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DISGORGEMENT FOR BREACH OF CONTRACT: A COMPARATIVE PERSPECTIVE

*John D. McCamus**

I. INTRODUCTION

Much controversy surrounds the question of whether the victim of a breach of contract may seek, as an alternative to the claim for damages, the remedy of disgorgement of the profits secured through breach by its perpetrator. Although there is some judicial support in recent American cases for the proposition that such a remedy is available,¹ disgorgement for breach of contract does not yet appear to be a well-established feature of American private law. Accordingly, the recent recognition of the availability of such relief as a matter of English law in the decision of the House of Lords in *Attorney General v. Blake*,² is a development of some interest. This Article provides a brief account of the doctrinal foundations upon which the *Blake* decision was constructed and an analysis of the decision itself. In addition, it suggests that the disgorgement remedy is likely to play a peripheral role in contract law, largely at the margins of more clearly recognized forms of disgorgement liability.

To begin, disgorgement must be located within the existing remedial scheme for breach of contract. The victim of a breach of contract is entitled to bring an action for damages against the perpetrator of the breach. Under well-established principles of contract law, the recoverable damages in such a claim are compensatory in nature and are calculated on the basis of the

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1. See, e.g., *Earthinfo, Inc. v. Hydrosphere Res. Consultants, Inc.*, 900 P.2d 113 (Colo. 1995). See generally, Andrew Kull, *Disgorgement for Breach, the "Restitution Interest," and the Restatement of Contracts*, 79 TEX. L. REV. 2021, 2052-53 (2001) (proposing the hypothesis that disgorgement of profits secured by breach can be justified in cases where the breach is both profitable and opportunistic).

2. [2000] 4 All E.R. 385 (H.L.) (Eng.).

expectancy principle. The plaintiff is entitled to recover an amount of money which, so far as money can, will place the plaintiff in the position he would have been in had the defendant fully performed his contractual obligations.³

As a general rule, the objective of the damages calculation in such a claim is compensation for the injury to the expectancy interest suffered by the victim of the breach.⁴ As an alternative to the claim for damages for breach of contract, the victim may be entitled to treat the contract as discharged by the breach and bring a claim for the value of benefits that the victim has conferred upon the party in breach. Some would suggest that the claim in such circumstances, for the value of money or other benefits conferred by a victim upon the perpetrator, are recoverable in order to avoid the unjust enrichment of the perpetrator.⁵ The question considered here is whether, as a further alternative, the victim of a breach of contract may be entitled to pursue an award, arguably restitutionary in nature, to recover *profits* secured by the perpetrator from whatever source

3. See 3 EDWARD ALLAN FARNSWORTH, *CONTRACTS* 188–226 (2d ed. 1998). The same rule applies in common law jurisdictions of the British Commonwealth. See *Keneric Tractor Sales Ltd. v. Langille*, [1987] 2 S.C.R. 440 (Can.); *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301 (P.C. 1910) (Eng.); *Robinson v. Harman*, 154 Eng. Rep. 363 (Ex. 1848).

4. In certain circumstances, the victim may be entitled to pursue what may appear to be an alternate claim for expenditures consumed in preparation for or performance of the contract. To the extent that such claims are subject to the expectancy principle—in the sense that if the plaintiff victim is in a “losing” contract, the “negative” expectancy is deducted from the recovery—it appears that they do not constitute a significant departure from the expectancy principle. See *Bowlay Logging Ltd. v. Domtar Ltd.*, [1982] 135 D.L.R. (3d) 179 (B.C. Ct. App.) (Can.); FARNSWORTH, *supra* note 3, at 276–79; S. M. WADDAMS, *THE LAW OF CONTRACTS* 526–28 (4th ed. 1999). Such claims may give rise, however, to a non-trivial shift in the parties’ burdens of proof. See *McRae v. Commonwealth Disposals Comm’n* (1950–51) 84 C.L.R. 377 (Austl.). These points will not be further explored here.

5. See, e.g., 1 GEORGE E. PALMER, *THE LAW OF RESTITUTION* ch. 4, at 363–565 (1978). The real test of this thesis is whether the restitution claim is capped by the expectancy principle. If it is not, the restitution claim stands as an alternative remedy for which the unjust enrichment principle provides the plausible explanation. If it is capped, the remedy appears to be contractual in nature. This too is a controversial point that will not be further explored here. The cases, however, weigh in heavily on the side of unjust enrichment as an alternative claim uncapped by the expectancy principle. See *id.* at 389–409; PETER D. MADDAUGH & JOHN D. MCCAMUS, *THE LAW OF RESTITUTION* 426–29 (1990).

through the breach of contract; that is, whether disgorgement of the gains that the party in default made as a result of the breach is proper.

Restitution scholars are likely to welcome the *Blake* decision as an addition to the existing stable of claims for disgorgement of the profits of wrongdoing, which are typically classified in contemporary accounts of the law of restitution as being restitutionary in nature.⁶ They are typically explained as applications of the restitutionary sub-principle that “a person shall not be permitted to profit from his wrongdoing.”⁷ Thus, persons who breach their fiduciary duties may be liable to disgorge all of the profits secured by this conduct, even though those profits cannot be matched with corresponding out-of-pocket expenses or other losses sustained by the plaintiff. Similarly, victims of tortious wrongs may “waive the tort” and sue in restitution for the profits secured by the wrongdoing. Disgorgement relief is available to lift the profits of breaches of confidence and, although the point is a difficult one, the profits of crime to some extent.

In the present context, then, should the disgorgement principle be available to the victim of a breach of contract on the theory that the commission of such a breach always, or at least in some cases, may constitute conduct that is wrongful in the requisite sense? This issue has been the subject of much academic⁸ and judicial discussion

6. See generally ANDREW BURROWS, *THE LAW OF RESTITUTION* 376–419 (1993) (analyzing unjust enrichment by wrongdoing); LORD GOFF OF CHIEVELEY & GARETH JONES, *THE LAW OF RESTITUTION* 709–816 (5th ed. 1998) (examining situations where the defendant has acquired a benefit through his own wrongful act and the resulting restitutionary claims against such wrongdoers); MADDAUGH & MCCAMUS, *supra* note 5, at 483–679 (discussing criminal and quasi-criminal acts, waiver of tort, compulsion, breach of fiduciary duty, unconscionable transactions, and other equitable wrongdoing); GRAHAM GILL VIRGO, *THE PRINCIPLES OF THE LAW OF RESTITUTION* 445–588 (1999).

7. See, e.g., *Halifax Bldg. Soc’y v. Thomas*, [1995] 4 All E.R. 673, 682 (C.A.) (Eng.).

8. See generally JACK BEATSON, *THE USE AND ABUSE OF UNJUST ENRICHMENT* 15–17 (1991) (discussing recovery of defendant’s gains from breach of contract); JAMES EDELMAN, *GAIN-BASED DAMAGES: CONTRACT, TORT, EQUITY AND INTELLECTUAL PROPERTY* 149–89 (2002) [hereinafter *GAIN-BASED DAMAGES*] (analyzing *Attorney Gen. v. Blake* and proclaiming it a watershed case in restitution law); S. M. Waddams, *Restitution as Part of Contract Law*, in *ESSAYS ON THE LAW OF RESTITUTION* 197, 207–13 (Andrew S. Burrows ed., 1991) (discussing the ways contract and restitution law are intertwined); Peter Birks, *Restitutionary Damages for Breach of Contract*:

in recent years. The recent decision of the House of Lords in *Blake* was much anticipated. Before turning to a consideration of the *Blake* case itself, it is useful to briefly present the arguments for and against disgorgement relief in the context of breach of contract, and to

Snepp and the Fusion of Law and Equity, 1987 LLOYD'S MAR. & COM. L.Q. 421, 442 (arguing that restitutionary damages should only be available if compensatory damages are insufficient); Andrew S. Burrows, *No Restitutionary Damages for Breach of Contract*, 1993 LLOYD'S MAR. & COM. L.Q. 453 (analyzing two English cases that directly address whether or not restitutionary damages can be awarded for breach of contract); M. Chen-Wishart, *Restitutionary Damages for Breach of Contract*, 114 L.Q. REV. 363 (1998) (discussing the incompatibility between protecting the plaintiff by removing the defendant's incentive for breach and not wanting to discourage the defendant from making an efficient breach); James Edelman, *Restitutionary Damages and Disgorgement Damages for Breach of Contract*, 2000 RESTITUTION L. REV. 129 [hereinafter *Restitutionary Damages*] (arguing that "[d]isgorgement damages should be available where a defendant has deliberately breached a contract to make a profit but the amount of the profit of which the defendant should be stripped should only be that which directly relates to the breach."); Edward Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1341 (1985) (arguing that although the "disgorgement principle" is not sound as a general proposition, there is a case for its limited application); Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504 (1980) (stating that restitutionary claims are appropriate in many cases where one person appropriates the interests of another); William Goodhart, *Restitutionary Damages for Breach of Contract: The Remedy that Dare Not Speak its Name*, 1995 RESTITUTION L. REV. 3, 14 (proposing legislation and the appeals process as two possible ways to make restitution a breach of contract remedy and arguing that there is no logical or practical reason to severely restrict restitution as a remedy for breach of contract); Peter Jaffey, *Restitutionary Damages and Disgorgement*, 1995 RESTITUTION L. REV. 30 (detailing the distinctions between different notions of restitutionary damages and advocating for maintaining those distinctions); Gareth Jones, *The Recovery of Benefits Gained from a Breach of Contract*, 99 L.Q. REV. 443 (1983) (describing various English and American cases where courts decided how much a plaintiff lost based in part on whether the defendant benefited); Kull, *supra* note 1 (explaining that some recent cases further the proposition that a material breach of contract makes the defendant liable to disgorge the benefits realized as a result of the plaintiff's performance); Janet O'Sullivan, *Loss and Gain at Greater Depth: The Implications of the Ruxley Decision*, in FAILURE OF CONTRACTS: CONTRACTUAL RESTITUTIONARY AND PROPRIETARY CONSEQUENCES 1 (Francis Rose ed., 1997) (discussing *Ruxley* in the context of domestic building work and non-commercial transactions); Lionel D. Smith, *Disgorgement of the Profits of Breach of Contract: Property, Contract and "Efficient Breach"*, 24 CAN. BUS. L.J. 121 (1994-95) (discussing whether disgorgement is available for breach of contract).

provide an account of the pre-*Blake* jurisprudence, which arguably extended beyond expectancy damages to reach gains secured by the perpetrator through breach of contract.

II. THE DISGORGEMENT DEBATE

Although an award of damages for breach of contract often forces the defendant to disgorge profits resulting from the breach,⁹ this is not invariably so. Hence, where the breach of contract creates opportunities for profit-taking that would not have existed but for the breach, the plaintiff's damages in the contractual expectancy measure may not equal the defendant's gain.

The factual background of the *Blake* decision provides a useful and colorful illustration of this point. George Blake had been a member of the British security and intelligence services from 1944 to 1961. He became an agent for the Soviet Union in 1951 and provided information to the Soviet government over the next nine years. When his treachery was uncovered, Blake was convicted of five charges under the Official Secrets Act¹⁰ and sentenced to forty-two years of imprisonment. Blake escaped from prison in 1966 and fled to Berlin, and then to Moscow, where he wrote an autobiography recounting his exploits as a spy. In 1989, Blake entered into a publishing contract with the publisher Jonathan Cape, Ltd. The contract provided that he would receive 50,000 pounds upon signing and two further installments of the same amount upon delivery of the manuscript and publication. The Attorney General became aware of this publishing event only upon publication of the volume, entitled "No Other Choice," in the fall of 1990. By the time the Attorney General commenced an action against Blake and the publisher, Blake had received approximately 60,000 pounds and was waiting for payment of the remaining 90,000 pounds due to him under the agreement.

By writing and agreeing to publish the volume, Blake clearly violated his employment contract with the Crown, in which he agreed "not to divulge any official information gained by [him] as a

9. Thus, where a seller, *A*, repudiates a contract to sell goods to *B* at less than the market price in order to resell the goods to *C* at the market price, *B*'s contract damages claim will yield an amount equivalent to the extra profits earned by *A* on the sale to *C*.

10. Official Secrets Act, 1911, 1 & 2 Geo. 5, c. 28, § 1(1)(c) (Eng.).

result of [his] employment, either in the press or in book form.”¹¹ Thus, the Attorney General was certainly entitled to bring a claim against Blake for damages for breach of contract. If damages were to be calculated on the basis of the expectancy principle, however, the Crown would not be able to establish a compensable loss. If Blake had performed his agreement with the Crown, he would not have written and published the book and he would not have earned any royalties. Thus, an award sufficient to place the Crown in the position in which it would have been had Blake performed his agreement would be nil or merely nominal damages. At the same time, however, the evident injustice of allowing Blake to profit from his treachery in this way raised, in an appealing manner, the issue of whether an alternative claim for disgorgement of his ill-gotten gains should be permitted.

The traditional common law approach is that relief in the disgorgement measure is not available in a claim for damages for breach of contract.¹² A number of justifications for the traditional approach exist. Some draw support from the views expressed by Oliver Wendell Holmes that the nature of a duty to perform a contractual obligation at common law is nothing more than “a prediction that you must pay damages if you do not keep it,—and nothing else.”¹³ Holmes conceded that this view “stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.”¹⁴ To the extent that the Holmesian view involves the simple assertion that this is the nature of the obligation imposed by a contractual doctrine, it is a circular and unconvincing argument.

Implicit in this view, however, is a more persuasive justification for the traditional approach. Many breaches of contract are innocent in a moral sense. People who have acted in good faith and who have attempted to perform their agreements may nonetheless fail to do so. In such cases, compensatory damages would appear to be sufficient

11. *Attorney Gen. v. Blake*, [2000] 4 All E.R. 385, 390 (H.L.) (Eng.) (quoting a declaration that Blake signed in 1944).

12. This view was reaffirmed by Sir Robert Megarry, V.C., in *Tito v. Waddell (No. 2)*, [1977] 1 Ch. 106, 332 (Ch. App.) (Eng.). See also *Asamera Oil Corp. Ltd. v. Sea Oil & Gen. Corp.*, [1979] 1 S.C.R. 633, 673 (Can.).

13. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

14. *Id.*

and just. More burdensome awards might arguably be appropriate, however, where the perpetrator has acted in bad faith. If the measure of relief in a contract claim depends on whether the perpetrator of a breach has acted in a wholesome rather than an objectionable way, a test of uncertain application is introduced into the law of contract. By requiring compensation alone as the measure of relief, such inquiries are avoided. Holmes, presumably, would agree that this is desirable. This point less troubles those who favor recognition of the disgorgement measure of relief. Some, though not all, would recommend that the test for the availability of disgorgement be the moral quality of the perpetrator's breach of contract.¹⁵

In any event, the increasing willingness of courts to imply requirements that parties to agreements act in good faith,¹⁶ and the recognition (at least under Canadian common law) that punitive damages may be awarded for breach of contract, suggests that judicial evaluation of the moral quality of the conduct of defaulting parties is not precluded in the contractual context.¹⁷ At the same time, however, there appears to be little support for the notion that the disgorgement measure is universally available. Accordingly, a test for identifying appropriate cases must be constructed. As a result, the problem of uncertainty cannot be forced to completely disappear.

Contemporary law and economics scholars have provided a further justification for the traditional approach.¹⁸ Under the theory

15. See, e.g., Birks, *supra* note 8.

16. See Shannon Kathleen O'Byrne, *Good Faith in Contractual Performance: Recent Developments*, 74 CAN. BAR REV. 70, 93–94 (1995); cf. *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, 749 (Can.) (concluding that, in a wrongful dismissal case, damages for breach of an implied obligation of good faith are not recoverable, but that a bad faith dismissal could, in effect, be compensated by extending the length of the period of reasonable notice). See generally GOOD FAITH AND FAULT IN CONTRACT LAW (Jack Beatson & Daniel Friedmann eds., 1995) (collection of scholarly essays examining the role of good faith in contract formation, breach, remedies, and contractual obligations in general).

17. In any event, the strict divide between ethics and contract law envisaged by Holmes was undoubtedly a distortion of the reality, as Pollock observed in correspondence with Holmes at the time. See S. M. Waddams, *Breach of Contract and the Concept of Wrongdoing*, 12 SUP. CT. L. REV. 1, 2 (2000).

18. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 130–40 (5th ed. 1998); see also Sidney W. DeLong, *The Efficiency of a Disgorgement as a Remedy for Breach of Contract*, 22 IND. L. REV. 737 (1989) (exploring certain

of so-called efficient breach, it is argued that there is a positive value in structuring the law of contract damages to facilitate, if not encourage, contract breaches that will lead to efficient behavior. Thus, where a seller of widgets discovers that a second purchaser is willing to pay a significantly higher price than the first purchaser to whom he is contractually bound, the seller should be encouraged to breach the contract and sell the widgets to the second purchaser who evidently places a higher value on the widgets. Provided that the first purchaser is compensated by expectancy damages, the net wealth of society arguably has been increased by the breach of contract. The seller is better off, the second purchaser is better off, and the first purchaser has suffered an injury that has been fully compensated. The theory holds that this opportunity for an efficiency gain will be lost if the seller is required to negotiate and purchase a release from the first purchaser. Accordingly, the seller is permitted to act unilaterally. A principle that stripped the seller of profits made on the second sale would discourage efficient behavior of this kind.

The theory of efficient breach has its critics.¹⁹ Typical criticisms include the suggestion that the supposed efficiency gains are illusory because they fail to take into account the potential costs of resolving the seller's likely dispute with the first purchaser, as well as the more general point that the theory fails to accommodate the need to encourage contractual performance. Moreover, one of the leading exponents of the theory has taken the view that an exception should be made for "opportunistic" breaches of contract, for which disgorgement is the appropriate remedy.²⁰ On this view, opportunistic breach is distinguishable from efficient breach. Where, for example, a seller accepts payment and then profitably invests the price but refuses to deliver the goods, the breach is merely "opportunistic" if the seller does not sell the goods to a higher

situations in which disgorgement appears to be an efficient remedy for breach of contract).

19. See Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1 (1989); Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982); Richard O'Dair, *Restitutionary Damages for Breach of Contract and the Theory of Efficient Breach: Some Reflections*, 46 CURRENT LEGAL PROBLEMS 113 (1993); *Restitutionary Damages*, *supra* note 8; Smith, *supra* note 8.

20. See POSNER, *supra* note 18, at 130–31.

bidder. With no efficiency gain, awarding disgorgement relief and capturing the profits made by the seller through this opportunistic behavior should discourage the behavior. Critics see this move, perhaps unconvincingly, as an unraveling of the theory.²¹

In short, the theory remains controversial. It therefore appears unlikely that the future of the disgorgement remedy in contract will rest on the development of a judicial or academic consensus on the validity of the theory of efficient breach. Even detractors of the theory of efficient breach, however, might agree with the notion that disgorgement damages for breach, if widely available, may “have a tendency to discourage economic activity in relevant situations.”²²

A further argument in support of the traditional approach is that the general availability of disgorgement relief would undermine the principle that the victim of a breach of contract has a duty to mitigate loss.²³ Under present law, if a seller fails to deliver goods which are readily available in the marketplace, the purchaser is under a virtually immediate obligation to seek substitute goods in the market, thus restricting the claim of expectancy damages to the difference between the contract price and the market price at the date of breach. If the buyer was entitled to relief in the disgorgement measure, however, the buyer could decline to mitigate and subsequently claim either the seller’s profits as a result of resale or the value of the goods at the date of judgment, if the seller retained them. Though the prudent purchaser might mitigate in any event, granting disgorgement relief might work against the mitigation principle in specific factual contexts.

An argument in support of the availability of disgorgement is the general principle that “a wrongdoer should not be allowed to profit from his wrongs.”²⁴ When this principle is applied in analogous contexts, it has the effect of granting disgorgement relief. If

21. See, e.g., Smith, *supra* note 8, at 133–35.

22. *Surrey County Council v. Bredero Homes Ltd.*, [1993] 1 W.L.R. 1361, 1370 (C.A.) (Eng.).

23. See Waddams, *supra* note 17, at 9; LAW COMMISSION, *AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES* Com. 247, at 3.46 (1997), available at <http://www.lawcom.gov.uk/library/lib-com.htm#liblc247> (last visited Oct. 19, 2002); see also *Restitutionary Damages*, *supra* note 8, at 148–49.

24. See, e.g., *Halifax Bldg. Soc’y v. Thomas*, [1995] 4 All E.R. 673 (C.A.) (Eng.).

disgorgement remedies are available for breach of fiduciary obligation, breach of confidence, and tortious wrongdoing, it is unclear why similar relief should not be available in the context of contractual breach.²⁵ Disgorgement relief in the context of tortious wrongdoing and, to some extent, in contractual settings has been permitted in order to protect proprietary interests. It may be difficult to articulate a basis for protecting proprietary interests in this way while refusing to protect contractual rights in the same manner.²⁶ A refusal to grant disgorgement relief simply permits the perpetrator to “expropriate” the contractual rights of the promisee. This argument may be particularly compelling in the context of cases such as *Blake*, where the expectancy measure of relief yields no compensation whatsoever. Further, it has been suggested that the impulse to grant disgorgement relief to meet the justice of an individual case is so strong that courts have, at times, distorted and instrumentally deployed such concepts as fiduciary obligation and compensation in order to indirectly achieve such results.²⁷ According to this view, more open recognition of the availability of disgorgement relief for breach of contract facilitates clearer thinking about the circumstances in which such relief should be made available.

In sum, there appear to be plausible arguments both for and against recognition of disgorgement relief for breach of contract. It is not surprising, therefore, that the point has proven to be a controversial one. The merits of these contending views can perhaps best be tested in the light of cases that consider granting such relief, a matter to which we now turn.

III. BEYOND COMPENSATION: THE EXISTING DOCTRINE

In the case law preceding the decision of the House of Lords in *Blake*, there appears to have been no direct authority for the proposition that one may, in effect, “waive the breach of contract”

25. See *Reading v. Attorney-Gen.*, [1951] A.C. 507 (H.L.) (Eng.). The relationship between the employment contract and the duty of confidence is explored in *Faccenda Chicken Ltd. v. Fowler*, [1987] 1 Ch. 117 (Ch. App. 1985) (Eng.). Waiver of tort is, in my view, the most attractive explanation for the result in *Penarth Dock Eng'g Co. v. Pounds*, [1963] 1 Lloyd's Rep. 359 (Q.B.) (Eng.) (claim in contract and in trespass—disgorgement measure applied).

26. See *Smith*, *supra* note 8, at 129–32.

27. See *id.* at 126–29.

and sue in restitution in the disgorgement measure.²⁸ Nonetheless, there are a number of cases allowing relief for breach of contract, which cannot be easily explained on the basis of the expectancy principle, in which awards calculated on the basis of the perpetrator's gain (as opposed to the victim's loss) have been granted.²⁹ First, the disgorgement claim in the breach of contract context is on its strongest foundation when the breach of contract also constitutes a breach of another duty which has traditionally given rise to a restitutionary claim in this measure. Thus, where a breach of contract also constitutes breach of fiduciary obligation, tort, or breach of confidence, a claim for disgorgement may lie.

In the *Blake* case, the House of Lords was of the view that Blake was not in breach of a fiduciary obligation owed to the Crown and that the information, at the date of his disclosure, did not possess the requisite degree of confidentiality to provide a foundation for a claim for breach of a duty of confidence.³⁰

On the very similar facts of *Attorney-General v. Observer Ltd.*,³¹ however, the possibility of a breach of confidence claim was suggested.³² In this case, the offending author had moved to Australia and was no longer amenable to suit.³³ Lord Goff indicated that the author would, if sued, be liable for an accounting of profits for his breach of confidence.³⁴

On similar facts in the American case of *Snepp v. United States*,³⁵ the Supreme Court held that an equivalent literary effort by a former member of the Central Intelligence Agency constituted a breach of his fiduciary obligations to his employer.³⁶ The profits earned thereby were impressed with a constructive trust.³⁷ The fact that the disgorgement principle is applicable in the case of the breach of independent duties of this kind does not, however, significantly advance the argument that restitutionary disgorgement may be

28. See *Attorney Gen. v. Blake*, [2000] 4 All E.R. 385, 393, 396 (H.L.) (Eng.).

29. See *id.* at 396.

30. See *id.* at 399.

31. [1988] 3 W.L.R. 776 (H.L.) (Eng.).

32. See *id.* at 786.

33. See *id.* at 780.

34. See *id.* at 812.

35. 444 U.S. 507 (1980).

36. See *id.* at 510.

37. See *id.* at 516.

available as a remedy for breach of contract *simpliciter*. Rather, it may be taken to confirm the unexceptional proposition that, where the party in default is concurrently liable for breach of a fiduciary obligation, for example, the innocent party is able to choose the most advantageous theory of liability. There are other decisions, however, that cannot be explained on this basis.

In some cases in which the disgorgement measure has been utilized, albeit for the purpose of calculating contractual damages, the interest of the plaintiff injured by the defendant's breach may be said to be proprietary in character. Thus, in *Lake v. Bayliss*,³⁸ it was held that where a vendor, having contracted to sell land to the plaintiff, repudiates the agreement and sells the land to a third party, the vendor will hold the proceeds of the sale to a third party in a constructive trust for the plaintiff. The defendant vendor's argument that the plaintiff should be restricted to damages was rejected on the basis that the vendor, upon entering a contract of sale, holds the property in question as trustee for the purchaser.³⁹

A different type of proprietary interest was protected by relief in the disgorgement measure in *Wrotham Park Estate Co. v. Parkside Homes Ltd.*⁴⁰ In that case, a developer had purchased land with a view to its development for residential purposes.⁴¹ The land was subject to a restrictive covenant prohibiting such development.⁴² Once development began, the plaintiffs, who were the successors in title of the original vendors, drew the attention of the developer to the covenant.⁴³ The developer replied that it had been advised the covenant was unenforceable and continued to implement its plans.⁴⁴ Some weeks later, the plaintiff brought an action seeking a mandatory injunction for the demolition of buildings erected in breach of the covenant.⁴⁵ That relief was refused on the ground that it would be "an unpardonable waste of much needed houses."⁴⁶ On the other hand, the court held that the plaintiff was not restricted to

38. [1974] 1 W.L.R. 1073, 1076 (Ch.) (Eng.).

39. *See id.*

40. [1974] 1 W.L.R. 798 (Ch. 1973) (Eng.).

41. *See id.* at 803.

42. *See id.* at 802.

43. *See id.* at 804.

44. *See id.*

45. *See id.*

46. *Id.* at 811.

damages in the contractual measure in the form of compensation for the injuries sustained by its land, which were insubstantial, for that would leave the defendant “in undisturbed possession of the fruits of their wrongdoing.”⁴⁷ Rather, the plaintiff could recover the profit garnered by this breach of duty, which the court assessed as “such a sum of money as might reasonably have been demanded by the plaintiffs from [the defendant] as a quid pro quo for relaxing the covenant.”⁴⁸

Although the holding in *Wrotham Park* proved to be the subject of controversy in subsequent English decisions, the approach adopted by the court in that case received the approval of the House of Lords in *Blake*. However, in *Surrey County Council v. Bredero Homes Ltd.*,⁴⁹ on facts rather similar to those of *Wrotham Park*, the Court of Appeal declined to apply the *Wrotham Park* principle.⁵⁰ The defendant developer had acquired two contiguous parcels of land from the two plaintiff municipal councils on the basis of an explicit understanding that the defendant would erect a housing estate containing a fixed number of units.⁵¹ In breach of this undertaking, the defendant ultimately obtained planning permission to build more houses on the parcels and proceeded to do so, thereby securing a greater profit from the development than originally envisaged.⁵²

47. *Id.* at 812.

48. *Id.* at 815. Farnsworth refers to this measure of relief as measurement in terms of “saving of the cost of modification” of the original agreement. Farnsworth, *supra* note 8, at 1346. He prefers it to the granting of recovery of all of the profits made by the subsequent conduct flowing from the breach because it is more narrowly restricted to that portion of the subsequent profit that can be said to be directly caused by the breach. *See id.* at 1347. The “saving of the cost of modification” is one example of a broader concept of “saving of the cost of other means” of securing the profit. *Id.* A second type, “saving of the cost substitution,” is illustrated in cases where the breach involves resale to a third party of goods promised to the plaintiff. *See id.* at 1345. The appropriate measure in such cases would be, in Farnsworth’s view, not the full profit on the resale but the cost of obtaining substitute goods, on the theory that any profit beyond that figure is, again, not strictly caused by the breach. *See id.*

49. [1993] 1 W.L.R. 1361 (C.A.) (Eng.).

50. *See id.* at 1367–68.

51. *See id.* at 1363.

52. *See id.*

Although the councils had not suffered losses compensable on the basis of the expectancy principle, relying on the decision in *Wrotham Park*, they sought an award that would represent a premium that could reasonably have been charged by them for permission to relax the contractual understandings concerning the restriction on the number of units to be constructed.⁵³ The Court of Appeal rejected this claim and awarded merely nominal damages.⁵⁴ Lord Justice Dillon rejected the approach taken in *Wrotham Park* on the basis that the general principle for the assessment of damages in a contract case is compensatory in nature.⁵⁵ The claim advanced by the plaintiff, although characterized by counsel for the plaintiff as “compensation” for the plaintiff’s lost opportunity to extract such a premium, was considered by Lord Justice Dillon to represent a claim for the profit made by the defendant by breaching its undertaking and therefore represented an unacceptable departure from the compensation principle.⁵⁶ Lord Justice Steyn, on the other hand, accepted the validity of the approach taken in *Wrotham Park* as a useful development in the law designed to protect against the invasion of property rights, but nonetheless distinguished *Wrotham Park*, as did Lord Justice Rose, on grounds that appear to be both narrow and obscure.⁵⁷

The tension between the holdings in *Wrotham Park* and *Surrey County Council* surfaced for reconsideration by the Court of Appeal in *Jaggard v. Sawyer*⁵⁸ and in the House of Lords in *Blake*.⁵⁹ In *Jaggard* the claim concerned a breach of a covenant not to use a

53. *See id.* at 1363–64.

54. *See id.* at 1368.

55. *See id.* at 1367.

56. *See id.* at 1368.

57. For Lord Justice Steyn here, unlike in *Wrotham Park*, there was no attempted invasion of property rights. *See id.* at 1369–70 (Steyn, L.J., concurring). This distinction rests, presumably, on the fact that the restriction on development was contained in a restrictive covenant in *Wrotham Park*, but in a mere contractual undertaking in *Surrey County Council*. *See id.* This distinction neatly illustrates the artificiality of a distinction between proprietary and non-proprietary interests for disgorgement purposes. *See Smith, supra* note 8. For Lord Justice Rose, *Wrotham Park* was distinguished because, unlike the present case, the plaintiff had objected to what the defendants did from first to last. *See Surrey County Council*, [1993] 1 W.L.R. at 1371 (Rose, L.J., concurring).

58. [1995] 1 W.L.R. 269 (C.A. 1994) (Eng.).

59. [2000] 4 All E.R. 385 (H.L.) (Eng.).

portion of land other than as a private garden.⁶⁰ The defendant had constructed a driveway over part of the land subject to the restriction.⁶¹ The trial judge followed *Wrotham Park* and awarded an amount which the plaintiff could have reasonably expected to receive for release of the covenant.⁶² The Court of Appeal agreed with this approach and approved the decision in *Wrotham Park*, although it chose to explain *Wrotham Park* as a case based on compensatory principles, the plaintiff being compensated for a continuing invasion of his contractual right.⁶³ As others have noted, however, it is difficult to justify the award in *Wrotham Park* on this basis.⁶⁴ If the defendant had performed his contractual undertaking, the plaintiff would have suffered no loss. In *Blake*, the House of Lords correctly explained the result in *Wrotham Park* on the basis of the disgorgement principle.⁶⁵ The *Wrotham Park* principle was adopted by the British Columbia Supreme Court in *Arbutus Park Estates Ltd. v. Fuller*.⁶⁶ In that case, the court awarded damages in a similar measure for failure to comply with a restrictive covenant prohibiting the building of a “detached garage” until the plans and specifications for its erection were approved by the plaintiff.⁶⁷ Injunctive relief was denied, but the plaintiff was allowed to recover the amount which the defendant had saved by failing to hire an architect to prepare the required plans.⁶⁸

In this line of cases, the courts manipulated the concept of “compensation” or “damages” in order to award disgorgement relief. In other cases, they utilized the concept of trust in what appeared to be an instrumental way in order to achieve a disgorgement award for breach of contract. Thus, in *Reid-Newfoundland Co. v. Anglo-American Telegraph Co.*,⁶⁹ the Privy Council awarded a disgorgement recovery for expenses saved by unauthorized use of a telegraph line. Under an agreement with the plaintiff telegraph

60. See *Jaggard*, [1995] 1 W.L.R. at 272.

61. See *id.* at 273.

62. See *id.* at 275.

63. See *id.* at 278–82.

64. See, e.g., Goodhart, *supra* note 8, at 7–8.

65. See *Attorney Gen. v. Blake*, [2000] 4 All E.R. 385, 395 (H.L.) (Eng.).

66. [1976] 74 D.L.R. (3d) 257 (B.C. Sup. Ct.) (Can.).

67. See *id.* at 258.

68. See *id.* at 265–66.

69. [1912] A.C. 555 (P.C.) (appeal taken from Nfld.) (Can.).

company, a Newfoundland railway company was entitled to access a telegraph line for certain limited purposes. In breach of the agreement, the defendant utilized the line for its own commercial purposes in a more general way. Relying on a contractual provision that stipulated that the company would “not pass or transmit any commercial messages over the said special wire, except for the benefit and account of the telegraph company,”⁷⁰ the Privy Council held that “an obligation in the nature of a trust arose” and that the defendant had a duty to set aside profits accruing from such use, as they belonged to the plaintiffs.⁷¹ In *Blake*, the House of Lords cited *Reid-Newfoundland* as an illustration of disgorgement relief for breach of contract to which the court “attached a different label.”⁷²

In the cases considered above, a potentially unifying theme may be the use of a disgorgement measure to protect proprietary interests. One might ask, then, whether disgorgement relief may be, or should be, restricted to such cases or, alternatively, whether these cases provide a foundation for a broader view of the availability of disgorgement relief for breach of contract.

It is difficult, however, to build an argument for the general availability of restitutionary disgorgement relief in breach of contract cases based on decisions dealing with proprietary interests. The special nature of such interests is well recognized. They are typically protected by equitable decrees for specific performance and injunctions on the basis that the normal damages claim at common law is inadequate to protect such interests. The use of the disgorgement measure may thus be seen as an alternate means of responding to this problem of inadequacy in situations, such as those just discussed, in which the granting of equitable relief is either impossible or, for other reasons, unattractive.

If the availability of disgorgement in the service of proprietary interests does not lead inescapably to the conclusion that the remedy should be available more generally, it would, on the other hand, be difficult to defend the proposition that disgorgement should be limited to such situations. As the decisions in *Wrotham Park* and *Surrey County Council* demonstrate, the distinction between proprietary and non-proprietary interests is, for present purposes at

70. *Id.* at 558 (quoting the contract between the plaintiff and the defendant).

71. *Id.* at 559.

72. *Attorney Gen. v. Blake*, [2000] 4 All E.R. 385 (H.L.) (Eng.).

least, a very narrow and arguably artificial one. The restriction on development in *Wrotham Park*, which was set out in the restrictive covenant, had a proprietary character, whereas the mere contractual undertaking in *Surrey County Council* did not.⁷³

One might justify the relief granted in the property cases on the basis that the disgorgement measure is being used in these cases to respond to situations where compensatory damages are inadequate or where equitable relief, which might otherwise correct the inadequacy, is for some reason unavailable. It must be noted however, that the problem of inadequacy may arise in situations which do not involve the invasion of proprietary rights.

This point is well illustrated in *British Motor Trade Association v. Gilbert*,⁷⁴ a case in which the disgorgement measure was used but no proprietary interest was involved. In that case, the defendant purchased a new motor car and entered into a deed of covenant with the plaintiffs and the dealer which required the defendant to sell the vehicle only to the plaintiffs during the first two years of ownership.⁷⁵ The creation of such covenants by the Association was part of a scheme designed to restrain the inflation of prices of new cars during a period of shortage.⁷⁶ In turn, the Association would resell any cars sold to it at a price calculated by deducting a stipulated rate of depreciation from the original sale price.

In breach of the covenant, the defendant sold his new car on the black market for a handsome profit.⁷⁷ The plaintiffs brought an action for damages and the defendant argued that the plaintiffs should be restricted to the contractual measure of relief which, in these circumstances, would yield no damages at all.⁷⁸ The court held that the plaintiffs were entitled to recover the profits earned by the defendant through his breach.⁷⁹ The explanation offered for this holding, however, was that the plaintiffs should be able to take into account the cost of substitution. The Court allowed substitution even though the relevant market price was established by surreptitious

73. See *Surrey County Council v. Bredero Homes Ltd.*, [1993] 1 W.L.R. 1361, 1367–68 (C.A.) (Eng.).

74. [1951] 2 All E.R. 641 (Ch.) (Eng.).

75. See *id.* at 643.

76. See *id.* at 644.

77. See *id.* at 641.

78. See *id.*

79. See *id.* at 645.

evasion of the plaintiffs' scheme, and even though this would enable the plaintiffs to recover damages in an amount which exceeded that which they would have obtained if the defendant had complied with his contractual obligations.⁸⁰

The court held that the covenant itself was not an improper restraint on trade since it was appropriately designed to protect the interests of the public and honest dealers in the motor trade.⁸¹ Presumably, therefore, this is an agreement which could have been enforced by injunctive relief had the sale been anticipated. Furthermore, it appears evident that the traditional measure of contractual damages did not adequately protect plaintiffs' legitimate interests.

The traditional pre-*Blake* doctrine may have been seen as somewhat inhospitable to the disgorgement measure in breach of contract cases. However, in recent years there has been some academic support for a limited extension of the disgorgement principle, though opinion is divided on the manner and extent to which such a development would be desirable. Some have recommended recognition of discretion to grant relief in the disgorgement measure in cases of cynical or unscrupulous breach of contract.⁸² Another has suggested an expansion of the kinds of proprietary interests that would attract such protection.⁸³ A third suggestion is that the main contribution the disgorgement principle makes in contractual cases is to provide a basis for granting the higher measure of relief in cases like *Tito v. Waddell (No. 2)*,⁸⁴ where

80. *See id.* at 644.

81. *See id.*

82. *See, e.g.,* PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 334-36 (1985); *cf.* LORD GOFF OF CHIEVELEY & GARETH JONES, THE LAW OF RESTITUTION 709-816 (4th ed. 1998) (examining situations where the defendant has acquired a benefit through his own wrongful act and the resulting restitutionary claims against such wrongdoers).

83. *See* Friedmann, *supra* note 8.

84. [1977] 1 Ch. 106 (Eng.). In this case, the defendant secured the right to mine phosphate in a South Pacific island on the condition that the land would be restored and replanted after the completion of the mining. The defendant failed to do so and the plaintiff sought damages in a rather substantial amount to reflect the cost of performing this task. The defendant successfully argued that the plaintiff's expectancy would more fairly be measured in a lesser amount, which reflected the diminution in the value of the island caused by this breach. *See id.* at 332. Farnsworth characterizes such situations as "abuse of contract" and recommends relief in the "saving of the cost of modification"

the expectancy principle applies ambiguously and offers two different methods for calculating damages.

Persuasive criticism of the first two proposals exists. It does not appear to be either practical or desirable to implement a distinction between cynical and acceptable breaches of contract for these purposes.⁸⁵ Furthermore, expanding the notion of proprietary interests for these purposes appears likely to lead to an artificial and unfruitful analysis.⁸⁶ Moreover, the general assumption that proprietary interests must automatically be protected in this way is a questionable one.

Therefore, the test of inadequacy of damages at common law is arguably a more accurate indicator of the appropriateness of disgorgement relief.⁸⁷ Plainly, however, the restitutionary disgorgement claim is most securely grounded when it rests upon an independent and concurrent breach of restitutionary obligation which, for reasons other than the mere fact the conduct also constitutes a breach of contract, engages the restitutionary principle that a wrongdoer shall not profit from his wrongdoing. However, adopting restrictions on the availability of disgorgement to situations identified by suggestions such as these was not embraced by the House of Lords in *Blake*. Whether they may continue to point in the direction of the future availability of disgorgement remains an open question.

IV. THE OPEN-TEXTURED APPROACH: *ATTORNEY GENERAL V. BLAKE*

The facts of the *Blake* case have been recounted above.⁸⁸ At trial, the Crown framed its claim exclusively on the basis that the writing and publication of Blake's book constituted a breach of a

measure. Farnsworth, *supra* note 8, at 1343–45, 1387–91. A second situation in which this concept would apply, in his view, is where a builder, through substitution of cheaper materials, has enjoyed savings that exceed the resulting diminution of the value of the completed work. *See id.* at 1382–87. *See generally* Frank Zaid, *Conflict in the Measure of Contract Damages—Cost of Performance (Replacement) Versus Difference in Value (Indemnity)*, 9 OSGOODE HALL L.J. 179, 180–84 (1971) (discussing Canadian cases involving this type of conflict).

85. *See* ANDREW S. BURROWS, *REMEDIES FOR TORTS AND BREACH OF CONTRACT* 270–75 (Butterworths 1987).

86. *See* Farnsworth, *supra* note 8, at 1343 n.9.

87. *See, e.g.*, BEATSON, *supra* note 8, at 17.

88. *See* discussion *supra* Part II.

fiduciary obligation he owed to the Crown.⁸⁹ The claim for breach of fiduciary obligation failed at trial and in the Court of Appeal,⁹⁰ and was not pursued before the House of Lords. The Court of Appeal, however, allowed the Crown to amend its claim to assert a public law claim which, although it would achieve a similar result, the Attorney General undertook “as guardian of the public interest.”⁹¹ This claim succeeded before the Court of Appeal.⁹²

At the same time, the court indicated an interest in the possibility of a private law claim for damages for breach of Blake’s obligation to refrain from divulging official information in which disgorgement of the royalties would be the appropriate measure of relief.⁹³ Although this claim was not pursued by the Crown before the Court of Appeal, it was advanced before the House of Lords where it enjoyed success.⁹⁴

In the leading opinion, Lord Nicholls⁹⁵ reviewed the various lines of authority, including breach of fiduciary obligation, waiver of tort, and the kinds of authorities concerning breach of contract described above, in which courts have granted awards which have the effect of disgorging gains secured through the breach of private law duties. Having observed that a number of these doctrines arose in the context of awarding financial recompense for interference with property rights, Lord Nicholls went on to note, however, that “it is not clear why it should be any more permissible to expropriate personal rights than it is permissible to expropriate property rights.”⁹⁶ Further, relying, *inter alia*, on cases such as *British Motor Trade Association v. Gilbert*, Lord Nicholls concluded that such cases “illustrate that circumstances do arise when the just response to a breach of contract is that the wrongdoer should not be permitted to retain any profit from the breach.”⁹⁷

89. See *Attorney Gen. v. Blake*, [1996] 3 All E.R. 903 (Ch.) (Eng.).

90. See *Attorney Gen. v. Blake*, [1998] 1 All E.R. 833 (C.A. 1997) (Eng.).

91. *Id.* at 833.

92. See *id.* at 847.

93. See *id.* at 843–44.

94. See *Attorney Gen. v. Blake*, [2000] 4 All E.R. 385 (H.L.) (Eng.).

95. With whom Lords Goff and Browne-Wilkinson concurred. Lord Steyn wrote a separate concurring opinion. Lord Hobhouse dissented. See *id.* at 395.

96. *Id.*

97. *Id.* at 397.

Although the expression “restitutionary damages” was considered to be an “unhappy” one, Lord Nicholls concluded that there “seems to be no reason, *in principle*, why the court must in all circumstances rule out an account of profits as a remedy for breach of contract.”⁹⁸ Further, having noted that an account of profits can be awarded for a breach of confidence where the breach of confidence constitutes a breach of a non-disclosure agreement, Lord Nicholls suggested that it would be “nothing short of sophistry” to say that an account of profits could be awarded with respect to the breach of confidence but not with respect to the breach of contract.⁹⁹ Accordingly, in his view, “it would be only a modest step for the law to recognise openly that, exceptionally, an account of profits may be the most appropriate remedy for breach of contract.”¹⁰⁰

Conceding that the main argument against recognition of the availability of disgorgement relief was the concern that this would induce an element of uncertainty into the law concerning commercial contracts, Lord Nicholls expressed the view that these fears were not well founded. Emphasizing that the account of profits would be awarded only in exceptional cases, Lord Nicholls indicated that “[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.”¹⁰¹

Indeed, he went on to suggest that it would only be in circumstances where such “remedies are inadequate” that an account of profits could be awarded.¹⁰² Although Lord Nicholls thus signaled that disgorgement should be awarded only in exceptional circumstances, he went on to articulate a standard for the award of an account of profits which is open-textured in the sense that it appears to confer broad discretion to make such awards, the exercise of which is neither structured nor confined by very precise guidelines. Lord Nicholls reasoned as follows:

No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter

98. *Id.*

99. *Id.*

100. *Id.* at 397–98.

101. *Id.* at 398.

102. *Id.*

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. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit.

It would be difficult, and unwise, to attempt to be more specific.¹⁰³

The proposed discretion to award an account of profits for breach of contract thus appears to be largely unstructured. However, some guidance with respect to its exercise may be gleaned from Lord Nicholls's treatment of various suggestions, with respect to the availability of disgorgement by the Court of Appeal in *Blake*, and from the reasons offered by Lord Nicholls and Lord Steyn for the making of such an award on the particular facts of the *Blake* case itself.

In the Court of Appeal, Lord Woolf M.R. suggested that there were two circumstances in which disgorgement relief might be particularly appropriate.¹⁰⁴ Neither suggestion was accepted by the House of Lords. The first suggestion concerned cases of "skipped performance."¹⁰⁵ In the oft-cited American illustration¹⁰⁶ of this phenomenon, a provider of firefighting services had skimmed on the number of firefighters and horses and the length of hose required by the agreement.¹⁰⁷ Nonetheless, the plaintiff customer suffered no property loss as a result of the lower level of firefighting services provided. The plaintiff sought to recover the supplier's saved expenses, but was awarded merely nominal damages by the American court.

For Lord Woolf, recovery of the saved expenses in such circumstances would have been appropriate. In Lord Nicholls's

103. *Id.*

104. *See* Attorney Gen. v. Blake, [1998] 1 All E.R. 833, 845-46 (C.A. 1997) (Eng.).

105. *Id.*

106. *See* City of New Orleans v. Firemen's Charitable Ass'n, 9 So. 486 (La. 1891).

107. *See id.*

view, however, compensatory damages calculated on an expectancy basis would meet the needs of justice in such a case.¹⁰⁸ Under the normal calculation of expectancy damages, the customer would be entitled to the difference in value between the service as promised and the service as provided. It would be unnecessary, therefore, to invoke the disgorgement measure to provide appropriate relief. The second suggestion made by Lord Woolf was that disgorgement should be available in circumstances where a defendant has obtained a profit by doing the very thing he contracted not to do.¹⁰⁹ Blake promised not to disclose official information.¹¹⁰ He profited by doing the very thing he had promised not to do and thus should be required to disgorge his profits.¹¹¹ Lord Nicholls, however, was of the view that this was too broad a test for the application of the disgorgement remedy and ran the risk of embracing “all express negative obligations.”¹¹²

The House of Lords did agree,¹¹³ however, with three further suggestions made by the Court of Appeal¹¹⁴ with respect to circumstances which would not be sufficient in themselves for departing from the general principle of compensatory damages on an expectancy basis. The House of Lords and the Court of Appeal agreed that the mere fact that a particular breach was cynical and deliberate would not be a sufficient basis for disgorgement.¹¹⁵ This suggests that the moral quality of the defendant’s act is not considered to be, by itself at least, a basis for disgorgement. It may well be, however, that the moral quality will count as a relevant consideration to one of the “circumstances of the breach” alluded to in the passage from Lord Nicholls set out above. Further, the House of Lords agreed with Lord Woolf’s suggestion that the mere fact that the breach had enabled the defendant to enter into a more profitable contract elsewhere would not be a sufficient basis for disgorgement, nor would the fact that, by entering a new and more profitable

108. *See Blake*, [2000] 4 All E.R. at 398.

109. *See Blake*, [1988] 1 All E.R. at 846.

110. *See id.*

111. *See id.*

112. *Blake*, [2000] 4 All E.R. at 398. Lord Steyn, on the other hand, appears more accepting of this approach. *See id.* at 403–04.

113. *See id.* at 398–99.

114. *See Blake*, [1988] 1 All E.R. at 845.

115. *See Blake*, [2000] 4 All E.R. at 398–99.

contract, the defendant had made himself incapable of performing his contract with the plaintiff.¹¹⁶

On this basis it would appear that the phenomenon of efficient breach has not been precluded by the *Blake* doctrine. It may be another matter, however, where a seller's refusal to deliver and subsequent resale is provoked by a desire to exploit unexpected volatility in the marketplace. The Israeli Supreme Court has awarded disgorgement relief in such circumstances,¹¹⁷ and it may be argued that this additional factor lifts the breach out of the category of mere resale at a higher price which was the subject of discussion in *Blake*.

Further guidance with respect to the likely range of availability of the disgorgement remedy can be discerned from the manner in which the doctrine is applied to the facts of the *Blake* case. Lord Nicholls emphasized, in stating the test for making disgorgement relief available, that "whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity" would provide a useful general guide.¹¹⁸ In apparent application of this principle to the *Blake* facts, Lord Nicholls placed considerable emphasis on the importance of confidentiality in the work of the security and intelligence services. "Secret information is the lifeblood of these services."¹¹⁹ Disclosures such as Blake's could undermine the complete confidence that members of the service need to have in each other and the willingness of informers to cooperate with the service, thus threatening to jeopardize the very effectiveness of the service. This particular breach of contract, then, constituted a threat to the effectiveness of an important public institution. Further, Lord Nicholls mentioned in passing that the conduct constituted the commission of a criminal offense.¹²⁰ Perhaps more importantly, it

116. *See id.*

117. This decision has been translated into English. *See Adras Bldg. Material Ltd. v. Harlow & Jones GmbH*, 1995 RESTITUTION L. REV. 235 (discussing whether the law of unjust enrichment applies in a situation in which there was a contract between the parties); Daniel Friedmann, *Restitution of Profits Gained by Party in Breach of Contract*, 104 L.Q. REV. 383 (1988) (discussing the importance of the issue of restitution of profits gained by a party due to breach of a contract in *Adras Bldg. Material Ltd.*).

118. *Blake*, [2000] 4 All E.R. at 398.

119. *Id.* at 399.

120. Arguably, this might constitute a separate and independent ground for disgorgement relief.

was Lord Nicholls's view that Blake's undertaking, though not precisely a fiduciary obligation, "was closely akin to a fiduciary obligation, where an account of profits is a standard remedy in the event of breach."¹²¹ In his concurring opinion, Lord Steyn agreed that the present case is "closely analogous to that of fiduciaries."¹²²

It may well be, therefore, that a critical indicator of the appropriateness of disgorgement relief will be the extent to which the breach of contract in question engages the kinds of policy considerations that have traditionally provided the foundation for the development of the law of fiduciary obligation and its associated remedies. Broadly speaking, the law of fiduciary relations has as its purpose the facilitation and protection of relationships of trust and confidence, based in part on the assumption that the promotion of such relationships serves legitimate social ends.¹²³ Though technically not a breach of fiduciary obligation, Blake's wrongdoing does appear to be of a very similar kind.

Perhaps the analogy of fiduciary obligation will prove to be an important one in the context of interpretation and application of the reasoning in *Blake* for future cases. It must be remembered, however, that the House of Lords took some care to avoid imposing rigid constraints on the availability of disgorgement. As Lord Nicholls said, "[n]o fixed rules can be prescribed."¹²⁴ In the same vein, Lord Steyn noted that "[e]xceptions to the general principle that there is no remedy for disgorgement of profits against a contract breaker are best hammered out on the anvil of concrete cases."¹²⁵

The reach of the disgorgement remedy for breach of contract in English law thus remains, to some extent, a matter of speculation. However, a careful examination of the pre-*Blake* instances of

121. *Blake*, [2000] 4 All E.R. at 400.

122. *Id.* at 404.

123. See *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 236 (Can.) (explaining that the objective of imposing fiduciary duties is to "maintain the integrity of institutions dependent on trust-like relationships.").

124. *Blake*, [2000] 4 All E.R. at 398.

125. *Id.* at 403. Lord Steyn, however, appeared to accept that there was some validity to the test proposed in argument by the Solicitor General to the effect that disgorgement would be appropriate where "(1) [t]here has been a breach of a negative stipulation," (2) the perpetrator has profited by doing the very thing he promised not to do, (3) the victim has more than a pecuniary interest in performance, and (4) neither specific performance nor an injunction would provide an effective remedy in the circumstances. *Id.*

disgorgement relief, together with the reasoning in *Blake* itself, may be thought to suggest that the remedy is not likely to be available beyond the range of fact situations in which, as in *Blake*, the breach of contract at issue is in conflict with important social values. Blake's breach of contract threatened the viability of the nation's security service, and it may have been a crime. It was close to breach of fiduciary obligation and breach of confidence and might be thought to undermine the viability or value of confidential relationships. Thus, it might be said that his breach was of such a character that it engaged the principle that a wrongdoer should not be permitted to profit from his wrongdoing. The conduct was not a mere breach of contract and was wrongful in the requisite sense.

It is more difficult, though perhaps not impossible, to explain the earlier cases on this basis. Certainly, *British Motor Trade Association v. Gilbert*¹²⁶ is a case in which the defendant's breach threatened the viability of a socially useful scheme. The cases concerning sale of land subject to a constraint on development are more difficult, though perhaps it may be suggested the vendor's insistence on the constraint is more likely to be consistent with the public interest than with the purchaser's desire to maximize profit.

Lake v. Bayliss,¹²⁷ allowing disgorgement in a land sale context, is again more difficult unless one takes the view that the general availability of specific performance against the vendor indicates a strong public interest in the enforcement of such bargains. However, as one travels down this path of explaining the existing instances of disgorgement for breach of contract on the basis that it lifts the profits from contract breaches which constitute anti-social behavior, one waters down the anti-social requirement. Indeed, one appears to again approach the point at which the test of inadequacy of damages as a remedy becomes a useful indicator of the situations in which disgorgement becomes a serious possibility.¹²⁸

126. [1951] 2 All E.R. 641 (Ch.) (Eng.).

127. [1974] 1 W.L.R. 1073 (Ch.) (Eng.).

128. The first trial decision applying *Blake* appears difficult to defend on any basis other than the inadequacy of damages test. See *Esso Petroleum Co. Ltd. v. Niad Ltd.*, 2001 WL 1476190 (Ch.) (Eng.) (unreported) (defendant service station participates in plaintiff oil company's "Pricewatch" scheme; defendant receives discount on gasoline supplied by plaintiff and agrees to reduce prices to the consumer upon the plaintiff's direction in order to remain competitive; defendant breaks contract by failing to make the price reductions required by

Tentatively, however, apart from its uses in the pre-*Blake* cases, disgorgement is likely to be made available, as in *Blake*, in cases where the conduct is sufficiently similar to breach of fiduciary obligation, breach of confidence, tort, and crime. In these contexts, the conduct engages the policy considerations underlying disgorgement and the applicable wrongdoing principles.

V. CONSEQUENTIAL ISSUES

In other common law jurisdictions of the British Commonwealth, a number of issues arise in the wake of *Blake*. Is the *Blake* doctrine likely to travel well? How will the remedy work? Is apportionment a possibility? Will it bring into play the possibility of constructive trust?

With respect to the Canadian scene, it is likely that Canadian courts will follow the lead of the House of Lords in *Blake* and explicitly recognize the availability of disgorgement relief for breach of contract in exceptional circumstances. Indeed, recognition of the availability of this form of relief has already, to some extent, occurred. The Supreme Court of Canada has recently intimated that such relief might be available.¹²⁹

Further, in *Jostens Canada Ltd. v. Gibsons Studio Ltd.*,¹³⁰ the British Columbia Court of Appeal awarded disgorgement relief for breach of contract. The defendant had, for some years, served as the local area representative for the plaintiff, a national firm of school photographers. In this capacity, the defendant contracted with local schools to provide student and class photographs. Prior to the expiry of the then current agreement in June of 1993, the defendant booked contracts with its various customers for the school year to come. Although the plaintiff attempted to renew the contract for the next school year, the defendant informed the plaintiff, shortly before the

plaintiff; defendant held unjustly enriched by the discounts and the excess charges to consumers).

129. See *Bank of Am. Canada v. Mut. Trust Co.*, [2002] 211 S.C.R. 44 (Can.). It is not clear that the controversial nature of the proposition was drawn to the court's attention in this case, the issue at hand being the appropriateness of awarding compound interest. *But see* Mitchell McInnes, *Restitutionary Damages for Breach of Contract: Bank of America Canada v. Mutual Trust Co.*, 37 CAN. BUS. L.J. 125 (2002).

130. [1999] 174 D.L.R. (4th) 351 (B.C. Ct. App.) (Can.) (reporting subsequent proceedings in the same matter that determine quantum of relief).

beginning of the fall term, that it did not intend to renew their agreement. During the summer months, the defendant informed the schools with which it had negotiated contracts that it was severing its relationship with the plaintiff and, in due course, enjoyed success in inviting their support in doing so.

The plaintiff sued for disgorgement of the profits thereby secured through what was alleged to be a breach of fiduciary duty, placing reliance on a provision of the agreement which referred to the defendant as the “agent” of the plaintiff. The trial judge dismissed the claim, holding that the mere use of agency language did not constitute a relationship of agency in the legal sense and that the relationship was not fiduciary in character.¹³¹ Although this finding was not disturbed on appeal, the court of appeal held that the agreement contained an implied term imposing an obligation of “good faith and fidelity” upon the defendant.¹³² The defendant had breached this term and, moreover, had breached a contractual obligation to “devote its full time and best efforts . . . to the promotion of [the plaintiff’s] business”¹³³ by taking unto itself business which it had booked prior to the expiry of the agreement. On this basis, in the court’s view, the plaintiff was entitled “either to damages at law for breach of that clause of the contract or in equity to an account of profits acquired by the breach.”¹³⁴

Although the court did not explore at length the innovative nature of this relief, the decision is certainly consistent with the reasoning in *Blake*. The case is also similar to *Blake* in the respect that the relationship between the parties, though not held to be fiduciary in character, is evidently closely akin to a fiduciary relationship. Also, the analogy of the fiduciary obligation appears to have played a significant role in the reasoning of the court.

Support for the availability of disgorgement in breach of contract cases in Canadian law can also be drawn, as it was in *Blake*, from the existence of the pre-*Blake* lines of authority described above, which award gains-based relief in breach of contract cases. There is no reason to doubt that the pre-*Blake* English doctrine also constitutes a good Canadian law and the decision in *Arbutus Park*

131. *See id.* at 355–56.

132. *Id.* at 352–53.

133. *Id.* at 354 (emphasis added).

134. *Id.* at 357 (emphasis added).

*Estates Ltd. v. Fuller*¹³⁵ is a clear authority to this effect. Perhaps the most important consideration in support of our tentative view that Canadian courts are likely to adopt the approach to disgorgement taken in *Blake*, however, is the recognition of the availability of punitive or exemplary damages in claims for breach of contract under Canadian common law.¹³⁶

A central pillar of the traditional reluctance to recognize the disgorgement remedy has been the assumption that damages for breach of contract should not be enlarged in order to effect a greater deterrence to breach of contract than is posed by the prospect of compensatory damages. Once it is recognized that punitive damages may be awarded in a breach of contract claim, this objection to disgorgement falls away. Indeed, disgorgement relief may appear to be simply a sharper and more appropriate instrument for providing a disincentive for the particular breach of contract in issue. Thus, at the very least, it appears likely that disgorgement relief will be considered to be available in situations where the breach of contract, in the words of the test for awarding exemplary damages, “is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature.”¹³⁷ More generally, however, recognition of the relevance of deterrence in fashioning remedies for breach of contract strengthens the argument for explicit recognition of the disgorgement remedy in exceptional cases.

Assuming that disgorgement is a remedy available in breach of contract cases under Canadian law, two further questions should be considered. The first question is whether, in fashioning disgorgement relief, courts should attempt to make an apportionment of the profits recoverable where a portion of the profits are attributable to the breach and another portion may appropriately be considered to be attributable to the efforts, expense, or expertise of the defendant.

Apportionment is likely to occur in some cases, at least, if only by indirect means. As has been suggested, careful application of the

135. [1977] 74 D.L.R. (3d) 257 (B.C. Sup. Ct.) (Can.).

136. *See Vorvis v. Ins. Corp. of B.C.*, [1989] 1 S.C.R. 1085, 1107 (Can.) (holding that it is possible, although rare, to award punitive damages in contract cases).

137. *Id.* at 1107–08; *see also Whiten v. Pilot Ins. Co.*, [2002] 209 D.L.R. (4th) 257, 290 (Can.).

notion of "causation" may be utilized to isolate recovery to those profits that are fairly attributable to the breach itself.¹³⁸ Similarly, apportionment may result from focusing recovery on the expenses saved by the perpetrator as a result of the breach.

In *Surrey County Council*,¹³⁹ the plaintiff was allowed to recover only that portion of the defendant's profits which represented the saved expense of not having to purchase from the plaintiff a release from the restriction on development.¹⁴⁰ The actual award was five percent of the profits made by the defendant in constructing a larger development.¹⁴¹ Apportionment should also be possible by direct means, however. Apportionment is a familiar concept within the remedy of account of profits as it is awarded in the context of intellectual property cases.¹⁴² The analogy of apportionment in the intellectual property context may be particularly appealing in breach of contract cases raising similar issues. Assuming that courts do possess a discretion to apportion profits, it is nonetheless unlikely that apportionment will occur in cases where the defendant's misconduct is particularly egregious. Thus, it is not surprising that the possibility of apportionment was not considered in *Blake*.

The second question is whether, on the assumption that disgorgement relief may be available in exceptional cases of breach of contract, the disgorgement remedy may take the form of a constructive trust. Disgorgement by means of the constructive trust is a familiar remedy in the context of breach of fiduciary obligation and, in Canada at least, in the context of breach of confidence.¹⁴³ It would be surprising, therefore, if constructive trust relief was not considered to be potentially available in cases like *Blake* and *Jostens*, which are closely akin to cases of fiduciary breach and, in *Blake* at least, breach of confidence. More generally, however, with the recognition, for purposes of Canadian law, of the remedial nature of

138. See *Restitutionary Damages*, *supra* note 8, at 149–51.

139. [1993] 1 W.L.R. 1361 (C.A.) (Eng.).

140. See *id.* at 710.

141. See *id.*

142. See D. VAVER, *INTELLECTUAL PROPERTY LAW* 262, 265–67 (1997).

143. See, e.g., *Lac Minerals Ltd. v. Int'l Corona Res. Ltd.*, [1989] 2 S.C.R. 574, 577 (Can.) (stating that a "constructive trust was the only just remedy here, regardless of whether this remedy was based on breach of confidence or breach of a fiduciary relationship.").

the constructive trust remedy,¹⁴⁴ there would appear to be no reason, in principle, why a remedial constructive trust could not be imposed in circumstances where the particular features of the constructive trust remedy would effect a just result. For example, in a case where the ill-gotten gains have been reinvested, the constructive trust may perform a useful role in ensuring that the defendant is stripped of all of the profits secured by the breach.¹⁴⁵

VI. CONCLUSION

My tentative conclusion is that the *Blake* doctrine, permitting disgorgement relief in cases of breach of contract, will most likely be applied in circumstances where the particular breach of contract is of such a nature that it engages the policy values fostered by the existing law of tort, crime, breach of confidence, and breach of fiduciary obligation. When the contract breach is fairly considered to engage these values, the breach is wrongful in a sense that brings into play the principle that a wrongdoer shall not profit from his wrongdoing. If this is correct, it appears likely that the *Blake* doctrine will typically operate at the margins of the existing applications of the wrongdoer principle, rather than providing a springboard for a substantial restructuring of contract remedies.

Finally, if this prediction has merit, the question is whether the likely range of activity for the *Blake* doctrine helps to determine whether it is an unjust enrichment doctrine rather than an aspect of the law of contract. Certainly, the House of Lords in *Blake* was not attracted by the fence-sitting label of “restitutionary damages.”¹⁴⁶ Ironically, perhaps, those who wish to wave the restitution banner may draw support from Lord Mansfield’s famous decision in *Moses v. Macferlan*¹⁴⁷—for some the very *fons et origo* of modern restitutionary doctrine.

144. Canadian courts have, on occasion, awarded constructive trust relief with respect to benefits conferred upon the perpetrator of a breach of contract by the innocent party. See MADDAUGH & MCCAMUS, *supra* note 5, at 483–678.

145. *Cf.* Attorney Gen. for Hong Kong v. Reid, [1994] 1 A.C. 324 (P.C. 1993) (Eng.) (holding that a Crown servant who accepted bribes to purchase properties held the bribe and any property acquired therewith on constructive trust for the Crown).

146. Attorney Gen. v. Blake, [2000] 4 All E.R. 385, 397 (H.L.) (Eng.).

147. 97 Eng. Rep. 676 (K.B. 1760).

Moses v. Macferlan could be considered to be a disgorgement for breach of contract case, albeit of a rather unusual nature. The unusual feature is that the claim concerned moneys paid by the plaintiff, Moses, to the defendant, Macferlan. Moses had endorsed four notes to Macferlan for the latter's convenience on the faith of Macferlan's undertaking that he would not pursue Moses as an endorser.¹⁴⁸ In breach of this agreement, Macferlan sued Moses on the notes in the Court of Conscience.¹⁴⁹ Moses pleaded the agreement in defense but the Court held it to be beyond its purview.¹⁵⁰ Macferlan therefore prevailed on his contract claim against Moses. Moses then brought a claim in King's Bench to recover the moneys he had lost to Macferlan in the Court of Conscience.¹⁵¹ Lord Mansfield held that such a claim would lie, as an alternative to a claim "on the agreement," and that Macferlan was "obliged by the ties of natural justice and equity to refund the money."¹⁵² Thus, this was not a claim for restitution of money paid to the defendant in the performance of an agreement, the typical case of restitution for breach of contract. Rather, it was Moses' claim for profits acquired through breach, albeit profits extracted from the very hide of Moses himself.

The restitutionary boundary claim for disgorgement for breach of contract thus has a rather respectable pedigree. Yet, it must be asked whether it is necessary to assign the doctrine exclusively to either the restitutionary or the contractual domain. From one perspective, the *Blake* doctrine appears contractual. It certainly offers a remedy for breach of contract. From another perspective, the *Blake* doctrine appears to be of a piece with other instances of disgorgement relief, which are generally considered to be remedies for a particular type of unjust enrichment.

148. *See id.*

149. *See id.*

150. *See id.*

151. *See id.* at 677.

152. *Id.* at 681.