The measure of restitution and the future of restitutionary damages

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Introduction

The development and understanding of awards of restitution for unjust enrichment has proceeded apace in the Commonwealth during the last two decades. Recently, courts across the Commonwealth have recognised that restitutionary awards are multi-causal: they are available for wrongdoing as well as for unjust enrichment. However, when restitutionary awards are made for wrongdoing they are rarely recognised explicitly. Descriptions include "licence fee damages", "reasonable royalties", "user fee damages", "negotiating damages" and "*Wrotham Park* damages". This article builds upon the recognition in England of the restitutionary nature of these awards and argues that it is possible to draw lessons for these cases of restitutionary damages for wrongdoing from cases where restitutionary awards are made for unjust enrichment. By doing so, this article also focuses upon one significant, and anomalous, restriction upon restitutionary damages which is not present in cases of restitution of unjust enrichment. This restriction concerns the confinement of these awards in the law of torts to proprietary torts. A case which is currently before the Supreme Court of the United Kingdom may present an opportunity to set the law back on the right course.

The multi causality of restitutionary awards

The law of unjust enrichment might seem an odd place to begin a discussion of restitutionary *damages.* However, the reason for this is that the Supreme Court of Canada and the House of Lords have both recently confirmed that restitution is multi-

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causal.[1] In 2007, a unanimous Supreme Court of Canada held that "[t]*here are at least two distinct categories of restitution: (1) restitution for wrongdoing; and (2) restitution for unjust enrichment."*[2] The same point was recently made by Lords Nicholls, Scott and Mance in the House of Lords in *Sempra Metals Ltd v HMRC*[3] where their Lordships drew a distinction between restitution for unjust enrichment and restitution for wrongdoing.[4] The High Court of Australia has also distinguished between unjust enrichment and breach of fiduciary duty.[5] Because restitution is multi-causal, an understanding of restitution in cases of unjust enrichment can assist to understand the operation of restitution in cases of torts and other wrongdoing.

The terminology of "restitution" in the law of unjust enrichment

The most important recent decision concerning restitution of unjust enrichment is the decision of the House of Lords in *Sempra Metals Ltd v HMRC*.[6] The background to *Sempra* involved Sempra as the lead claimant in a group litigation which arose after Sempra's success in the European Court of Justice in *Metallgesellschaft Ltd v IRC, Hoechst AG v IRC.*[7] The European Court of Justice had considered section 247 of the Income and Corporation Taxes Act 1988. That section enabled UK resident corporate groups to postpone the time at which they paid corporation tax. However, it withheld this advantage from corporate groups with subsidiaries resident in the UK and parent companies resident elsewhere in the EC. Such groups had to pay Advance Corporation Tax. The ECJ held that this disparity of treatment was contrary to European Community law, and directed the UK courts to provide disadvantaged groups with '*an effective legal remedy in order to obtain reimbursement or reparation*

[1] This argument had been forcefully made by Peter Birks in 1998: P Birks 'Misnomer' in W Cornish et al *Restitution, Past Present and Future* (1998) 1.
[2] *Kingstreet Investments Ltd v New Brunswick* [2007] SCC 1; [2007] 1 SCR 3 at [33]. The decision of the court was that the instant case fell within a third category of restitution based on constitutional principles (cf *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558). Unfortunately, the court assumed, without argument, that alternative analysis of a cause of action was not possible so that if restitution were awarded for constitutional reasons, an alternative claim could not be brought in unjust enrichment, such as for mistake or failure of consideration.
[3] [2007] UKHL 34; [2008] 1 AC 561.
[4] *Sempra Metals Ltd v HMRC* [2007] UKHL 34; [2008] 1 AC 561 at [116] (Lord Nicholls), [132]-[146] (Lord Scott), [230]-[231] (Lord Mance).
[5] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89 at [150].
[6] [2007] UKHL 34; [2008] 1 AC 561
[7] Joined cases C-397/98 and C-410/98; [2001] ECR I-1727.

of the financial loss which they [had] *sustained and from which the authorities* [had] *benefited*'.[8]

In *Sempra*, one question for the House of Lords was whether the claimant company could recover compound interest in a claim in unjust enrichment for restitution of the value that the defendant Commissioners had obtained from their free use of Sempra's payment.[9] The House of Lords held that such a restitutionary claim for unjust enrichment succeeded. Several important points were established. First, every Law Lord held that an action for restitution did not require any loss to be suffered by a claimant. The focus is on the benefit received by the defendant.[10] Secondly, each of the Lords in the majority on the measure of restitution carefully distinguished between an award of restitution and an award which focuses upon the actual profits made by the defendant.[11] The latter award of disgorgement is one which, in the law of wrongdoing, is commonly referred to as an account of profits. Lord Walker observed the following:[12]

> "*There is a clear need for a vocabulary, generally understood and accepted, to distinguish between (1) proprietary claims which may involve tracing in equity (as in Attorney General for Hong Kong v Reid [1994] 1 AC 324); (2) personal claims for an account of profits (that is, for a sum equal to the profits actually made by the defendant); and (3) personal claims for interest which represents (in a more or less conventional way) the benefit which the defendant is presumed to have derived from money in his hands.*"

In the minority, Lord Scott did not accept the difference between awards (2) and (3), and asserted that the restitutionary award in *Sempra* was "wholly conceptual".[13] One commentator has also described it as "illusory".[14] This is incorrect. The Revenue in

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[8] [2001] ECR I-1727 at [97].
[9] The question of the period during which the unjust factor of mistake had been operative had earlier divided the House of Lords in *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558.
[10] *Sempra Metals Ltd v HMRC* [2007] UKHL 34; [2008] 1 AC 561 at [28], [30]-[31] (Lord Hope), [116], [119] (Lord Nicholls), [144] (Lord Scott), [154] (Lord Walker- generally agreeing with Lords Hope and Nicholls), [231] (Lord Mance).
[11] *Sempra Metals Ltd v HMRC* [2007] UKHL 34; [2008] 1 AC 561 at [32] (Lord Hope), [117] (Lord Nicholls, [180] (Lord Walker).
[12] *Sempra Metals Ltd v HMRC* [2007] UKHL 34; [2008] 1 AC 561 at [180].
[13] *Sempra Metals Ltd v HMRC* [2007] UKHL 34; [2008] 1 AC 561 at [145] (Lord Scott).
[14] P Ridge 'Pre-Judgment Compound Interest' (2010) 126 LQR 279 at 288.

Sempra received something which it wanted for free. The free use of millions of pounds of money is not an illusory benefit, even if it later turned out that no profit had been made with the money. The free use of money is an immediate benefit and unjust enrichment is concerned with the valuation of benefits at the moment of receipt. It would be a great surprise to any lender of money or chattels that a defendant who obtained the use of the money or the chattel without paying for it did not immediately obtain any benefit. A car hire company does not refund the cost of the hire if the hiring party decides not to drive the car. A bank does not waive interest charges if the borrower squanders the money. However, if it turns out that the hiring party or borrower does not take subsequent advantage of the benefit—the car is not used or the money is squandered—a defence of subsequent change of position might arise.[15] The availability of such a defence will also depend on factors such as the legality of the defendant's subsequent actions or defendant's good faith or the defendant's knowledge of the circumstances.

In summary, awards (2) and (3) described by Lord Walker are fundamentally distinct and they need different labels. I have previously suggested a vocabulary in which the word "restitution", whether in the law of unjust enrichment ("restitution of unjust enrichment") or the law of wrongdoing ("restitutionary damages"),[16] is used to refer to an award which reverses a transfer of value from a claimant to a defendant, and therefore focuses upon the immediate benefit received by the defendant.[17] In contrast, the word "disgorgement" should be used where, in the law of wrongdoing, a personal award is made to disgorge actual profits made by a defendant.

The measure of restitution for unjust enrichment

One significant area of unjust enrichment concerns claims for restitution of a

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[15] A possibility mentioned by Lord Nicholls which might apply to a private person rather than a body like the Revenue: *Sempra Metals Ltd v HMRC* [2007] UKHL 34; [2008] 1 AC 561 at [145]

[16] There is debate about whether restitution for wrongdoing is appropriately described as a type of "damages". Lord Nicholls thought that "damages" was an "unhappy expression" in this context because of the association of damages with loss (see the comments of Lord Nicholls in A Burrows and E Peel *Commercial Remedies: Current Issues and Problems* (2003) 129 and his speech in *Attorney General v Blake* [2001] 1 AC 268 at 284). But exemplary damages and nominal damages show that there is no necessary link between damages and loss: see J Edelman *Gain-based Damages* (2002) chapter 1; and *Stevens v Premium Real Estate Ltd* [2009] NZSC 15 at [98]. The Court of Appeal in *Blake* had no such reluctance with the word "damages": [1998] Ch 439 at 458. See also *Stevens v Premium Real Estate Ltd* [2009] NZSC 15 at [99].

[17] See J Edelman *Gain-based Damages* (2002) chapter 3.

defendant's enrichment which was the result of the conferral of services rather than the payment of money. These claims were historically pleaded as the form of action for *quantum meruit* ("as much as it was worth"). Such a *quantum meruit* claim for the value of a claimant's labour which has unjustly enriched a defendant is now recognised as a claim for restitution of unjust enrichment.[18]

This point can be illustrated by reference to *Greenwood v Bennett*.[19] In that case Bennett entrusted his car to Searle who promised to repair it for £85. Searle fraudulently sold it to Harper who bought it in good faith and spent £226 on labour and materials repairing it. The car was subsequently sold by Harper but Bennett eventually recovered it. In the action in which Bennett recovered the car, Harper sought to recover the reasonable value of his labour and materials. The sum of £226 was sought from Bennett as restitution of Bennett's unjust enrichment. Bennett argued that he would only have been prepared to spend £85 to repair the car and that this should be the measure of his enrichment. In the leading speech, Lord Denning MR awarded £226. He said that *"It would be most unjust if* [Bennett] *could not only take the car from him, but also the value of the improvements he has done to it."*[20]

Although it is now well established that this restitutionary award focuses on the benefit to the defendant, there is controversy over the relevance of the price which that particular defendant *would have been prepared to pay.* In *Greenwood,* Harper's claim for the reasonable value of his services was not limited to the £85 that Bennett would have been prepared to pay for the repairs to the car. When restitutionary damages are awarded for *wrongdoing* the financial position of the claimant is generally irrelevant and hence the price which the defendant would have been willing to pay.[21] In contrast, in two recent unjust enrichment decisions the price which a

[18] Examples where a *quantum meruit* claim has been described as restitutionary or as part of unjust enrichment are *Mohamed v Alaga* [2000] 1 WLR 1815; *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 WLR 1752 at [4]; and *Greenwood v Bennett* [1973] QB 195 at 202; *Dimond v Lovell* [2002] 1 AC 384 at 397. If there is a contract in existence it could, of course, be a contractual claim- such as where a claimant and a defendant have contracted, expressly or by implication for the supply of goods or services at a reasonable price.
[19] [1973] QB 195.
[20] [1973] QB 195 at 202.
[21] *Irvine v Talksport Ltd* [2003] EWCA Civ 423. But cf the extreme cases of *Ministry of Defence v Ashman* [1993] 2 EGLR 102.

particular defendant was willing to pay was considered to be relevant to ascertaining the reasonable benefit received and, hence, the measure of restitution.[22] A limited reconciliation might be possible if the particular defendant's views are merely evidence of the reasonable value of those services to a similar defendant.[23] The focus is then upon the degree of abstraction, and relevant qualities of the defendant, to be ascribed to the reasonable recipient of such a benefit. Resolution of this issue is not simple. For instance, in the law of torts several different approaches have been taken to the relevant characteristics of the reasonable person when assessing whether a breach of duty has occurred. No clear conclusion can yet be drawn in relation to these claims for breach of duty[24] nor yet in the context of assessment of restitutionary awards.

The nature of all restitutionary awards

Although the precise nature of an award of restitution for unjust enrichment was not an issue before the House of Lords in *Sempra* recent cases have explored the meaning and nature of restitutionary awards. In *Kingstreet Investments Ltd v New Brunswick,*[25] the Supreme Court of Canada perfectly described the nature of a restitutionary award for unjust enrichment by explaining that

> *Restitution is a tool of corrective justice. When a transfer of value between two parties is normatively defective, restitution functions to correct that transfer by restoring parties to their pre-transfer positions. In Peel (Regional Municipality) v. Canada, [1992] 3 S.C.R. 762, McLachlin J. (as she then was) neatly encapsulated this normative framework: "The concept of 'injustice' in the context of the law of restitution harkens back to the Aristotelian notion of correcting a balance or equilibrium that had been disrupted"*

[22] *Benedetti v Sawiris* [2009] EWHC 1806 (Ch); *Amin v Amin* [2010] EWHC 528 (Ch). The former is subjected to searching criticism on this point by A Lodder "Unjust Enrichment and the Assessment of Quantum Meruit Awards (2010) 126 LQR 42.
[23] A Lodder "Unjust Enrichment and the Assessment of Quantum Meruit Awards (2010) 126 LQR 42.
[24] This point is discussed in detail in J Edelman "Torts and Equitable Wrongs" in A Burrows (ed) *English Private Law* (2006) at 17.46-17.53.
[25] [2007] SCC 1; [2007] 1 SCR 3 at [32]. See further, J Edelman *Gain-based Damages* (2002) chapter 3.

The same point has also been made in the High Court of Australia in relation to unjust enrichment: "[r]*estitutionary relief, as it has developed to this point in our law, does not seek to provide compensation for loss. Instead, it operates to restore to the plaintiff what has been transferred from the plaintiff to the defendant.*"[26] It is this focus on the immediate benefit received by a defendant, and the reversal of that transferred value, which shows why a restitutionary award does not focus on actual profits. In Lord Hope's succinct words in *Sempra*,[27] the (immediate) "*gain…needs to be reversed*".

However, as explained above, this rationale is not confined to instances of restitution of unjust enrichment. In relation to wrongdoing, Arden LJ has recently said that situations arise where "*there has been a transfer of value for which the wrongdoer must account*".[28] And in the Supreme Court of New Zealand, Tipping J has also observed that this same rationale underlies restitutionary damages (which he preferred to call "restorative damages"):[29] "*financial remedies designed to restore to the plaintiff the monetary value of what the plaintiff has transferred to the defendant when, in the circumstances, the law requires restoration of that value.*"

Restitutionary damages for wrongdoing

I turn now from restitution for unjust enrichment to restitution (or, as I prefer, "restitutionary damages") for wrongdoing. In the law of wrongdoing (including torts and intellectual property wrongs, breaches of contract and breaches of equitable duties), the award of restitutionary damages has traditionally been hidden behind labels such as "negotiating damages", "hypothetical licence fee", "reasonable fee damages", "reasonable licence fees" or "*Wrotham Park* damages". The reason I prefer the label "restitutionary damages" should be apparent from the above discussion, and the recognition in England, Australia and Canada that restitution is an award which might be given for *either* wrongdoing *or* unjust enrichment.

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[26] *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; 208 CLR 516 at [26] (Gleeson CJ, Gaudron and Hayne JJ) quoting *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 75 (Mason CJ).
[27] *Sempra Metals Ltd v HMRC* [2007] UKHL 34; [2008] 1 AC 561 at [28].
[28] *Devenish Nutrition Ltd v Sanofi-Aventis SA (France) & Ors (Rev 1)* [2008] EWCA Civ 1086 at [38].
[29] *Stevens v Premium Real Estate Ltd* [2009] NZSC 15 at [99].

A simple example suffices. Suppose a claimant is deceived by a defendant into paying £10,000 to the defendant. The claimant could rely on his mistake and bring an action in unjust enrichment against the defendant for restitution of the benefit mistakenly paid to the defendant: £10,000 plus the value of the use of that money to a reasonable person in the defendant's position for the period the defendant had it. But the claimant also has an action against the defendant for deceit. The concurrent availability of restitution for wrongdoing means that the claimant ought also to have a restitutionary action against the defendant based on the tort of deceit in the alternative to the claim in unjust enrichment based on mistake. The difference could be significant. A restitutionary claim based on wrongdoing might differ from a restitutionary claim for unjust enrichment in relation to limitation periods, private international law, or defences (such as change of position).[30]

In his speech in *Sempra,*[31] Lord Nicholls (with whom Lord Walker generally agreed) made this point explicit, repeating observations he had made earlier in his leading speech in *Kuwait Airways Corp v Iraqi Airways Co (No 6).*[32] Those observations concerned the award of '*Wrotham Park* damages' (named for *Wrotham Park Estate Co v Parkside Homes Ltd*[33]). Lord Nicholls described such claims as "*instances of restitution for wrongdoing as distinct from restitution for unjust enrichment*". His Lordship emphasised that in relation to torts such as conversion, "*the wrongdoer may well have benefited from his temporary use of the owner's goods. It would not be right that he should be able to keep this benefit.*" Lord Brown (as Simon Brown LJ), in a trespass case, summarised the point succinctly, explaining that an award based on gain by wrongdoing was '*a restitutionary award, ie damages calculated according to the value of the benefit received by the [defendant].. rightly decided not by reference to what subjectively the* [claimant] *would otherwise have done, but rather by an objective determination of* [value to the defendant].'

It is possible to trace the origins of the observations of Lord Nicholls and Lord Brown in relation to the availability of these restitutionary awards for wrongdoing (which are the parallel to awards of restitution for unjust enrichment). Lord Denning had made

[30] See further, J Edelman *Gain-based Damages* (2002) at 93-99.
[31] *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34; [2008] 1 AC 561 at [116].
[32] [2002] UKHL 19; [2002] 2 AC 883.
[33] [1974] 1 WLR 798.

similar observations in *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd.*[34] In that case the defendant unlawfully retained the claimant's switchboards in his theatre in order to make it more marketable for sale. He refused to return them and committed the tort of detinue. The trial judge assessed the damages based on the loss suffered by the claimant and deducted an amount from the market hire rate to represent the possibility that the claimant would not have been able to hire the switchboards elsewhere. On appeal to the Court of Appeal the full market hire rate was awarded. Denning LJ explained that the award would be available even if the owner had 'in fact suffered no loss'[35] and that the award focused upon the objective benefit to a person in the defendant's position, the full 'hiring charge for the period of the detention.'[36] This decision of Denning LJ was relied upon by Brightman J in *Wrotham Park Estate Co v Parkside Homes Ltd*[37] which, in turn, was relied upon by Lord Nicholls when he explained that restitutionary awards could be made in cases of wrongdoing.

Distinguishing restitutionary damages from disgorgement damages

Although restitution for wrongdoing, as a parallel action to restitution for unjust enrichment, has now been recognised by most of the House of Lords, along with courts in Canada, Australia and New Zealand, the nature and measure of the award of restitution for wrongdoing is still uncertain. However, in contrast with awards of restitution for wrongdoing, a different gain-based award which operates to strip actual profits is well recognised (particularly for equitable wrongdoing). The label "account of profits" is extremely well known for wrongs such as breach of fiduciary duty, breach of confidence and intellectual property infringements. The label I prefer for this award, which Justice Tipping has also recently adopted in the New Zealand Supreme Court,[38] is "disgorgement damages". I prefer to describe the account of profits by the label "disgorgement damages" for two reasons. First, "account of profits" is misleading. What the claimant is really seeking in these cases is not an

[34] [1952] 2 QB 246. He also cited *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyds Rep 359 a case in which Lord Denning MR emphasized that 'the measure of damages is not what the plaintiffs have lost but what benefit the defendant obtained.'
[35] *Strand Electric* at 254.
[36] *Strand Electric* at 255 (Denning MR).
[37] [1974] 1 WLR 798.
[38] *Stevens v Premium Real Estate Ltd* [2009] NZSC 15 at [102].

accounting procedure but an order—sometimes consequent upon the taking of an account, but not always—for the disgorgement of the defendant's profits.

The second reason why I prefer the label "disgorgement damages" is that the word "damages" helps to dispel the myth that the account of profits is an equitable remedy and is only available for equitable wrongdoing such as breach of fiduciary duty or breach of confidence. More than a century ago, in a case which has since been cited thousands of times, this award was recognised by the House of Lords. In *Livingstone v Rawyards Coal Company*,[39] the respondent had innocently mined under the appellant's land. No damage was done to the appellant's land. The appellant had sought disgorgement of the all profits made by the respondent from the mining represented by the value of the coal which the defendant had extracted. The House of Lords had held that the appellant was only entitled to nominal damages because no loss had been suffered. However, all of the Lords indicated that if there had been evidence of 'bad faith or sinister intention'[40] the appellant could have recovered the profits obtained by the defendant. In *Broome v Cassell & Co*,[41] Lord Diplock referred to the *Livingstone* case and acknowledged that the goals of this award of disgorgement damages were mirrored in the profit-stripping (second) limb of exemplary damages for cynical breach.

A principled approach to restitutionary damages and disgorgement damages

Although, as we have seen, the award of restitutionary damages is the parallel action to restitution of unjust enrichment, there is an anomalous restriction in restitutionary damages cases which does not exist in cases of unjust enrichment. This restriction is that restitutionary damages for torts are only available in cases of "proprietary" torts. This restriction was recently enunciated in *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)*.[42]

[39] (1880) 5 App Cas 25.
[40] *Livingstone* above at 31 (Earl Cairns LC), 34 (Lord Hatherley), 39 (Lord Blackburn).
[41] [1972] AC 1027 at 1129.
[42] [2008] EWCA Civ 1086, [2009] Ch 390.

In *Devenish*, a French company called Sanofi-Aventis SA had conspired with other companies and formed cartels for the sale of vitamins. These actions were in breach of Article 81 of the EC Treaty. They were found liable for these infringements by the European Commission and large fines were imposed. Devenish Nutrition Ltd had purchased vitamins and vitamin products from these cartel participants and Devenish had sold them on to its customers. Devenish brought a common law claim against the respondent cartel participants for breach of statutory duty based on the infringements of Article 81. The respondents accepted that a claim for compensatory damages was available for this infringement. But Devenish also claimed an account and disgorgement of the respondents' profits obtained as a result of these deliberate infringements. The Court of Appeal upheld a strike out of this additional claim. The leading decision was given by Arden LJ. Although her Ladyship referred to the claim for disgorgement of profits as "restitutionary" damages,[43] she did recognize that award was separate and distinct from a (true) restitutionary award "*where its purpose is simply to cause the reversal of a benefit conferred by the claimant*". As explained above, it is simpler, and consistent with the meaning of restitution in the law of unjust enrichment, to describe the former (profit-stripping for wrongdoing) as "disgorgement damages" and to reserve the label "restitutionary damages" only for awards which cause a reversal of the benefit immediately transferred to a defendant by some wrongdoing.

The majority of Lady Justice Arden's speech was devoted to the state of the law concerning (what I have described as) disgorgement damages. Her Ladyship commenced with the suggestion that:

> *"the law on remedies for interference with property, damages in lieu of an injunction, damages for breach of fiduciary duty and breach of contract should be coherent and that the same remedies should be available in the same circumstances, even if the cause of action is different. On that basis, a restitutionary* [disgorgement: my insertion] *award is available in tort unless it is precluded by Wass or Halifax. In my judgment, it is precluded by Wass.*

[43] [2008] EWCA Civ 1086, [2009] Ch 390 at [3].

> *However, if I am wrong in that conclusion, it is a condition of a restitutionary* [disgorgement: my insertion] *award that exceptional circumstances of the kind described in Blake should be shown. That condition is not satisfied in this case, principally because on the assumed facts damages would be an adequate remedy."*

The starting premise of Arden LJ was therefore that the law in relation to disgorgement damages ought, in principle, to apply to all equitable and common law wrongdoing. In every case the fundamental question ought to be whether 'exceptional circumstances' can be shown. This requirement for 'exceptional circumstances' derives from *Attorney General v Blake*.[44] Lord Nicholls explained that those circumstances involved the following:[45]

> *"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."*

These 'normal' remedies will be inadequate when they provide insufficient deterrence of the relevant wrongdoing.[46] This meaning is clear because Lord Nicholls was drawing from the well established rationale for disgorgement in fiduciary duty cases, namely that disgorgement should be available because of a need to deter breach. Lord Nicholls referred to the ability to characterise some contractual rights as fiduciary as being one way to avoid inadequacy. Further, his Lordship gave as an example of "exceptional circumstances, where those remedies are inadequate" where "*the plaintiff had a legitimate interest in preventing the defendant's profit-making activity*

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[44] [2001] 1 AC 268.
[45] [2001] 1 AC 268 at 285.
[46] The headnote to the Appeal Cases report is incorrect in its suggestion that "exceptional circumstances' means where the normal remedies are inadequate *compensation* for breach of contract. Apart from the fact that this is not what Lord Nicholls meant, if compensatory damages were inadequate to compensate for loss then the solution would surely be to increase those damages until they *were* adequate to perform their compensatory function.

and, hence, in depriving him of his profit." In other words, those remedies will be inadequate when there is a further need to deter the defendant's profit making activity.

The suggestion of Arden LJ is highly principled, and could bring a great deal of consistency to this area of gain-based damages for wrongdoing. It would not mean that disgorgement damages are available in the same circumstances for every wrong. It merely means that the same question should be asked: is a disgorgement award needed to deter wrongdoing? Thus, in cases of breach of fiduciary duty, there is such a need for deterrence, to hold a defendant to its duties, that disgorgement should be awarded whenever a profit is made which exceeds the claimant's loss. In those cases, disgorgement of profits will be ordered even in cases of innocent breach.[47] A claimant will always have a legitimate interest in deterring profit making because that is the very purpose of the "no profit" fiduciary rule. But in ordinary cases of breach of contract, deterrence of breach is not essential to the functioning of commerce nor an aspect of the argreement. So disgorgement of profits will not be ordered even if the breach of contract is intentional; it will only be ordered where there is some additional legitimate interest in preventing the defendant's profit-making. The same approach would mean that for torts, the conclusion should be (as it has been for half a century in relation to exemplary damages)[48] that deterrence, and disgorgement, is always required where the tortfeasor has acted intentionally or cynically, in breaching the claimant's rights.[49]

Just as Arden LJ has suggested a principled basis upon which disgorgement damages might be awarded, recently Sales J suggested a principled basis for the award of restitutionary damages. In *Vercoe v Rutland Fund Management Ltd*[50] Sales J made an award of restitutionary damages for a breach of confidence. He observed that although these awards of a reasonable fee are most commonly awarded for infringement of property rights (including intellectual property rights) it is possible that the law might develop to allow this award generally in cases involving rights "*of*

[47] However, even the strictness of this rule, and the need for such deterrence has recently been questions: see *Murad v Al Saraj* [2005] EWCA Civ 959.
[48] *Broome v Cassell & Co* [1972] AC 1027 at 1129.
[49] *Livingstone v Rawyards Coal Company* (1880) 5 App Cas 25.
[50] [2010] EWHC 424 (Ch).

a kind… regularly bought and sold in a market, [where] damages assessed by reference to a notional buy-out fee may often represent an appropriate and fair remedy." Such a development of the law relating to restitutionary damages would be desirable, principled and easily comprehensible. A defendant who, by committing a wrong, obtains an immediate wealth benefit from the claimant, ought always to pay restitutionary damages representing the objective value of that benefit received. This is the position in relation to unjust enrichment. As we have seen, a defendant who receives an immediate benefit from the claimant, is liable to make restitution if the transfer of that benefit was "unjust" (such as by some unjust factor of mistake, duress, undue influence or failure of consideration). Why should the result be any different if the defendant receives the same benefit as a result of *wrongful* conduct?

An anomalous restriction on restitutionary damages

Unfortunately, although these recent cases have pointed the way forward for a principled approach to restitutionary and disgorgement damages, such approaches will now have to wait for a decision of the Supreme Court. In *Devenish*, the Court of Appeal considered that it was bound by the decision in *Stoke-on-Trent City Council v W & J Wass Ltd*[51] so that in the law of torts both disgorgement damages and restitutionary damages are available only for proprietary torts. Although the Court of Appeal rightly considered itself so bound, this restriction is anomalous and is akin to the 'cause of action' restriction on exemplary damages which was finally rejected by the House of Lords in *Kuddus v Chief Constable of Leicestershire Constabulary*.[52]

In *Wass* the defendant had committed the tort of nuisance by operating a market in an area in which the claimant had exclusive market rights. The gain-based damages award sought in *Wass* was what I have described above as restitutionary damages. It was referred to in that case as "user damages". Two approaches were taken in the Court of Appeal: one by Nourse LJ and one by Nicholls LJ (Mann LJ agreeing with both of them). Nicholls LJ refused the claim because[53] '*the protection which the law affords to the owner of a market right is limited to protecting him against being*

[51] [1988] 1 WLR 1406.
[52] [2001] UKHL 29, [2002] 2 AC 122.
[53] [1988] 1 WLR 1406 at 1418.

disturbed in the enjoyment of his right'. In other words, unlike a monopoly right conferred by a patent, the very nature of the market right conferred upon the claimant was simply a right to be compensated for losses as a result of disturbances in the claimant's enjoyment of the market. Defined in such a way, there could be no room for restitutionary damages: the nature of the right was only ever to prevent losses.

In contrast, Nourse LJ did not define the cause of action so narrowly. Instead, Nourse LJ simply considered, generally, whether the case fell within exceptions to the general principle that damages are compensatory to allow the claimant to recover what I have described as restitutionary damages. Nourse LJ considered that the exceptions where such an award is allowed were cases of trespass to land, detinue, patent infringement and, in some cases, of breach of contract. The approach of Nourse LJ was relied upon by the Court of Appeal in *Surrey CC v Bredero Homes Ltd*,[54] where a developer who developed land in breach of a restrictive covenant was held liable to the covenantee only for nominal damages. However, in the leading speech in *Attorney General v Blake*,[55] Lord Nicholls rejected the narrow reasoning of Nourse LJ. His Lordship said that: '*in so far as the* Bredero Homes Ltd *decision is inconsistent with the approach adopted in the* Wrotham Park *case, the latter approach is to be preferred*.'

The Court of Appeal in *Devenish* could have distinguished *Wass* in two ways. First, the Court could have limited *Wass* to the narrower decision of Nicholls LJ and held that for any tort which was actionable *per se* an award of either restitutionary damages or disgorgement damages could be available. Alternatively, the Court of Appeal could have confined *Wass* to cases of restitutionary damages and developed disgorgement damages in the principled manner foreshadowed by Arden LJ. Neither method of distinguishing *Wass* would have been wholly satisfactory. Since Mann LJ agreed with both Nourse LJ and Nicholls LJ, the decision of Nourse LJ could not be ignored. And, it would arguably have introduced even more arbitrariness into English law if the Court of Appeal had accepted that restitutionary ("user") damages were unavailable for any torts except proprietary torts, yet disgorgement damages would be more widely available. Both are species of gain-based damages. Further, restitutionary

[54] [1993] 3 All ER 705.
[55] [2001] 1 AC 268.

damages, with their concern to reverse all wrongful transfers, should be more readily available than disgorgement damages which are needed only where other remedies do not provide sufficient deterrence.

The future of restitutionary damages

A recent case which may hold the future for the nature and measure of restitutionary damages for wrongdoing is *Bocardo SA v Star Energy UK Onshore Ltd*.[56] This decision has been given leave by the Supreme Court. In *Bocardo,* the claimant owned land which included sub-surface strata through which the defendant's pipelines trespassed. The primary question before the Court of Appeal was how to quantify the damages arising from the defendant's trespass. The Court of Appeal considered that the defendant had committed only a 'technical trespass' of its pipes far beneath the claimant's land. The loss that was suffered by the claimant was nominal. The trespass of the defendants did not cause any damage to the claimant's land.[57] Further, the defendant could have exercised its statutory rights and paid £82.50 to the claimant to permit it to run its pipelines below the claimant's land. For these reasons, the Court of Appeal considered that there was an 'attraction' in making an award of only nominal damages. However, the claimant sought '*Wrotham Park* damages' and relied upon the *obiter dicta* of Lord Nicholls in the leading speech in *Kuwait Airways Corp v Iraqi Airways Co (No 3)*[58] that:

> '*the wrongdoer may well have benefited from his temporary use of the owner's goods. It would not be right that he should be able to keep this benefit. The court may order him to pay damages assessed by reference to the value of the benefit he derived from his wrongdoing.*'

Adopting this approach, the Court of Appeal held that the defendant could not be left better off by committing a wrong and that although the claimant was in a weak bargaining position (as a result of it vulnerability to the exercise of statutory powers for a very small cost to the claimant), the court awarded £1,000 damages because

[56] [2009] EWCA Civ 579.
[57] [2009] EWCA Civ 579 at [91].
[58][2002] UKHL 19; [2002] 2 AC 883 at [87].

'*lawyers are expensive and time wasted on legal wrangling would be petroleum – and so money – lost*'.[59]

An issue likely to be pursued in the Supreme Court is whether £82.50 was the proper statutory assessment of compensation for the infringement. But irrespective of this issue of statutory construction, the case offers an opportune moment for the Supreme Court to clarify the difficult issues raised in this area. First, the Supreme Court could take the opportunity to clarify the nature of the award which is variously described as "licence fee", "reasonable royalty", "*Wrotham Park* damages", or "negotiating damages". As explained above, the most natural explanation of these awards is that they are "restitutionary damages"; they are the counterpart to awards of restitution for unjust enrichment. Secondly, the Supreme Court could take the opportunity to clarify the way that these damages are measured. Consistently with the approach to restitution of unjust enrichment, the result ought to be an objective measure of the benefit to the defendant: how much would a reasonable person in the defendant's position pay for the opportunity which the defendant obtained? Thirdly, the Supreme Court could take the opportunity, albeit in *obiter dicta*, to reject the anomalous *Wass* restriction on restitutionary damages for torts which confines the awards only to "proprietary torts".

Conclusions

There is now widespread recognition in England and the Commonwealth that restitution is a multi-causal award: restitution is not confined to unjust enrichment; it is also an award for wrongdoing; it might also be an award for other events, such as for policy or constitutional reasons. It is very likely that the multi-causality of restitution will also be recognised by the American Law Institute when it releases the *Restatement of the Law Third, Restitution and Unjust Enrichment.*

The last two decades have seen considerable advances in the law relating to restitution of unjust enrichment. There have been numerous important decisions which have now clarified that the measure of restitution for unjust enrichment focuses on the value immediately received by the defendant. That value is measured objectively, as the

[59] [2009] EWCA Civ 579 at [119].

value to a reasonable person in the defendant's position. However, very few decisions which have considered, explicitly, restitution (or "restitutionary damages") for wrongdoing. Awards which focus on the value immediately obtained by a reasonable person in the defendant's position have been variously described as "negotiating damages", "user damages", "reasonable royalties", "licence fee damages" or "*Wrotham Park* damages". Although Lord Steyn, Lord Hope, Lord Nicholls, Lord Hoffmann, Lord Mance and Lord Brown have all recognised that such awards are focused on the gain to the defendant, lower courts have not always embraced this conception.[60] By embracing the decisions and *obiter dicta* which have recognised these awards as restitution for wrongdoing (or, as I prefer, "restitutionary damages"), it should now be possible to draw lessons from the nature and measure of restitution for unjust enrichment.

One note of caution must be sounded. Just as one must exercise caution to separate award of restitution for unjust enrichment from restitutionary damages for wrongdoing, so too caution must be exercised so that these restitutionary awards do not crowd out other possible analyses. In cases of breach of contract, for instance, some of these cases can be alternatively assessed as awards of what I have previously described as "performance damages".[61] These awards focus upon the value of a promised performance which has not been received and, in Canada, have been described as a monetary "substitute for an order of specific performance".[62] As Lord Millett observed in comparing this award with restitutionary damages, there is room

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[60] See the speeches of Lords Nicholls and Mance in *Sempra Metals Ltd v HMRC* [2007] UKHL 34; [2008] 1 AC 561; the decision of Simon Brown LJ in *Gondal v Dillon Newsagents Ltd* [2001] RLR 221 and the leading speech of Lord Nicholls (with which Lords Steyn, Hoffmann and Hope agreed) in *Kuwait Airways Corp v Iraqi Airways Co (No 6)* [2002] UKHL 19; [2002] 2 AC 883.

[61] J Edelman *Gain-based Damages* (2002) at 182-185. See also *Mirant Asia-Pacific Construction (Hong Kong) Ltd v Ove Arup & Partners International Ltd* [2007] EWHC 918 (TCC).

[62] *Semelhago v Paramadevan* [1996] 2 SCR 415. This also seems to have been the analysis of the Privy Council in *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45. This argument should not be confused with the argument of Robert Stevens for a species of damages which he has described as "substitutive damages". Stevens argues that these are damages which are a substitute for the claimant's rights, valued at the time of infringement, and awarded irrespective of any loss suffered and not as the cost to fulfil performance of the duty: R Stevens *Torts and Rights* (2007) 60 et seq. There are numerous problems with this argument which I have addressed in J Edelman "The Meaning of Loss and Enrichment" in R Chambers et al *Philosophical Foundations of Unjust Enrichment* (2009) chapter 8. Most recently, Sales J rejected the assertion in Stevens' argument that the full value of a property right should always be awarded as a "substitute" for the right when it is infringed: see *Checkprice (UK) Ltd v Her Majesty's Revenue and Customs* [2010] EWHC 682 (Admin). It is also inconsistent with *Performance Cars Ltd v Abraham* [1962] 1 QB 33 and all of the cases which have followed that decision.

for both approaches: the approaches "*will often produce the same measure of damages although they will not always do so.*"[63]

[63] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 at 588.