is "the response which consists in causing one person to give up to another an enrichment received at his expense or its value in money",<sup>85</sup> and unjust enrichment is the "generic conception"<sup>86</sup> of all the events which can give rise to restitution. Birks maintained that the only event capable of generating a restitutionary response was unjust enrichment, that restitution and unjust enrichment perfectly quadrate.<sup>87</sup>

The generic conception (unjust enrichment at the expense of another) posed a problem. 'At the expense of' naturally implies that something of value has passed from one person to another. Thus where person B takes \$10 from person A, B has

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<sup>83</sup> See generally Peter Birks, *Introduction to the Law of Restitution* (Clarendon Press, Oxford, 1989) ("Introduction").

<sup>84</sup> M McInnes, "Restitution, Unjust Enrichment and the Perfect Quadrature Thesis" [1999] RLR 118, 118.

<sup>85</sup> *Introduction*, 13, above n 83.

<sup>86</sup> *Ibid*, 17.

<sup>87</sup> *Ibid*, 16-22.

been (presuming it was in circumstances giving rise to restitution) unjustly enriched *at the expense of* A. This much was non-contentious. However, in order to sustain his thesis of perfect quadrature, Birks had to answer how wrongs also fitted within the generic conception, thus giving rise to restitution. He did this by dividing unjust enrichment into enrichment by subtraction from the plaintiff, and enrichment by doing wrong to the plaintiff. The broad policy behind the latter was that a person should not benefit from their wrongdoing, an instinctive reaction which lies at the core of any gain-based approach.

The phrase ‘unjust enrichment by wrongs’ posed a further problem. Birks recognised that restitution for unjust enrichment in the second sense of ‘at the expense of’ is in reality just ‘restitution for wrongs’. Unjust enrichment was a “dependent description”,<sup>88</sup> dependent on there first being a restitution-yielding wrong. It is important to keep in mind that despite recognising that it is more economical to refer to restitution for wrongs, Birks was not compromising the perfect quadrature between unjust enrichment and restitution. Instead Birks recognised that where an unjust enrichment requires a wrong to exist, it is that wrong which generates the restitutionary response – the wrong is the cause of action. But the commission of that wrong (if it is to have a restitutionary response) still creates an unjust enrichment. Birks simply acknowledged that the unjust enrichment (unless alternative analysis is available)<sup>89</sup> is not in itself the cause of action.

## 2. Breach of Contract as a Restitution-Yielding Wrong

In this analysis, breach of contract is a wrong.<sup>90</sup> This is not enough, however, to forward us to a restitutionary response. The fundamental question is: is a breach of contract a *restitution-yielding* wrong? Birks identified three tests to help answer this question: was there deliberate exploitation of wrongdoing, was the wrong involved an anti-enrichment wrong, or was the remedy for the wrong necessarily prophylactic

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<sup>88</sup> *Ibid*, 43.

<sup>89</sup> *Ibid*, 314 “[t]he victim of a wrong may be able to analyse the facts in such a way as to make out a claim to restitution on a basis which has nothing whatever to do with a wrong...he may be able to ignore the wrong and to make out his cause of action in autonomous unjust enrichment.”

<sup>90</sup> ‘Wrong’ is used in the Birksian sense, referring not to moral culpability, but simply to any breach of duty. See *ibid*, 313.

(thus restitutionary)?<sup>91</sup> Breach of contract could satisfy either of the first two tests.<sup>92</sup> So, according to this original theory, the *Wrotham Park* award was restitutionary, responding to the unjust enrichment of Parkside Homes. Classifying the contractual duty as one not to benefit from any development carried out other than in accordance with approved plans, Birks fitted *Wrotham Park* into the second of the above tests, the restitution-yielding wrong satisfying the second meaning of ‘at the expense of’.<sup>93</sup> Applying the first test, Birks also argued that cynical breach creates an unjust enrichment,<sup>94</sup> allowing for a restitutionary response.

It appears that the High Court in *Esso* also tackled damages for breach of contract through unjust enrichment (although somewhat superfluously). *Esso* involved a marketing scheme between an oil company and a petrol station. Niad entered into an exclusive supply contract with Esso and undertook to observe Esso’s Pricewatch scheme. Pricewatch was introduced to ensure that individual retailers offered competitive petrol prices. Esso advertised to customers that it offered competitively low prices, adjusted daily, according to what rivals charged. The individual retailers were contractually obliged to call in competitors’ prices, and then adjust their own according to Esso’s direction. The crucial part of the arrangement was that in exchange for retailers lowering their prices, Esso would reimburse them a proportion according to the variable price. Niad purported to operate the Pricewatch scheme, received the corresponding financial support from Esso, but did not charge customers the directed competitive price.

Traditional expectation damages were of no help to Esso<sup>95</sup> as Esso would have the impossible task of quantifying lost sales caused by Niad’s overcharging. Instead, the Vice-Chancellor allowed either an account of profits, believing it a case exceptional enough to satisfy *Blake*,<sup>96</sup> or a restitutionary remedy, acknowledging the unjust enrichment of Niad at Esso’s expense.<sup>97</sup> It is difficult to understand why these two

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<sup>91</sup> *Ibid*, 326-333.

<sup>92</sup> *Ibid*, 334-336.

<sup>93</sup> *Ibid*, 335.

<sup>94</sup> See generally Peter Birks, “Restitutionary Damages for Breach of Contract: *Snepp* and the Fusion of Law and Equity” [1987] LMCLQ 421 (“*Snepp* and the Fusion of Law and Equity”).

<sup>95</sup> *Esso*, at para [56], above n 43.

<sup>96</sup> For further discussion as to the appropriateness of this award see Chapter IV.

<sup>97</sup> *Esso*, at para [64], above n 43.

awards are distinct on the Vice-Chancellor's reasoning,<sup>98</sup> but even if taken as separate, the latter restitutionary award is entirely inappropriate. The Vice-Chancellor held that the benefit obtained by Niad (the excess Niad received between directed prices and charged prices) matched the loss suffered by Esso (in providing price support) thus appearing to evidence unjust enrichment by subtraction.<sup>99</sup> However, this approach was in fact overly generous to Esso. Niad may not even have gained: presumably charging more money than competitors would lose a retailer money, rather than make it.<sup>100</sup> What this confused application reveals is a willingness to strip Niad of its profit and the strong influence that unjust enrichment, and its apparently suitable response of restitutionary damages has had on thinking in this area.

### 3. Lessons Learned

Birks said “a law of contract which allows recourse to breach of contract as an instrument of gain is simply not doing its job.”<sup>101</sup> As a solution, he found a remedy for a plaintiff who, due to restricted understandings of ‘loss’, would otherwise have no remedy. He did so through unjust enrichment. He did us a huge service in correctly identifying the “abusive instrumentalism”<sup>102</sup> which had previously hidden the need for independent consideration of this contractual issue. But this analysis has worked both for and against us. Although drawing our attention to these complex contractual situations, and highlighting that these plaintiffs should not be without a remedy (or forced to pursue a remedy through covert means), it introduced us to an era of gain-based thinking – one that the law is only slowly recovering from. Focussing on the defendant's gain, and preoccupying our thinking with notions of unjust enrichment, blinded us to the possibility that we were not dealing with situations where the plaintiff suffered no loss and that compensatory damages are the most appropriate remedy.

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<sup>98</sup> *The Law of Restitution*, 490, “the distinction between an account of profits and the so-called ‘restitutionary remedy’ is a difficult one to draw on these facts”, above n 63.

<sup>99</sup> *Esso*, at para [64], above n 43.

<sup>100</sup> Steve Hedley, “Profit from Breach of Contract”, online posting, 28 November 2001, Restitution Discussion Group <<http://www.ucc.ie/law/restitution/disc.htm>>, accessed 18 March 2008.

<sup>101</sup> “*Snepp* and the Fusion of Law and Equity”, 423, above n 94.

<sup>102</sup> “Profits of Breach of Contract”, 520, above n 6.

In Birks' original theory, this gain-based approach was even more dangerous. In maintaining the perfect quadrature between unjust enrichment and restitution, Birks effectively submerged the law of contract into wider considerations of unjust enrichment. His linear approach to restitution, with wrongs creating unjust enrichments before generating the desired response, in essence demoted the contractual element, and occupied our thinking with restitution, and its lifeblood unjust enrichment instead.

## B. ASSOCIATION WITH RESTITUTION FOR WRONGS

In 1998 Birks wrote what has been regarded as the “most important paper of the last decade.”<sup>103</sup> Aptly named “Misnomer”,<sup>104</sup> Birks recanted his theory of perfect quadrature, instead acknowledging that restitution is not mono-causal, and unjust enrichment is only one of several causative events which can give rise to it. Birks' second theory allowed restitutionists to look at wrongs independent of unjust enrichment, and ask simply whether the wrong in question is one deserving of a restitutionary response. In a contractual setting, emphasising the independence of contract from unjust enrichment was a “necessary part”<sup>105</sup> of Birks' revised theory. This was a marvellous step in the right direction, as it recognised that the law of contract can give damages where the plaintiff appeared to have suffered no loss. No longer were contractual breaches in this context submerged into unjust enrichment, rather they were restitution-generating wrongs in their own right.

However this view has still seriously misled us. We were unable to see that a defendant's gain was merely a means to an end – that end being the quantification of the plaintiff's loss. What we did instead was move deeper and deeper into restitution for wrongs, evolving new concepts and trying to keep a gain-based approach afloat, even in the face of growing inconsistencies. These inconsistencies arise when gain-based analysts attempt to explain why *extensive loss* is sometimes measured not by a

<sup>103</sup> M McInnes, “Misnomer: A Classic” [2004] RLR 79, 79.

<sup>104</sup> In W Cornish, R Nolan, J O'Sullivan & Virgo (eds), *Restitution: Past, Present & Future* (Hart, Oxford, 1998), 1-29.

<sup>105</sup> SM Waddams, “Contract and Unjust Enrichment: Competing Categories, or Complementary Concepts?”, 167-183 in C Rickett & R Grantham (eds), *Structure and Justification in Private Law* (Hart, Oxford, 2008), 167.

proportion, but an account of a defendant's profit. This section will examine how theorists attempt to justify restitution's annexation of contract law, either by grading monetary awards according to moral blameworthiness, or by differentiating proportional awards with the account in *Blake*, arguing that the former are restitutionary damages, whereas an account is disgorgement. Either way, it is a wrongs-based focus, building on previous ideas of unjust enrichment, which has entrenched consideration in this area in gain-based thinking.

## 1. Rights and Wrongs

Restitution for wrongs arises within the rubric of primary and secondary rights. A primary right refers to that which "those bound by the right must do, or abstain from doing".<sup>106</sup> It exists independently of any wrongdoing.<sup>107</sup> A secondary right on the other hand, arises as a direct result of wrongdoing. It is the obligations then visited upon the wrongdoer as a result of their breaching the primary right. Primary rights can be imposed by the common law, equity, statute or by contract.<sup>108</sup> Looking at contract law specifically, primary rights are those created by the contract itself (those rights and obligations incurred and obtained by consent), whereas secondary rights are generated by the wrong of committing a breach of contract.<sup>109</sup> It is important to note that the content of a secondary right is not necessarily dictated by the nature of primary right, and what remedy the plaintiff is entitled to is a question of policy.<sup>110</sup>

At this point restitutionists argue that the content of the secondary right (which responds to the wrong of a breach of contract) should be, in the circumstances we are concerned with, the giving up of gains. There has been no shortage of writing in support of this view. Indeed, it would not be an over-exaggeration to say that a majority of authors support, in one-way or another, restitution for breach of contract.

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<sup>106</sup> R Nolan, "Remedies for Breach of Contract: Specific Enforcement and Restitution" in F Rose (ed) *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences* (Hart Publishing, Oxford, 1997), 35-59 ("Nolan"), 37.

<sup>107</sup> R Zakrzewski, *Remedies Reclassified* (Oxford University Press, Oxford, 2005) ("*Remedies Reclassified*"), 13.

<sup>108</sup> *Unjust Enrichment*, 21, above n 20.

<sup>109</sup> *Ibid.*

<sup>110</sup> Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 *U Western Australia L. Rev* 1, 12.

As we know, restitution for wrongs is underpinned by the broad justification that a wrongdoer should not profit from committing a wrong – in this case breach of contract, and that in some situations the compensatory measure is inadequate.<sup>111</sup> Thus, the plaintiff is entitled to the wrongdoer’s gains. Of course the vexed issue still remains as to when this remedy should be available, and ever conscious that “questions of availability should never be severed from a consideration of the reasons why such damages are available”,<sup>112</sup> academics and courts attempted to reason through a gain-based approach when a plaintiff should be enabled to recover. Given the prolific amount of opinion in support of this approach, it would not be economical to discuss every view, yet a broad understanding will be necessary in order to later explain how this restitutionary approach has misled us in the past.

(a) *Birks and cynical breach*

Birks, ever on the frontier of legal thought, argued early on that breach of contract should generate a restitutionary remedy where the breach was cynical.<sup>113</sup> Employing his process for deciding which wrongs warrant a restitutionary response,<sup>114</sup> Birks identified that where a plaintiff’s “legitimate interest meets...remedial inadequacy...restitutionary damages...should be made openly available.”<sup>115</sup> As to why, Birks pleads consistency. He showed us five areas of law<sup>116</sup> where courts will not allow a wrongdoer to profit from their wrongdoing, and asks whether we are prepared to “allow that principle [that a wrongdoer may not profit from their wrong] to develop unnecessary lacunae.”<sup>117</sup>

Birks’ reasoning is valid insofar as argues for a remedy, but his reasons do not lead to the logical conclusion that that remedy must be restitutionary. In fact, some of the reasons seem to be more supportive of exemplary, rather than restitutionary, damages. Drawing an analogy with punitive damages in tort, Birks argued that “the cynical

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<sup>111</sup> O’Sullivan, 332, above n 13.

<sup>112</sup> R Cunnington, “The Measure and Availability of Gain-Based Damages for Breach of Contract” in R Cunnington, and D Saidov (eds), *Contract Damages: Domestic and International Perspectives*, (Hart Publishing, Oxford, 2008), 207-242 (“Cunnington”), 231.

<sup>113</sup> See generally “*Snepp* and the Fusion of Law and Equity”, above n 94.

<sup>114</sup> See discussion under “Breach of Contract as a Restitution-Yielding Wrong” starting on page 23.

<sup>115</sup> “Profits of Breach of Contract”, 521, above n 6.

<sup>116</sup> See “*Snepp* and the Fusion of Law and Equity”, 426-429, above n 94. These areas are economic duress, punitive damages in tort, waiver of tort, servitude, intellectual property and confidentiality.

<sup>117</sup> *Ibid*, 429.

tortfeasor who calculates that his gain will exceed his victim's loss must learn that unlawful conduct does not pay.”<sup>118</sup> The court will award the complainant punitive damages. Acknowledging that contract law does not support punitive damages, Birks maintains that for consistency's sake we should have restitutionary damages instead. If we are truly concerned with the bad behaviour of the defendant, firstly why should it matter that compensatory damages are inadequate (recall Birks' requirement of “remedial inadequacy”),<sup>119</sup> and secondly, these points seem more well-suited to arguing for exemplary damages for breach of contract, rather than looking further afield into restitution.<sup>120</sup>

(b) *Specific performance*

Not convinced a cynical breach test is a sufficiently conservative umpire to control restitution for breach of contract, Beatson argues that only specifically enforceable contracts should generate a restitutionary response.<sup>121</sup> And in this view he is not alone.<sup>122</sup> Focussing not on the wrong, but on the nature of the obligation, this theory is based on the assumption that “contracts that are specifically enforceable may, from several points of view, be regarded as creating a species of obligation different from contracts that are not specifically enforceable.”<sup>123</sup> This difference in obligations is attributable to the concept of exclusivity (an absolute right to performance) – a luxury only a plaintiff under a specifically enforceable contract is afforded.<sup>124</sup> So the argument goes that restitution for breach of contract is a substitutive remedy, arising from an inability to realise the primary right of specific performance.<sup>125</sup> The important part to understand here is that restitutionary damages are necessarily linked

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<sup>118</sup> *Ibid*, 427.

<sup>119</sup> Above n 115.

<sup>120</sup> For further discussion on exemplary damages see J Burrows and J Finn and S Todd, *Law of Contract in New Zealand* 3<sup>rd</sup> ed, (LexisNexis NZ Limited, Wellington, 2007), 685-687; Steve Hedley also thinks that the account in *Blake* (at least when justified through restitution for wrongs) fades into an award of exemplary damages see Steve Hedley, “Profit from Breach of Contract”, online posting, 28 November 2001, Restitution Discussion Group <<http://www.ucc.ie/law/restitution/disc.htm>>, accessed 18 March 2008.

<sup>121</sup> *Use and Abuse*, 17, above n 63.

<sup>122</sup> For example S Waddams, “Restitution as a Part of Contract Law”, in Andrew Burrows (ed), *Essays on the Law of Restitution* (Oxford University Press, Oxford, 1991), 197-213 (“Restitution as a Part of Contract Law”); Nolan, 35-59, above n 106; *Use and Abuse*, 15-17, above n 63.

<sup>123</sup> S Waddams, “Restitution as a Part of Contract Law”, 208, above n 122.

<sup>124</sup> See generally Nolan, above n 106.

<sup>125</sup> For a detailed analysis of specific and transformative remedies see “*Remedies Reclassified*”, above n 107.

to the availability of specific performance – as Beatson puts it “giving the plaintiff the defendant’s gains is in reality a monetised form of specific performance.”<sup>126</sup>

This theory is mildly attractive as it steers clear of arguing that there is a fundamental right to performance of a contract. Approaching this issue from a wrongs-based perspective, one is immediately met with a dilemma – why should a breach of contract entitle a plaintiff to the defendant’s gains? If there is no underlying principle dictating that the defendant should never have breached the contract, how can we then punish the defendant for his ‘wrong’? Resonating through this whole topic is the forceful rhetoric of Oliver Wendell Holmes that

[t]he only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfilment has gone by, and therefore free to break his contract if he chooses.<sup>127</sup>

One known exception to this is obviously specific performance, where equity will intervene and require a promisor to carry out his promise. By pegging restitution for breach of contract onto specific performance, the underlying rationale for allowing a gain-based award is less disruptive.

Although holding some appeal, limiting a plaintiff’s right to recovery to specifically performable contracts is specious. The whole thesis smacks of the proprietary limitations that we saw were misleading above. Acknowledging that specific performance is most often used when proprietary interests are at stake,<sup>128</sup> this justification for gain-based awards starts to sound a lot like earlier associations with injunctions and Lord Cairns’ Act. Fellow restitutionists are equally unimpressed. Burrows, for example, worries about negative obligations, which are not amenable to specific performance – should there thus be no available remedy when compensatory damages are inadequate?<sup>129</sup> Likewise Sir William Goodhart QC is critical of this

<sup>126</sup> *Use and Abuse*, 17, above n 63.

<sup>127</sup> Oliver Wendell Holmes, *The Common Law* (Harvard University Press, Boston, 1963), 236.

<sup>128</sup> Nolan, 42, above n 106; see also “Gains Derived from Breach of Contract”, “the availability of specific performance is interrelated with the question of whether the defendant has infringed a proprietary right.”, 206, above n 30.

<sup>129</sup> *The Law of Restitution*, 485, above n 63.

approach.<sup>130</sup> He identifies that the reason there appears to be a correlation is that cases where equity would traditionally intervene also evidence cases where additional common law damages are necessary.<sup>131</sup> Although urging for a restitutionary, not contractual remedy, the argument is sound.

(c) *Jackman and institutional integrity*

Jackman provides a unique account of why restitution may be appropriate in these contractual contexts.<sup>132</sup> Jackman argues that

the rationale for the right to restitution for wrongs is the protection of a variety of private legal facilities, or facilitative institutions...Such facilities require protection against those who seek to take the benefits of an institution without submitting to the burdens thereof, and in this way the right to restitution for a wrong is triggered not by harm to a person as such, but by harm to an institution.<sup>133</sup>

Whereas restitution protects tort and property law as institutions, leaving compensation to remedy personal harm, contract law has thus far managed with only compensation. Compensation remedies personal harm, and in doing so also upholds contract's institutional integrity. However, Jackman suggests at the end of his analysis that in some situations contractual integrity may be compromised by cynical breaches, thus requiring "additional institutional protection"<sup>134</sup> in the form of restitutionary damages. This additional protection is predicated by a "hierarchy of moral fault",<sup>135</sup> requiring courts to look beyond breaches of duty and into moral blameworthiness.

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<sup>130</sup> See W Goodhart, "Restitutionary Damages for Breach of Contract: The Remedy that Dare not Speak its Name" [1994] RLR 3 ("Goodhart").

<sup>131</sup> *Ibid*, 11-12 "[i]t is, however, an obvious logical fallacy to say that because there are *some* cases where neither equitable relief nor restitutionary damages are appropriate, restitutionary damages must be refused in *all* cases where equitable relief is not available."

<sup>132</sup> Jackman, above n 63.

<sup>133</sup> *Ibid*, 302.

<sup>134</sup> *Ibid*, 321.

<sup>135</sup> *Ibid*, 320.

## 2. Proportions and Accounts: One Rule for All?

*Blake* was eagerly embraced by restitutionists. As is clear from the general justifications offered above, it seemed to fit perfectly within the rhetoric of remedial inadequacy, wrongdoing, and cynical breach. Not to be dissuaded by Lord Nicholls' hostility to the phrase "restitutionary damages",<sup>136</sup> it appeared to evidence a consummate example of restitution for the wrong of breach of contract. Although there was little in the case law before *Blake* to suggest a "principled acceptance of a restitutionary measure",<sup>137</sup> *Blake* apparently provided just that.<sup>138</sup>

But *Blake* has also proved problematic. As it was the first case to allow an account of profits for breach of contract, restitutionists had two very different-looking awards to deal with. All previous justifications had been offered in respect of the proportional awards (such as that in *Wrotham Park*), as that was (until now) all the courts had to offer. But gain-based analysts were determined to take *Blake* in their stride, employing two different approaches to do such. Some theorists (in one commentator's view "empire builders")<sup>139</sup> locate the award in *Blake*, and the previous proportional awards on a restitutionary spectrum, with an account at one end and a proportion at the other. They have a somewhat overzealous appreciation of the scope of restitution, and as we shall see, give varied and unconvincing explanations as to why some plaintiffs are entitled to an account, and others only a percentage of profits.

Others however, recognise that trying to adapt existing restitutionary justifications to the account in *Blake* is a troublesome task, and choose instead to view *Blake* as a novel application of a new remedy for breach of contract, disgorgement. They see an important distinction between giving *back*, which is restitutionary, and giving *up*, which is disgorgement. Whether this is a valid distinction is doubtful, and although it

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<sup>136</sup> *Blake*, at para [H], above n 1. Lord Nicholls thought restitutionary damages an "unhappy expression", anxious to maintain that awards in a *Blake* context are discretionary. He saw 'damages' as denoting an award available as of right. Cf Edelman who maintains that "damages" merely means a monetary award, J Edelman, *Gain-Based Damages*, (Hart Publishing, Oxford, 2002) ("*Gain-Based Damages*"), 1-4.

<sup>137</sup> O'Sullivan, 328, above 13.

<sup>138</sup> For example see its later application in *Esso*, above n 43.

<sup>139</sup> Steve Hedley, "Hendrix", online posting, 25 March 2003, Restitution Discussion Group <<http://www.ucc.ie/law/restitution/disc.htm>>, accessed 11 September 2008.

avoids the contentions of the cohesive restitutionary view, still evidences an attempt to keep a gain-based approach afloat in the face of growing inconsistencies.

(a) *Blake as restitutionary damages*

The ‘empire builders’ view proportional awards, such as in *Wrotham Park*, and the account in *Blake* as part of a restitutionary continuum. The theory is that together, they “provide a full range of restitutionary remedies for breach of contract, on a ‘sliding scale’ extending from various levels of partial disgorgement (hypothetical release damages) to total disgorgement (account of profits).”<sup>140</sup> *Experience Hendrix* provided some motivation for this view.

*Experience Hendrix* involved a breach of contract restricting the use of Jimi Hendrix recordings. PPX originally owned the rights to Hendrix’s recordings, but following a settlement with his estate over the unduly harsh terms of that arrangement, was restricted in its ability to license out these recordings. In breach of contract, PPX continued to exploit a number of recordings, granting licenses to numerous record labels. At trial, Hendrix’s estate unsuccessfully claimed damages and an account of profits.

The question before the Court of Appeal was whether a plaintiff could recover despite not proving any direct financial loss.<sup>141</sup> The Court held it would be manifestly unjust if PPX could simply breach the contract to obtain a better deal, rather than renegotiate to obtain that permission.<sup>142</sup> However the Court declined to award an account of profits. Distinguishing *Blake* on several fronts,<sup>143</sup> the circumstances of the breach were not exceptional enough to allow an account of profits.<sup>144</sup> The appellant instead

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<sup>140</sup> D Campbell and P Wylie, “Ain’t No Telling (Which Circumstances Are Exceptional)” (2003) 62 CLJ 605 (“Ain’t No Telling”), 608. Note that the authors use the term ‘disgorgement’ interchangeably with ‘restitution’, and are not arguing (as we will see done below) for a distinction between the two. See also A Burrows and E Peel, *Commercial Remedies* (Oxford University Press, Oxford, 2003), 129 “[o]nce one had crossed the threshold for being able to recover an account of profits for breach of contract, rather than compensatory damages or specific relief, Lord Nicholls thought that the measure of recovery could extend from expense saved through to stripping all of the profits made from the breach. The *Wrotham Park Estate* case (where 5 per cent of the profits had been stripped) was therefore based on the same principle as *A-G v Blake* (where all the profits had been stripped).”

<sup>141</sup> *Experience Hendrix*, at para [15], above n 18.

<sup>142</sup> *Ibid*, at para [43].

<sup>143</sup> See Chapter IV.

<sup>144</sup> *Experience Hendrix*, at para [44], above n 18.

obtained an injunction to prevent further breaches, and the sum that might have reasonably been demanded of PPX for permission to exploit the recordings.<sup>145</sup>

According to some, this award is on a continuum with *Blake*, both still concerned with restitution for wrongs. Although this uniform restitutionary classification is aesthetically tempting – it has a comforting ‘completeness’ about it, in practice it is hard to sustain. The inimical question remains: why in a *Wrotham Park* case, if the defendant has committed a restitution-yielding wrong, does he nonetheless get to keep part of his profit? Not only does this analysis take us no further in understanding when an account will be appropriate, it introduces further doctrinal inconsistencies within restitution itself.

So what are the proffered justifications for sliding up and down the scale? Burrows suggests two factors which should dictate proportion.<sup>146</sup> These are the skill and time a defendant puts into making the profit, and the moral blameworthiness of his breach. But this really takes us no further in understanding when a defendant will be allowed to keep some of his profit – surely every profit-making activity involves some element of time and skill, so what is the threshold? And again, how ‘bad’ does a breach of contract have to get before it reaches *Blake*-type bad? Why should we introduce a subcategory of morality into an otherwise clinical conception of wrongdoing?

One commentator suggests that a restitutionary award for breach of contract should be either a full account or 50 per cent of the profit, but short of a plea for certainty it is unclear why.<sup>147</sup> Less optimistically, yet far more likely, McKendrick suggests that “there is no principle capable of yielding an answer to this question [when a plaintiff gets only a percentage of the defendant’s profits].”<sup>148</sup> Instead we must wait patiently for enough case law to amass, from which we can construct a consistent principle. This is thoroughly uninspiring, and offers no assurance that there ever will be an adequate justification for apportioning restitutionary remedies in this manner.

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<sup>145</sup> At para [45].

<sup>146</sup> A Burrows, *Remedies for Torts and Breach of Contract* (Oxford University Press, Oxford, 2004), 407; see also McCamus, 971-972, above n 50.

<sup>147</sup> Goodhart, 13, above n 130.

<sup>148</sup> E McKendrick, “Breach of Contract, Restitution for Wrongs, and Punishment” in A Burrows and E Peel (eds), *Commercial Remedies* (Oxford University Press, Oxford, 2003), 115.

### *Evaluation*

This view that *Blake* is merely at one end of a restitutionary spectrum has been intensely criticised. One commentator has termed it “a joke at the expense of a restitutionary argument which is intended to remove ‘discretionary remedialism’ from the law.”<sup>149</sup> Clearly vague notions of morality and the unprincipled discretion this model would introduce are troubling for many. On a more specific level, it is not clear from *Experience Hendrix* that the defendant’s profit was even at the forefront of discussion.<sup>150</sup> Were this award related to *Blake* through restitution, surely PPX’s actual profit would have been the focus of the judgment. In fact, the Court only saw profit as a means by which to assess the reasonable sum that *Experience Hendrix* would have required, had PPX bothered to renegotiate. What we can see then is that any attempt to view the award in *Experience Hendrix* as a microcosmic *Blake*, and embrace *Blake* as gain-based, is strained and misleading, an unfortunate by-product of a desire for tidiness in a messy area of law.

#### *(b) Blake as disgorgement*

This discomfort a gain-based analyst encounters in attempting to unite the proportional awards in *Wrotham Park* and *Experience Hendrix* with the account in *Blake* is illustrated by the increasingly popular view<sup>151</sup> that the two awards are in fact different. The difference is created by demarcating ‘disgorgement’ from ‘restitution’. Restitution provides the remedy in *Wrotham Park* cases, whereas an account evidences disgorgement – a jurisprudentially different remedy. Like above, *Experience Hendrix* also appeared to provide support for this view. Describing *Blake* as “a new start in this area of law”,<sup>152</sup> it was all too tempting to see the account as an entirely new and distinct remedy. What we now know of course is that *Blake* was not a new remedy, but merely an *extension* (both in the sense of being independent of any proprietary interest, and being an account rather than a proportion) of an existing compensatory remedy.

<sup>149</sup> “Ain’t No Telling”, 623, above n 140.

<sup>150</sup> See for example Steve Hedley, “*Experience Hendrix v PPX Enterprises (CA)*”, online posting, 24 March 2003 and J Edelman, “New Case”, online posting, 24 March 2003, Restitution Discussion Group <<http://www.ucc.ie/law/restitution/disc.htm>>, accessed 11 September 2008.

<sup>151</sup> See for example, *Gain-Based Damages*, above n 136; Cunnington, 207-242, above n 231; P Jaffey, “Restitutionary Damages and Disgorgement” [1994] RLR 30.

<sup>152</sup> *Experience Hendrix*, at para [16], above n 18.

One of the leading proponents for this ‘divide and conquer’ approach is James Edelman. In his book *Gain-Based Damages*<sup>153</sup> he argues compellingly that there are two different strains of gain-based damages, and most importantly, gives reasons as to why a court would choose one over the other. To utterly oversimplify his work, he argues that restitutionary damages<sup>154</sup> “reverse wrongful transfers of wealth from a claimant by subtracting the objective benefit received by the defendant”,<sup>155</sup> whereas disgorgement focuses not on what value the defendant has taken from the plaintiff, rather on the “actual profit accruing to the defendant from the wrong.”<sup>156</sup> A “fine example”<sup>157</sup> of the former is *Wrotham Park*. On this restitutionary analysis the transfer between Wrotham Park and Parkside Homes was the market value of the right to develop, and Parkside Homes wrongfully took that value (from Wrotham Park) for themselves.

Disgorgement, on the other hand, is not interested in what has been taken from the plaintiff. Whereas the restitutionary award is a matter of corrective justice, disgorgement is clearly geared at deterrence.<sup>158</sup> Given the defendant focus, it exists independently of loss (whether in a purely financial, or rights value approach) and seems to offer a fitting explanation for the account in *Blake*. Advocates of this approach view a fiduciary’s obligation to account as a close relative of a defaulting contractor’s exceptional duty to do the same. The emphasis in *Blake* on the ‘almost fiduciary’ relationship,<sup>159</sup> and *Experience Hendrix*’s rejection of an account largely due to the absence of anything remotely fiduciary<sup>160</sup> lends support to this reasoning. For breach of contract, Edelman would restrict the availability of disgorgement to cases of cynical breach, where compensatory damages are inadequate, and thus cannot act as a deterrent themselves. In this way, his gap-filling remedy echoes Jackman’s idea of institutional integrity and the perceived need for an extra remedy where traditional damages run short.

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<sup>153</sup> Above n 136.

<sup>154</sup> Note that according to Edelman ‘restitutionary damages’, which refers to wrongful transfers of value, are distinct from restitution, which concerns an action in unjust enrichment. See *Gain-Based Damages*, 66, *ibid*.

<sup>155</sup> *Ibid*, 68.

<sup>156</sup> *Ibid*, 72.

<sup>157</sup> J Edelman, “Restitutionary Damages and Disgorgement Damages for Breach of Contract” [2000] RLR 129, 133.

<sup>158</sup> *Gain-Based Damages*, 86, above n 136.

<sup>159</sup> *Blake*, 287, at paras [F]-[G], and 291-292, at paras [H]-[C], above n 1.

<sup>160</sup> *Experience Hendrix*, at para [37], above n 18.

### *Evaluation*

Although separating disgorgement from restitution runs temptingly parallel to the fiduciary discussion in both *Blake* and *Experience Hendrix*, it is nonetheless incorrect. As Birks points out, disgorgement “has no legal pedigree”.<sup>161</sup> Disgorgement fits the award in *Blake* so well as it was largely constructed to accommodate the peculiarity of the account in a contractual context. Lord Nicholls used *Wrotham Park* as a bridge to get to an account of profits. And just as a bridge is necessarily connected to the bank, so too is the award in *Wrotham Park* and the account in *Blake*. Fundamental to Lord Nicholls’ reasoning was the notion that the two awards are of the same genus.

The reason for this partitioned view is undoubtedly the difficulty in uniting the account in *Blake* and the proportional awards within a restitutionary framework. It is at this point, where we construct new remedies in an effort to resolve doctrinal inconsistencies, that we should reassess whether these inevitable contentions are because we are looking for the right remedy in the wrong place. This is the time to return to starting principles. Thankfully, that is precisely what the Court in *WWF* has done for us, returning us to our traditional compensatory principles but confirming that our narrow understanding of loss is no longer sustainable.

### **3. Lessons Learned**

Whether disgorging or empire building, this gain-based approach has nonetheless seriously misled us. We were led astray by the temptation of gain, unable to see that it is merely a means to an end – compensating a plaintiff for their *extensive loss*. Although restitution initially provided what seemed like a sensible solution to contractual problems where a plaintiff appeared to suffer no loss, the theory was not strong enough to accommodate *Blake*’s extension of previous proportional awards. Resilient, gain-based analysts were forced to either devise seemingly arbitrary rules for proportioning profit, or invent new remedial concepts to cater for exceptional cases. Although ultimately misleading, this is not to say that no good has come of this association. Unlike several commentators’ views that “restitution’s general

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<sup>161</sup> *Unjust Enrichment*, 3-4, above n 20.

application to contract will yield nothing positive”,<sup>162</sup> we should in fact be grateful that this association got us thinking about the defendant’s gain. It rescued us from unjust enrichment, and without it we may not have reached the point we are at today, where we can comfortably say that the account in *Blake*, and the proportional awards in *Wrotham Park* and *Experience Hendrix* are compensatory, yet pay close attention to a defendant’s gain.

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<sup>162</sup> “Ain’t No Telling”, 630, above n 140.

## *IV*

### *A New Dawn*

Stifled by an unnecessarily narrow view of loss, courts and academics attempted to deal with breaches of contract where a plaintiff suffers no *core loss* through initially practical, but ultimately misleading, ideas. We became preoccupied with gain, and turned our attention to the defendant's wrongdoing, rather than the plaintiff's loss. Now, we are seeing a new dawn. *Blake* and *WWF* confirm that courts are willing to recognise and recompense *extensive loss*, and that there are two measures of that loss available.

We met the first measure in *Wrotham Park* and *Experience Hendrix*. An extension of the user principle in property law, it looks at the actual or potential profit a defendant made from his breach of a negative obligation, and awards the plaintiff a proportion of that. That proportion represents the amount the plaintiff could have demanded to renegotiate the contract had the defendant bothered. Although the more commonplace of the two awards, it is not available for every negative obligation, and its suggested availability will be discussed below.

Exceptionally, a court uses a different measure. As in *Blake*, no longer able to entertain the possibility that the contract could be renegotiated, the court awards an account of profits. To get to this stage, the contract must effectively over-qualify for the proportional remedy. We are still compensating for *extensive loss*, but where circumstances are exceptional enough to make retrospective renegotiation inappropriate, a court will measure that loss by the totality of the defendant's gain.

## A. AVAILABILITY OF RETROSPECTIVE RENEGOTIATION

Which contractual breaches entitle a plaintiff to retrospective renegotiation? The difficulty in answering this question is that courts have given us little indication as to what factors upgrade a breach of contract to one causing *extensive loss*. Clearly not every breach causes *extensive loss*, otherwise we would introduce a rule that a defendant is never free to breach a contract, and must always ask first. We do know that we need a negative obligation. This is because the availability of retrospective renegotiation was borne of our property cases, and our link to contract law came through negative covenants. The law has simply continued to develop along this path.

A useful starting point is *Experience Hendrix*. What circumstances made the proportional award appropriate? A clue can be found in Mance LJ's treatment of *Blake*. He noted that

if Lord Nicholls' general guide [whether the plaintiff has a legitimate interest in preventing the profit-making activity of the defendant] is a useful starting point in respect of an account of profits, it must be all the more so in respect of the lesser claim to a reasonable sum.<sup>163</sup>

Mance LJ noted that one instance where a plaintiff has a legitimate interest is where he would be in a position to get an injunction.<sup>164</sup> Mance LJ then highlighted the circumstances that pointed towards recognising *Experience Hendrix's extensive loss*. These were the fact that it was a negative obligation, that property was involved and that *Experience Hendrix* had obtained an injunction for the future.<sup>165</sup> The property aspect is of interest. We know from *Wrotham Park* that where there is a proprietary flavour, a court is willing to recognise *extensive loss* – Mance LJ confirms this. The proprietary aspect is certainly a persuasive factor, but *extensive loss* exists in its absence. *Blake* did not involve anything proprietary, and clearly *Blake* would have warranted at least a proportional award.

<sup>163</sup> *Experience Hendrix*, at para [35], above n 18. See also *Gain-Based Damages*, 173, above n 136.

<sup>164</sup> *Experience Hendrix*, at para [35], above n 18. Although an example of when a plaintiff may have a legitimate interest, it is not determinative. *Extensive loss* is not dependent on there being an injunction, or even the possibility of getting one. See *WWF* at para [54], above n 3 “the court may award damages on the *Wrotham Park* basis, notwithstanding that there is no claim for an injunction; and notwithstanding that there could be no claim for an injunction.”

<sup>165</sup> *Experience Hendrix*, at para [36], above n 18.

What other factors are relevant? Lord Nicholls also said that

[t]he court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought.<sup>166</sup>

This passage preceded Lord Nicholls' 'general guide', and although in the context of an account of profits, surely it is relevant to whether a plaintiff could get a proportional remedy as well. After all, an account is merely a more extreme measure of the same loss, so the presence or otherwise of *extensive loss* will necessarily cover much of the same analytical ground. Lord Nicholls' circumstances are purposefully vague (he basically tells us just to look at all the circumstances), and it is very difficult to predict which contractual breaches will cause *extensive loss*.

One solution may be that we are concerned with cases where traditional damages are inadequate. Just as the court can order injunctions and specific performance to ensure performance, measuring *extensive loss* by a proportion of a defendant's gain goes a little way to remedy a plaintiff's lost performance.<sup>167</sup> This award is not overgenerous to the plaintiff – he still misses out on what he really wanted (performance) and must be satisfied with a forced renegotiation instead. According to this analysis, where there is a substantial breach of a negative obligation and a plaintiff's *core loss* either cannot be easily quantified, is minimal, or even non-existent, the court will measure his *extensive loss* through retrospective renegotiation.

## 1. Efficient Breach

One relevant factor when defining the limits of *extensive loss* is efficient breach. The basic idea of efficient breach is that “[a] benefit unaccompanied by a loss typically is thought to be a good thing – a basis for celebration, or at worst indifference, but not a

<sup>166</sup> *Blake*, 285, at para [G] above n 1.

<sup>167</sup> Some commentators would argue however that the 'performance interest' generates a distinct species of damages: 'performance damages', not to be confused with the proportional remedy in *Wrotham Park* or the account in *Blake*. See *Gain-Based Damages*, 182-185, above n 136.

call for redress.”<sup>168</sup> This is because economic efficiency dictates that resources should be allocated to those members of society who are most apt to use them. Where a defendant can make more money elsewhere, with no loss to the consumer, it would be inefficient, and thus insensible, to restrain him from doing so. The contention goes that given the plaintiff has not lost anything; the defendant should be entitled to keep his gains.<sup>169</sup>

Already we can see a problem with this. The plaintiff has lost something. Once we appreciate *extensive loss*, the ‘efficient breach’ is not so efficient after all. Efficient breach appears hostile to profit-measured awards only when the award is justified in a restitutionary context.<sup>170</sup> If the defendant is stripped of some or all of his profits because he committed a wrong, it undermines the notion of efficient breach. If however he is ordered to pay damages because his profit is the best measure of the plaintiff’s loss, which is what actually happens, then efficient breach should have no friction with *extensive loss*.

## 2. Skipped Performance

Skipped performance is a frustrating category of breach, often cited as a classic example evidencing *extensive loss*. Many even think that a defendant’s skipped performance should always require him to account,<sup>171</sup> perhaps influenced by Birks’ emotive hospital scenario,<sup>172</sup> which we shall return to later when we look at the availability of an account. A defendant skimps performance when he offers a service

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<sup>168</sup> M McInnes, “Gain-Based Relief for Breach of Contract: *Attorney-General v Blake*” (2001) 35 Can. Bus. LJ 72, 91. For a detailed argument in favour of efficient breach see RA Posner, *Economic Analysis of the Law* 5<sup>th</sup> ed (Aspen, New York, 1998).

<sup>169</sup> This is certainly so in a commercial context, as it is presumed that commercial parties will always favour the most efficient rule, however it may be that in a non-commercial case such as *Blake*, efficiency is not the touchstone. See Hanoch Dagan, “Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory” (2000) 1 Theoretical Inquiries in Law 115, 144-145.

<sup>170</sup> Although even still it has been intensely criticised, see for example *Gain-Based Damages*, 162-164, above n 136; G Jones, “The Recovery of Benefits Gained from a Breach of Contract” (1989) 99 LQR 443; L Smith “Disgorgement of the Profits of Breach of Contract” (1994) 24 Can. Bus. LJ 121.

<sup>171</sup> For example the Court of Appeal in *Attorney General v Blake* [1998] 1 All ER 833 (“*Blake* (CA)”), 818, at para [H].

<sup>172</sup> Above n 6.

inferior to that contracted for.<sup>173</sup> Is there any justification for holding that all cases of skimmed performance warrant retrospective renegotiation? As the law stands today, no. Firstly, evidenced by Lord Nicholls’ “legitimate interest in *preventing* the defendant’s profit-making activity”<sup>174</sup> and Mance LJ’s indication that likelihood of recovery is comparable to the potential to get an injunction, we are only concerned with negative obligations. Skimmed performance arises in the context of positive obligations, and so is not on its face a hugely deserving candidate for category-wide recovery. Secondly, it is clear that courts will determine the existence of *extensive loss* on a case-by-case basis. Extending it in this broad-brush fashion would undermine the careful considerations put forward by Lord Nicholls, and make what was previously a restricted principle available as of right.

## B. AVAILABILITY OF ACCOUNT OF PROFITS

*Blake* and *WWF* recognised another measure of *extensive loss*. Exceptionally, a contractual circumstance, which would otherwise have warranted retrospective renegotiation, is too special to be renegotiated. So, a different measure is needed. Rather than allow a defendant to benefit from creating immeasurable loss, the court simply takes the only measure available to it: the whole of the defendant’s gain. Only two cases have allowed an account so far, *Blake* and *Esso*. Whether *Esso* was an appropriate application of *Blake* is contentious, and will be discussed below.

Predicting *Blake*’s future application is not a straightforward task. As Goff and Jones suggest, “[a]t present, the jurist can but look into a glass darkly.”<sup>175</sup> As the House of Lords made clear, it is a precedent that can only really be developed on a case-by-case basis. We shall have to wait and see which contracts are unique enough to persuade the court not to entertain a forced renegotiation. For now, we must take what we can

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<sup>173</sup> In New Zealand, if the contract is a consumer service contract, a plaintiff could seek relief under the Consumer Guarantees Act 1993. If a failure to perform a consumer service contract is not of a substantial character (defined in s 36 – if it is of a substantial character, the plaintiff can cancel the contract), the consumer has a variety of remedies available, including requiring the supplier to remedy the failure, or recompense the costs of remedy.

<sup>174</sup> *Blake*, 285, at para [H], above n 1. Emphasis added.

<sup>175</sup> Goff and Jones, *The Law of Restitution* 7<sup>th</sup> ed (Sweet & Maxwell, London, 2007), 529.

from *Blake*, and its subsequent consideration, to understand when an account is appropriate.

## 1. *Blake*

*Blake* involved a former double agent who wrote an autobiography in breach of contract. The Court of Appeal, despite granting an injunction for other reasons,<sup>176</sup> made it clear that had the Attorney General pursued a claim for breach of contract, he would have been successful.<sup>177</sup> The House of Lords withdrew the injunction, instead allowing for the first time an account of profits for breach of contract. As we have already seen, Lord Nicholls used *Wrotham Park*, a case that had taken the user principle and applied it to contract law, as a stepping-stone to an account of profits. Although the law had already recognised that a plaintiff may be entitled to damages measured by a *proportion* of a defendant's profits, no case had ever taken it a step further to an account. When guidance then, did the House of Lords give us as to when an account may be available in future?

## 2. Legitimate Interest

Lord Nicholls was purposefully vague when setting guidelines as to when an account will be available, stating that “[n]o fixed rules can be prescribed”.<sup>178</sup> Lord Steyn was equally noncommittal, preferring to leave principles to be “hammered out on the anvil

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<sup>176</sup> The Court of Appeal granted the Attorney General an injunction on public law grounds due to his role as guardian of the public interest. This prevented Blake from receiving around £90,000 from his publishers. Blake was criminally liable for disclosing official information and his profit was therefore proceeds of a crime. The statutory regime for confiscation was ineffective as Blake had fled to Moscow. The Court found that at common law, the Attorney General had had the same power, and could get an injunction to avoid the criminal law from being undermined. See *Blake* (CA), 819-825, above n 171.

<sup>177</sup> The Court of Appeal rejected any suggestion that Blake was a fiduciary, but nonetheless held that had the Attorney General pursued it, they would have allowed damages for breach of contract. Lord Woolfe MR said in obiter that skimped performance, and profiting by doing the very thing contracted not to do, both warranted an account. However moral culpability, profiting directly because of the breach or the fact that by breaching a defendant puts it outside his power to perform the contract were alone insufficient justifications. See *ibid*, 814-819.

<sup>178</sup> *Blake*, 285, at para [G], above n 1.

of concrete cases.”<sup>179</sup> The majority did comment, however, on the Court of Appeal’s preordained categories. As to skimmed performance, Lord Nicholls believed that an account was unnecessary, and traditional damages could compensate for the difference in value of the product contracted for.<sup>180</sup> Lord Nicholls also held that “something more”<sup>181</sup> than a mere negative obligation is required before an account would be awarded.

As a “useful general guide”,<sup>182</sup> Lord Nicholls suggested we ask “whether the plaintiff had a legitimate interest in preventing the defendant’s profit-making activity and, hence, in depriving him of his profit.”<sup>183</sup> When then, does a plaintiff have this legitimate interest? Some say that Lord Nicholls’ general guide in fact “provides no guidance at all”,<sup>184</sup> it was an attempt to dress up what was essentially a one-off as something more principled.<sup>185</sup> Subscribing to this view are those (including Lord Hobhouse)<sup>186</sup> who believe that the majority invented a remedy to punish a notorious traitor, and outside other spy-memoir cases, the decision has little precedential value.<sup>187</sup>

This view is overly pessimistic. *Blake* was one example where, due to the nature of the contract, a court could not contemplate renegotiation. Moving outside spy memoirs, it is plausible that there are other equally exceptional contracts. This is not to say that an account will become a commonplace remedy – far from it; but there is enough guidance in *Blake* to develop principles incrementally, and it should not be seen as an isolated application of an exclusive remedy.

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<sup>179</sup> *Ibid*, 291, at para [E].

<sup>180</sup> *Ibid*, 286, at paras [A]-[D].

<sup>181</sup> *Ibid*, 286, at para [D].

<sup>182</sup> *Ibid*, 285, at para [H].

<sup>183</sup> *Ibid*.

<sup>184</sup> Denis Ong, “Non-Financial Loss Resulting from Tort and Breach of Contract” (2002-2003) 22 U. Queensland LJ 20, 49.

<sup>185</sup> Andrew Phang and Pey-Woan Lee, “Rationalising Restitutionary Damages in Contract Law – An Elusive or Illusory Quest?” (2001) 17 JCL 240, 250.

<sup>186</sup> *Blake*, 299, above n 1.

<sup>187</sup> See for example Steve Hedley, “‘Very Much the Wrong People’: The House of Lords and Publication of Spy Memoirs (A-G v Blake)” [2004] 4 Web JCLI “[t]he reasoning of their lordships therefore cannot, I think, be severed from its Cold War roots, and is of little value as a precedent, except of course in relation to the publication of spy memoirs.”

Beatson suggests a negative description, proffering spite and vengeance as “obvious examples” of what is *not* legitimate.<sup>188</sup> But this leaves room for an extremely wide definition of ‘legitimate interest’, and would cover a vast majority of contracts. Other commentators interpret this to mean a legitimate interest *in performance*.<sup>189</sup> This comes in via Lord Nicholls’ earlier reasoning from the equitable remedies of specific performance and injunction.<sup>190</sup> This analysis takes us no further though. What is a legitimate interest in performance? Lord Nicholls tells us that where the court has ordered specific performance, or granted an injunction, a plaintiff had a legitimate interest in performance, but that does not tell us outside of those circumstances what a legitimate interest is. Given that a plaintiff’s interest in performance extends beyond that which the court will recognise by specific performance or injunction,<sup>191</sup> reinterpreting ‘legitimate interest in preventing a defendant’s profit-making activity’ as ‘legitimate interest in performance’ provides no extra insight.

### *Evaluation*

A more promising interpretation is that a plaintiff has a legitimate interest in preventing a defendant’s profit-making activity where, due to the nature of the contract, should the defendant breach, the plaintiff’s loss will predictably be (without an account) immeasurable.<sup>192</sup> ‘Predictably’ is an important qualifier here. It is not enough that *after* the defendant breaches, compensatory damages (traditionally measured) are inadequate.<sup>193</sup> That argument is circular, as the legitimacy of a plaintiff’s interest surely arises when the contract is made, and cannot be superimposed post-breach.

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<sup>188</sup> *Use and Abuse*, 17, above n 63.

<sup>189</sup> See for example *Gain-Based Damages*, 153-159, above n 136.

<sup>190</sup> *Blake*, 285, at paras [H]-[B], above n 1 “[w]hen, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract. In the same way as a plaintiff’s interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff’s interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract.”

<sup>191</sup> *Ibid*, at para [G] “[n]ormally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, *where those remedies are inadequate*, that any question of accounting for profits will arise.” Emphasis added.

<sup>192</sup> Mark Gergen, “Profits from Breach (*Eso v. Niad*)”, online posting, 28 November 2001, Restitution Discussion Group <<http://www.ucc.ie/law/restitution/disc.htm>>, accessed 18 March 2008.

<sup>193</sup> “Ain’t No Telling”, p 611, above n 140.

As explained in the Introduction, we are looking for contracts which could never sustain a retrospective renegotiation, thus the plaintiff had a legitimate interest in preventing the defendant's profit-making activity. The Crown had such an interest in *Blake* because public interest in holding members of the SIS to their contractual undertakings dictated "[a]n absolute rule against disclosure".<sup>194</sup> What Lord Nicholls' general guide does then is reframe the question – 'when is a contract, out of principle, exceptionally non-negotiable?'

### 3. Exceptionality and 'Something More'

#### (a) WWF

*WWF* is a hugely important case as it bridged *Wrotham Park* – where extensive loss was measured according to a proportion of the defendant's gain – with the account in *Blake*. It explained for us what the 'something more' is that *Blake* had, and what future cases will need. *WWF* concerned a breach of an agreement restricting the use of the initials "WWF". The question to be decided before the Court was whether it was an abuse of justice for a party to seek hypothetical release damages, when it had already claimed unsuccessfully for an account of profits. Thus the question was whether the award in *Wrotham Park* was "juridically highly similar" to the account in *Blake*.<sup>195</sup> The Court of Appeal held that it was. This was significant as it rebutted theories that the two awards were distinct, and it also told us what pushes a proportional award into an account. The 'something more' in *Blake* was the fact that the contract was "too bizarre"<sup>196</sup> to contemplate renegotiating. What makes a contract "too bizarre" thus becomes the focus of our inquiry.

#### (b) *Blake, Fiduciaries and the 'Ish' Factor*

Hugely influential in *Blake* was the fact that Blake was "in a very similar position to a fiduciary."<sup>197</sup> Indeed, some commentators even suggest that he was a fiduciary.<sup>198</sup>

<sup>194</sup> *Blake*, 287, at para [F], above n 1.

<sup>195</sup> *WWF*, at para [60], above n 3.

<sup>196</sup> *Ibid*, at para [46].

<sup>197</sup> *Blake*, 292, at para [B], above n 1.

<sup>198</sup> See for example Hanoch Dagan, "Profit from Breach of Contract: Reconsidering Blake", online posting, 28 November 2001, Restitution Discussion Group <<http://www.ucc.ie/law/restitution/disc.htm>>, accessed 18 March 2008.

This requires far too broad an interpretation of the fiduciary relationship and sounds alarmingly like Birks' "abusive instrumentalism".<sup>199</sup> However the fiduciary-ish nature of *Blake* was nonetheless one of the key factors that made it so exceptional. This was made clear by the Court in *Experience Hendrix*, which distinguished the case before it largely due to the fact that there was "no direct analogy between PPX's position and that of a fiduciary."<sup>200</sup> It makes sense that a contractual relationship which approaches, but never becomes, a fiduciary relationship should go a long way towards satisfying 'something more'. An account will only be available where the court cannot contemplate forcing parties to renegotiate. A relationship that verges on fiduciary would, in many circumstances, be one that the courts should not impliedly suggest can be easily renegotiated.

It is unclear how persuasive the 'ish' factor is outside a fiduciary context however. Recall that the plaintiffs in *WWF* originally tried to claim an account of profits.<sup>201</sup> Jacobs J expressly denied that the fact the obligation was "a bit 'trademarkish' or 'IPish'"<sup>202</sup> had any influence on whether an account would be appropriate.<sup>203</sup> If we favoured a restitutionary approach, this would seem very strange indeed. Patent infringement is an oft-cited example of where an account is customarily available, likewise a fiduciary relationship. When a defendant breaches either, his wrong generates a restitutionary response. According to *Blake*, when he breaches an 'ish' obligation, his wrong is equally morally blameworthy and justifies an account.

But this is to misunderstand the relevance of the 'ish'. *Blake*'s fiduciary overtones, and especially the context in which they appeared, meant that it would have been against public policy for the court to simulate a renegotiation. It was not that fiduciaries often have to account, so almost fiduciaries should too sometimes, rather that it would disrupt the sanctity of the fiduciary relationship if the court forced parties to renegotiate it. But the High Court in *WWF* suggests that trademark infringement does not carry with it this concern, and that forcing a party to renegotiate a contract in this context would not be disruptive, or cause a "threat to the

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<sup>199</sup> "Profits of Breach of Contract", 520, above n 6.

<sup>200</sup> *Experience Hendrix*, at para [37], above n 18.

<sup>201</sup> [2002] FSR 32 ("*WWF* (HC)").

<sup>202</sup> Intellectual Property.

<sup>203</sup> *WWF* (HC), at para [62], above n 201.

effectiveness of an important public institution.”<sup>204</sup> One reason for this may be that trademark infringement is inherently commercial, and that there is no place for an account of profits in the commercial arena.

#### 4. *Esso* and Commercial Contracts

Whether an account of profits is available in a commercial context is a controversial question. We saw the Court in *Experience Hendrix* decline an account due to the absence of any fiduciary relationship, and because the contract was of a commercial nature. However in *Esso*, the Court allowed an account of profits regardless. *Esso* involved Niad’s breach of Esso’s petrol pricing initiative ‘Pricewatch’. Naturally, quantifying lost profits directly would have been impossible, and instead the Court allowed Esso an account of profits.

What appears to have been decisive in this case, and indeed picked up on and approved by the Court in *Experience Hendrix*,<sup>205</sup> was the fact that “the obligation to implement and maintain the recommended pump prices was fundamental to Pricewatch”.<sup>206</sup> It is not yet clear whether courts will agree that a negative obligation, in a commercial context, can qualify for *Blake* exceptionality. Despite the Court’s approval in *Experience Hendrix*, it is always going to be harder to argue that commercial contracts deserve the special protection of the court. We know from cases that allowed proportional awards (such as *Wrotham Park* and *Experience Hendrix*) that the fact a plaintiff would never have renegotiated is irrelevant. The court will only feel compelled to award an account if to renegotiate the contract would do harm. The public interest in national security, combined with the almost-fiduciary nature of the relationship in *Blake* certainly set a high standard. As mentioned above an award may well have acceptably wider applications than this, but extending it to a commercial context should be done only with extreme caution, and the fact that the obligation went to the root of the contract is not a strong enough justification to warrant extension.

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<sup>204</sup> McCamus, 966, above n 50.

<sup>205</sup> *Experience Hendrix*, at para [38], above n 18.

<sup>206</sup> *Esso*, at para [63], above n 43.

In a commercial context, perhaps retrospective renegotiation is all a court is willing to offer. Just as Mance LJ drew on *Blake* principles to award a proportional award in a commercial context, Lord Nicholls hinted in *Blake* that were it a commercial context, retrospective renegotiation may have been more appropriate.<sup>207</sup> This is not to say that an account has no place in a commercial context, just that exceptionality, which moves our measure of *extensive loss* into an account, is always going to be harder to locate within a commercial setting. What may most often be the case, is that a contract which seems to tick all the ‘*Blake* boxes’, will fail to make it to an account if it is in a commercial context, and the plaintiff will have to settle for retrospective renegotiation instead.

#### 4. The ‘Hospital Case’

We return finally to Birks’ hospital example.<sup>208</sup> What relief is there for the hospital which contracts with a cleaning company, specifying exactly how the hospital is to be cleaned and which products to use etc. Wanting to make extra money (by saving expense), the cleaners use inferior cleaning products, and clean less often. Surely the hospital should not be left without any means of recompense. Lord Nicholls would say that the hospital could only recover the difference in the service contracted for, with the value of that actually given.<sup>209</sup> This is because he did not consider an account of profits capable of accommodating expense saved. This has however been challenged by a number of academics who still see restitutionary damages capable of stripping a skimping defendant of his profits.<sup>210</sup> Although we now know that these damages would be compensatory, there is force in the view that an expense saved is tantamount to a profit made, and should be likewise within the reach of an account of profits.

Instinctively, one feels that the hospital should be compensated. And this case may present a rare example where breach of a commercial contract can legitimately sustain

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<sup>207</sup> *Blake*, 286, para [H], above n 1.

<sup>208</sup> Above n 6.

<sup>209</sup> *Blake*, 286, para [A]-[D], above n 1.

<sup>210</sup> See for example *The Law of Restitution*, 489, above n 63; and of course Birks’ ‘Profits of Breach of Contract’, above n 6.

an account of profits. We saw earlier that it is incoherent to argue that as a general class of breach, skimmed performance should always be amenable to retrospective renegotiation. Obviously then it could not possibly be an automatic candidate for an account. But Birks' hospital example is a unique case, which although skimmed performance, actually oversteps the requirements for obtaining the proportional award, and could well be worthy of an account.

It would require an extension of *Blake* in three ways. Firstly, as we just saw, expense saved would have to be synonymous with profit made, and within the reach of an account. Secondly, we would have to reason around the fact that our skimmed performance example does not involve a negative obligation. One way to do this would be to suggest that where a contract provides so specifically how it is to be performed, it has the same qualities as a negative obligation. Presumably the cleaners had to use a particular product, and to clean a particular way. Although involving positive obligations, given the lives at risk should they deviate, it amounted to a negative obligation not to do anything but that specified.

This manoeuvres the hospital into a position where it *could* ask the court for an account, but simply having a negative obligation is not enough to realise an account. There must be something special about the contract that makes it too bizarre for the court to consider renegotiating. And this is where we see how clever Birks was in illustrating his point [the need for monetary solutions to these situations] with such an emotive case. Few would deny that something is very wrong with his scenario. It would be a stretch though, to argue that we are dealing with a fiduciary-ish contract. And we are, admittedly, looking at a commercial contract.

So why is an account instinctively so appealing? It is because there is a revealing parallel with *Blake*. Arguably, the contract between a hospital and its cleaning company, which specifies how they are to clean, is one which the court would not entertain renegotiating. It has the same public interest flavour about it that *Blake* had, that it would be damaging to suggest that this is a contract we should allow to be forcibly renegotiated. This is an exceptional example, and just as *Blake* will be rare in application, applying *Blake* to a commercial context will be even rarer. It is obviously an abstract application of *Blake*, but it at least illustrates that there is potential for an

account to be legitimately applied in wider, and even more exceptionally, commercial, contexts.

## V

### *Conclusion*

*Attorney General v Blake* exceptionally allowed an account of profits for breach of contract. The award ignited academic and judicial contention as to the juridical nature of contractual damages where a plaintiff appeared to suffer no loss. What we now know is that the account in *Blake* was a rare extension of the retrospective renegotiation principle. A contractual continuation of the user principle at property law, retrospective renegotiation allows a court to measure a plaintiff's *extensive loss* by a proportion of a defendant's gain.

We had a lot of trouble coming to terms with the award in *Blake*, and any attempts to forecast its future application were marred by misunderstandings as to its nature. An unnecessarily narrow understanding of loss forced us to look for solutions elsewhere. Three associations led us astray. The proprietary beginnings of the retrospective renegotiation principle continued to loiter in a contractual context. Attempts to attribute *Wrotham Park* to proprietary underpinnings threatened our ability to see that a purely contractual claim can support damages measured in reference to a defendant's gain.

We then gave in to the temptation of gain. Whether through associations with unjust enrichment or restitution for wrongs, the necessary relevance of the defendant's gain proved too overwhelming to resist. We became ensconced in gain-based analysis, even in the face of growing inconsistencies. Restitution for wrongs proved an uncomfortable fit for the account in *Blake* and the lesser proportional awards in *Wrotham Park* and *Experience Hendrix*. Theorists were divided as to whether an account could even sensibly be restitution, and instead termed it disgorgement, eager to keep a gain-based approach afloat yet aware that *Blake* had outgrown existing gain-based theories.

Now, largely thanks to *WWF*, we have been set once again on the compensatory path. Comfortable in the knowledge that *Blake* was merely an exceptional extension of the

already established, and compensatory retrospective renegotiation principle, we see that an account will only be available when a court could not reasonably entertain the notion of renegotiation. When exceptional contracts like this come along, a plaintiff's *extensive loss* can only be measured by the whole of a defendant's gain. *Blake's* future application depends on which contracts courts will find so exceptional that they are essentially nonnegotiable. As the rule was developed in *Blake*, there is little room for the concept to grow. It could potentially be applied to cases of skimmed performance, but again only in exceptional circumstances. Any further extension of account of profits for breach of contract will depend on how widely courts take their appreciation of *extensive loss*, and how appropriate it is to measure that loss by a defendant's gain.

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