

**THE AVAILABILITY OF GAIN-BASED DAMAGES FOR BREACH OF
CONTRACT**

by

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ABSTRACT

This thesis examines, from an economic perspective, the problem of determining when and whether gain-based damages are an appropriate response to a breach of contract. Starting from the premise that such a remedy is needed to protect the integrity of contract's institutional function, consideration is then given to the nature of that function and how gain-based damages may support it. The conclusion reached is that contract's legal function is essentially economic and that gain-based damages may be of aid to courts in remedying inefficient outcomes arising from breach of contract, preventing economically inefficient breaches. The nature of a gain-based remedy is then explored, and enquiry is made into the potential means for developing such a remedy. After considering the potential to adapt a number of existing remedies, the thesis concludes that only an entirely novel development will fulfil the function of the remedy required, as adapting existing remedies will only create difficulties in other areas of law.

TABLE OF CONTENTS

ABSTRACT	ii
TABLE OF CONTENTS	iii
ACKNOWLEDGEMENTS	iv
DEDICATION	v
CHAPTER 1: What is ‘contract’?	1
1.1 How did it get that way?	4
CHAPTER 2: Why gain-based damages for breach of contract?	11
2.1 Why has it not happened yet?	11
2.2 What’s wrong with efficient breach?	14
2.2.1 The ‘quality’ of contractual entitlements	15
2.2.2. The cost of foregone opportunity	28
2.3 What does this have to tell us about the availability of gain-based damages?	39
2.3.1 Application to a situation involving a plea for an actual gain-based remedy	41
2.4 Why conventional damages do not work in these circumstances	45
2.4.1 Why the remedy cannot be compensatory	46
2.4.2 Why gains not specifically expected cannot come within ‘expectations’	49
2.5 Frustration – an odd inversion of my point	52
2.6 Further similarity to unexpected events inflicting loss	54
2.7 Summary: when efficient breach does not hold true	58
CHAPTER 3: What are gains-based damages?	59
3.1 Types of remedies	59
3.2 The unjust enrichment principle	60
3.3 The deterrence of wrongdoing	63
3.4 The protection of contract as an institution	66
3.4.1 Why ‘compensatory’ may be misleading	68
3.4.2 Back to quantification	69
CHAPTER 4: Can we find the Equity?	74
4.1 Equitable obstacles	74
4.1.1 Clean hands	77
4.1.2 Discretionary nature of relief	78
4.2 Attempting to force a fit	80
4.2.1 The fiduciary principle	81
4.3 Significance for the original doctrine	91
4.4 Significance for Equity	92
4.5 Present remedies	93
4.5.1 Specific performance	93
4.6 The Account of Profits	101
4.6.1 What if we revise?	104
4.7 Verdict on the appropriateness of an equitable response	106
CHAPTER 5: Conclusion	108
BIBLIOGRAPHY	110

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CHAPTER 1: What is 'contract'?

What is 'contract'? The perspective I will adopt in this thesis is that 'contract' is essentially an institution, or, in my own words, a mechanism to facilitate cooperative human behaviour pursuant to an underlying purpose. Describing contract in these terms, however, begs the question: what precisely is its purpose? Contract in a common law setting is almost synonymous with freedom of choice; the system affords parties a great deal of latitude to determine for themselves the reasons why they will enter contracts, in what form, and when. The parties' plurality of purpose, however, is not coextensive with the purpose of contract, which is unitary. That purpose in my view is chiefly an economic one, and may be described as enabling and encouraging the creation of surpluses in an efficient manner.¹ It might be said that, given the frequent and sometimes frustrating separation between law in theory and practice, such a claim may be rather bold, but this thesis will show that the conceptual unity of this branch of law is demonstrable. Indeed, I do not see how the common law of contract could have developed thus otherwise.

In economic terms the efficiency of a transaction would be measured according to the quantum of 'surplus' realised by the parties relative to their cost of entering into the transaction i.e. the greater the surplus generated over and above the cost of attaining it,

¹ See Anthony T Kronman & Richard A Posner, *The Economics of Contract Law* (Boston; Toronto: Little Brown & Co, 1979) at 5 [Kronman & Posner].

the more efficient the transaction.² That surplus may be thought of as the benefit to the parties of entering into the transaction. Direct ascertainment or measurement of the surplus is, as I will elaborate, something of an epistemological challenge, but as ostensibly rational wealth maximizers, contracting parties are generally assumed to only contract where there is some benefit to them over and above the cost of doing so.³ As such, depending on the ‘quality’ of the contractual entitlements transferred to the relevant parties, the existence of a surplus is something of a matter of inference, but it is the chief reason to engage in contractual relations from an economic perspective and, as I will argue, the chief justification for the institution of contract.⁴

The exposition in the preceding paragraph may be of some academic interest to the lawyer, but it does not explain why promoting the efficient creation of surpluses can plausibly be argued to be the underlying purpose of contract as an institution. This purpose only becomes apparent when we consider the larger significance of the surplus, which is that it not only confers a benefit upon the parties to the transaction, but is actually thought to convey a benefit upon wider society by virtue of the fact that the surplus will not be consumed entirely by the parties.⁵ As such, the economic perspective confirms the long-standing intuitive common law assumption that mercantile activity is in

² Jeffrey L Harrison, *Law and Economics in a Nutshell* 4th ed (St Paul, MN: Thomson/West, 2007) (the author explains the basic concept of efficiency in terms of measuring output over cost/input at 28 – 30).

³ Richard A Posner, “The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication” (1979-1980) 8 Hofstra L Rev 487 at 489; J Coleman, “Efficiency, Utility, and Wealth Maximisation” in AW Katz, ed, *Foundations of the Economic Approach to Law* (New York, OUP, 1998) 11 at 14 [Katz].

⁴ Gary Becker, “The Economic Approach to Human Behaviour” in Katz, *supra* note 4 at 6; Melvin Aron Eisenberg, “The Principles of Consideration” in Richard Craswell & Alan Schwartz, eds, *Foundations of Contract Law* (New York, OUP, 1994) 224 at 225 [Craswell & Schwartz].

⁵ Kronman & Posner, *supra* note 2 at 2; RA Posner, “Utilitarianism, Economics, and Legal Theory” (1979) 8 J Legal Stud 103 at 123 [Posner, “Utilitarianism”].

the interest of society. The efficiency with which such surpluses are generated, therefore, would appear to be of significant interest to the law as being in the interests of the greater good; and the way in which such transactions are often effectuated in a common law setting, and thus surpluses realised, is by contract. The efficient maximisation of surpluses (or wealth) is therefore the most likely candidate, in my view, for the underlying purpose of the law of contract as a common lawyer would understand it.

This explanation of contract's underlying purpose is the most significant foundational assumption of my thesis, required to justify my analysis and prescription. As such, it is insufficient to merely state it as a reasonable or plausible inference without offering any further justification as to why we ought to view or analyse contract in this way. To do so would render my conclusions persuasive at best; dubious at worst. The argument is not merely that we 'can' perceive contract in this way, but that we should: because modern contract law internalised this perspective during its genesis. A consideration of the economic ramifications of the present state of the law is therefore the best means of understanding whether the law on any particular point is in the interests of the overall institution, and thus its constituency. The following section will consider how the modern law of contract came to be permeated by economic thinking.

1.1 How did it get that way?

Rather bold claims are sometimes made by proponents of the law and economics movement for the primacy of economic analysis in explaining law as a phenomenon.⁶ In some circumstances this argument is highly persuasive, in others such as the ‘market for rape’ it appears far more dubious, if not repulsive.⁷ At the outset of this section, I would like to stress that I do not view economics as a Rosetta stone for understanding law in all of its varying permutations. Even in respect of contracts there is room to argue that the law is not solely concerned with the maximization of wealth. There is after all a moral complexion to the idea of enforcing promises. A layman for instance, if quizzed as to the underlying reason for enforcing promises, might respond that it is simply “wrong” for a man to break his word. That lay-understanding of the enforcement of contracts may once have been the law’s underlying *raison d’être*, but if we examine the record over a period of centuries we can see that the common law exhibits tendencies more mercantile than sentimental.

Modern contract law is often thought to have had its genesis during the industrial revolution in England running from the late eighteenth century through to the mid-nineteenth century, when it developed many of the aspects discussed in this thesis.⁸ To understand how far contract has come, however, and how removed it is from the moral

⁶ RA Coase & Francesco Parisi, eds, *Economic Foundations of Private Law* (Cheltenham, UK; Northampton, MA: Edward Elgar Publishing, 2002) at x.

⁷ JJ Donohue & Ian Ayres, “Posner’s Symphony No.3: Thinking about the Unthinkable”, Book Review of *The Economic Analysis of Law* by Richard A Posner, (1986-1987) 39 *Stan L Rev* 791.

⁸ MP Furmston, *Cheshire, Fifoot & Furmston’s Law of Contract*, 15th ed (Oxford: OUP, 2007) at 13-14 [Furmston, *Cheshire’s Law of Contract*].

ethos referred to above, we need to look back to the beginning of contract in English law when it was known as *assumpsit* or “action on the case”.⁹

The development of the action of *assumpsit* and the move away from its predecessor action, the more narrow ‘action in debt’, began in the fifteenth century.¹⁰ The move away from the action in debt, which strictly speaking did not enforce ‘agreements’ or promises, but rather a form of legal claim for a given sum that arose from the operation of the law itself, was something of a seismic shift in English law.¹¹ Prior to this, the idea of enforcing a promise in and of itself was almost entirely foreign, and as such the limitations and requirements of such a form of action were at the outset ill-understood and ill-defined.¹²

Coincidentally, at the same time that common law was attempting to formulate guidance or rules stipulating when an action would lie in *assumpsit* and thus when a valid contract would exist, the Chancery was similarly attempting to formulate guidance in relation to ‘use’.¹³ Both systems semi-independently settled on the term ‘consideration’, and the requirement of its existence as the touchstone of the enforceability of ‘contracts’ and ‘uses’ respectively.¹⁴ The equitable conception of consideration developed by the Chancery – as one might expect – had a distinctly moral character, and explicitly

⁹ Sir William Holdsworth, *A History of English Law*, 2nd ed (London: Methuen & Co, 1937) vol 8 at 1 [Holdsworth]; Furmston, *Cheshire’s Law of Contract*, *supra* note 9 at 5.

¹⁰ Furmston, *Cheshire’s Law of Contract*, *supra* note 9 at 7-8.

¹¹ *Ibid.*, at 6.

¹² *Ibid.*, at 7-8.

¹³ Holdsworth, *supra* note 10 at 4-5.

¹⁴ *Ibid.*

included “natural love and affection” among those things which qualified.¹⁵ This equitable conception had a particularly strong influence on common law in the sixteenth and seventeenth centuries as it grappled with the novelty of enforcing promises or agreements de jure, and as a result the doctrine of consideration as applied in relation to assumpsit was very different from our understanding of consideration today.¹⁶ See for instance the dictum of Scroggs CJ in *Dutton v Poole* where he stated:¹⁷

...[There] was such apparent *consideration of affection* from the father to his children for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children. [Emphasis added.]

Against this background, at this point in legal history the underlying theory of consideration – and thus ‘contracts’ – was far more coextensive with the (supposed) ideas of the ordinary layman. The ensuing centuries would, however, see a shift in the common law that reflected the developing ideas and attitudes of the men that comprised the bench and bar.

Where Chancery was historically influenced by men preoccupied with the world to come, it was men grounded in the present who had the biggest influence on the medieval common law. As P.S. Atiyah describes in his seminal work *The Rise and Fall of Freedom of Contract*, the early bar was thick with the younger sons of landed gentry who, by misfortune of late birth, were without an estate to inherit and therefore lacked independent means.¹⁸ Left to fend for themselves, and unable to practice collectively at

¹⁵ Ibid.

¹⁶ Holdsworth, *supra* note 10 at 12.

¹⁷ *Dutton v Poole* 1793 2 Lev 210 at 212-213, 83 ER 523 at 524.

¹⁸ See PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, UK: Oxford University Press, 1979) at 114.

the time, these economic orphans of privilege would make an ideal audience for the principle of laissez faire.¹⁹ It would be centuries of course before such ideas would emerge openly, or find their way into the minds of English lawyers, but the historical record tends to indicate that some glimmer of these ideas lurked beneath the surface of the law reports centuries before anyone would coin the term ‘economy’.²⁰ Lord Coke’s hostility towards monopolies, for instance, is well documented and deemed highly significant in the context of civil rights (on the basis that a prohibition of monopolies was primarily justified because of their perceived interference with the freedom of subjects).²¹ It is perhaps less well known that his Lordship’s antipathy to monopolies extended to their perceived inefficiency and the hardship they created for common people, demonstrated by his “inaccurate” reporting of the monopolies case.²² In that case, the justices before whom the matter was decided neglected to consider the question of the inherent validity of any monopoly granted by the Crown.²³ In the decision as reported by his Lordship, however, the justices are said to have impugned all monopolies for the inequitable hardship of depriving subjects of competition in the market for the goods they consume, and others of the opportunity to earn a livelihood, thus rendering most monopolies simply illegal and therefore void.²⁴ As such, it would appear that his

¹⁹ Ibid., at 112-114.

²⁰ Ibid.

²¹ See Sir Edward Coke, *The second part of the institutes of the laws of England: containing the exposition of many ancient and other statutes* vol 1 (London: W Clarke & Sons, 1809) (Making of Modern Law) (“Generally all monopolies are against the Great Charter, because they are against the [freedom] and liberty of the subject, and against the law of the land.” at 47).

²² Atiyah, *supra* note 19 at 118; *The Case of Monopolies* (1572-1616) 11 Co Rep 84, 77 ER 1260.

²³ Atiyah, *supra* note 19 at 118; See also *The Case of Monopolies* (1572-1616) 11 Co Rep 84, 77 E.R. 1260 (Lord Ellesmere’s Observation at 88a)

²⁴ *The Case of Monopolies* (1572-1616) 11 Co Rep 84 at 86b, 77 E.R. 1260 at 1263.

Lordship's preference for commercial freedom, apart from its apparent political or ideological connections, had a deeply considered substantive aspect as well.²⁵

This approach appears to have had an ongoing influence on a number of his Lordship's successors who applied his reasoning in later centuries, demonstrating a continuing enmity towards monopolies as well as oligopolistic and anti-competitive behaviour. In other words preferring substantive freedom of contract to more formalistic interpretations of the same ideal.²⁶

Moving forward in time to the industrial revolution, Lord Coke's successors had grown into an intellectually robust and well established class of professionals.²⁷ As a cohort, their economic life was well and truly separate from the outgoing agrarian model of their ancestors, and they were poised to participate in and reap the benefits of the economic upheaval of the age. Far from being inimical to change, they went along with it, and this extended not only to their practices but their intellectual disposition as well.²⁸ The intellectual climate in which these gentlemen found themselves was dynamic and, more importantly, not at all as fractured as the intellectual landscape is today; a humanities Pangaea in contrast with our looser archipelago.²⁹ As such, the extra-curial and extra-professional discussions in which lawyers and judges could meaningfully participate

²⁵ David Little, *Religion, Order, and Law: a study in pre-Revolutionary England* (New York, Harper & Row, 1969) at 244.

²⁶ Atiyah, *supra* note 19 at 125-127, 393.

²⁷ *Ibid.*, at 250-251.

²⁸ *Ibid.*

²⁹ *Ibid.*, at 293-294.

were far broader than they are today, ranging from moral philosophy to the then fledgling field of economics.³⁰

Authors such as Atiyah are of the view that such exposure must inevitably have had an influence on the development of the rapidly evolving field of contract.³¹ Such claims are difficult to prove conclusively, but we can see evidence of a metamorphosis whereby the ancient action premised in part on the sanctity of promises became primarily concerned with profits and the betterment of society. Explicit references to such underlying ideological influences are unfortunately scant to non-existent, but tantalizing glimmers of an underlying purpose or rationale consistent with that set out in section 1.1 are there.

Consider for instance the following passage from the judgment of Sir George Jessel MR in *Printing and Numerical Registering CO v Sampson*:³²

...if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice.

In a similar vein to the decision of Lord Coke CJ in the monopolies case some centuries earlier, there is also the dictum of Lord Macnaghten in *Nordenfelt Guns & Ammunition Co v Nordenfelt*:³³

...[the] true view at the present time I think, is this: *The public have an interest in every person's carrying on his trade freely*: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special

³⁰ Ibid.

³¹ Ibid.

³² *Printing and Numerical Registering CO v Sampson* (1874-75) LR 19 Eq 462 (Ch) at 465.

³³ *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company* [1894] 1 AC 535 HL (Eng) at 565.

circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable - reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities...[Emphasis added.]

Moving into the 'modern era' we can see in *Balfour v Balfour* what one could describe as an assertion that the old moral complexion of consideration had, by the beginning of the twentieth century, given way to an entirely different paradigm:

Agreements such as these are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. *The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts.* The terms may be repudiated, varied or renewed as performance proceeds or as disagreements develop, and the principles of the common law as to exoneration and discharge and accord and satisfaction are such as find no place in the domestic code. The parties themselves are advocates, judges, Courts, sheriff's officer and reporter. In respect of these promises each house is a domain into which the King's writ does not seek to run... [Emphasis added.]³⁴

Coming as it does from the pen of Atkin LJ (as he then was), one of the most empathetic and spiritually inclined members to have sat on a judicial committee of the House of Lords in 'recent' times, it is perhaps clear evidence that the law of contract has indeed moved on from the protection of promises for their own sake.³⁵

³⁴ *Balfour v Balfour* [1919] 2 KB 571 at 579 (CA), Atkin LJ.

³⁵ John W Morden, "An Essay on the Connections between Law and Religion" (1984) 2 J L & Religion 7 at 15 (for instance the 'lawyer's question' asked by Lord Atkin in *Donoghue v Stevenson* is the same as that asked of Jesus by a 'lawyer' before Jesus recounted the parable of the good Samaritan in Luke 10:25-37); See *M'Alister (or Donoghue) v. Stevenson* [1932] AC 562 HL (Eng) at 580; See also *Liversidge v Sir John Anderson* [1942] 1 AC 206 (in dissent Lord Atkin alone adopted the unpopular position that "[i]n this country, amid the clash of arms, the laws are not silent", and that 'reasonable grounds' to detain someone meant what it had always meant i.e. that said grounds must be objective and not merely subjective at 228, 244).

CHAPTER 2: Why gain-based damages for breach of contract?

Having now established the significance of economic thought to contract, and thus set the stage for my analysis, I can now turn to addressing the more crucial question: why should the law allow gain-based damages for breach of contract at all? As with all novel claims the burden of proof lies heavily on me to show adequate reasons for change. In the present case this is compounded by the fact that I must not only explain why the law should change in the way I prescribe, but also why – if I am correct and my proposed change is consistent with contract’s own function and internal logic – it has not happened already. The latter question is a somewhat more daunting obstacle, but one that can be overcome, and my analysis will be clearer if I address it first. Let us consider, therefore, why the law of contract does not presently allow for gain-based damages in response to a breach.

2.1 Why has it not happened yet?

Looking back into the mist of legal history, there appears to be a long-standing tradition in the common law of providing gain-based remedies or damages in response to various kinds of civil wrong. The action for money had and received, *quantum meruit*, and what might be called ‘restitutionary damages’ in tort, are a few examples of differing labels applied to causes of action or remedies that allowed a wronged party to obtain some

measure of ‘restitutionary’ relief.³⁶ For centuries though these examples appeared to lack any form of conceptual unity, and the legitimacy and general acceptance of such remedies is actually only a fairly recent academic/jurisprudential development that can be traced to the first edition of the seminal work *Goff & Jones: The Law of Restitution* published in 1966.³⁷ Gain-based remedies have for a time fallen out of the living memory of common lawyers, with something of a stultifying effect on their wider availability!³⁸

In addition to absence of awareness, we can point to a more acute reason why the common law has not developed a gain-based response to breaches of contract: the common law’s general perception of the quality of contractual entitlements as compared with its perception of other rights and interests protected by law. The common law has generally perceived the rights and interests secured by contract as being facilitative in nature; they are principally regarded as the means by which other and further benefits may be realized. In other words, they are best categorised as a means to an end, and thus not intrinsically valuable.³⁹ This in turn leads to a general presumption that they are capable of some measure of objective assessment and replacement in pecuniary form.

³⁶ Charles Mitchell, Paul Mitchell & Stephen Watterson, eds, *Goff & Jones: The Law of Unjust Enrichment*, 8th ed (London, Sweet & Maxwell, 2011) at 1-29 [Mitchell, Mitchell & Waterson]; Harvey McGregor, *McGregor on Damages*, 18th ed (London, Sweet & Maxwell, 2009) at 12-007 – 12-008 [McGregor].

³⁷ Mitchell, Mitchell & Waterson, *supra* note 37 at para 1-01.

³⁸ They are certainly not a core component of the law school curricula of most modern LL.B or JD programs of which I am aware.

³⁹ Andrew Tettenborn & David Wilby, *The Law of Damages*, 2nd ed (London: LexisNexis, 2010) (discussion of exceptions to this, which are described as ‘rare’ at 19.43 – 19.46) [Tettenborn & Wilby]; Ralph Cunnington, “Contract Rights as Property Rights” in Andrew Robertson, ed, *The Law of Obligations: Connections and Boundaries* (London, UCL, 2004) 169 (discussion of the difference between the position in American or Civil traditions that treat contractual rights as being akin to property rights and thus inherently deserving of protection and the English common law position, which has traditionally regarded contractual rights as less than this and thus not meriting absolute protection, at 182-186).

This perhaps makes sense if we were to contrast, for instance, the right to the integrity of one's person, versus the right to X bales of cotton at Y price per bale; the two are clearly incommensurate.

This perception and the consequent presumptions it gives rise to are essential ingredients of the doctrine of 'efficient breach'. That doctrine effectively posits that a party is free to break their contract if they so choose, as long as they honour the secondary obligation to pay damages in lieu of the primary obligations they have disclaimed.⁴⁰ The law does not specify any particular reasons necessary for such a breach to be allowed, but the generally understood position is that rational parties cognisant of their own interests will generally only choose to break a contract where they are able to pursue more lucrative opportunities elsewhere.⁴¹ Consistent with that freedom to break contracts, so long as the contract-breaker pays the necessary damages to their opposite, any premium over and above that cost is theirs to keep.⁴² The law then not only tolerates such breaches of contract, but in fact encourages them in certain situations, which is consistent with the

⁴⁰ See SM Waddams, *The Law of Damages*, 4th ed (Toronto: Canada Law Book, 2004) at para 9.200 [Waddams, *Damages*]; James Edelman, *Gain-based damages: contract, tort, equity, and intellectual property* (Oxford: Hart Publishing, 2002) at 162-163 [Edelman].

⁴¹ See Richard A Posner, *Economic Analysis of Law*, 7th ed (New York: Aspen Publishers, 2007) at 120 [Posner, *Economic Analysis* 7]; See also Michael Furmston, ed, *The Law of Contract*, 4th ed (London: LexisNexis, 2010) [Furmston, *Law of Contract*] (refers to the presumed preference of contractors to sell covenanted performance to a third party for a higher price at 1791).

⁴² See *Bank of America Canada v Mutual Trust Co* 2002 SCC 43, [2002] 2 SCR 601 [*Bank of America*] (note the doctrine is couched as a general rule, likely in light of the House of Lords' decision in *Blake* the year before paras 30-31); See also *Surrey County Council And Another v Bredero Homes Ltd* [1993] 1 WLR 1361, Steyn LJ ("[s]ir William invoked the principle that a party is not entitled to take advantage of his own wrongdoing ... That is contrary to the general approach of our law of contract and, in particular, to rules governing the assessment of damages" at 1370); See also Tettenborn & Wilby, *supra* note 40 at para 19.33.

underlying purpose of contract identified above i.e. promoting the efficiency of transactions or, in other words, the realisation of the greatest possible surplus.⁴³

The idea of granting some disgorgement of the gains made by the contract-breaker in response to a breach appears to be entirely inconsistent with the exposition of the doctrine of efficient breach, discussed above, and therefore the underlying institutional purpose of contract. It is for that reason that I suggest many common lawyers, particularly those in England, would oppose the type of development I propose in this thesis. However, as I demonstrate in the next section, the inconsistency between the pursuit of ‘efficiency’ and the availability of gain-based remedies is more apparent than real.

2.2 What’s wrong with efficient breach?

As embarrassing as some may think it is to be found ‘wiser than one’s ancestors’, there are flaws in the orthodox understanding of efficient breach that can be exposed through the application of a modern understanding of economic theory.⁴⁴ The orthodox theory of efficient breach suffers from two particular deficiencies, or rather two factors which it does not presently take into account, that have the effect of skewing the effect of the doctrine in favour of the contract-breaker. They are the quality or value of contractual entitlements on the one hand, and the notion of opportunity cost on the other. I shall discuss and explain each factor in turn.

⁴³ See *Bank of America*, *supra* note 43 at paras 30-31.

⁴⁴ See Sir Thomas Moore (Saint), *UTOPIA: Written in Latin by Sir THOMAS MORE, CHANCELLOR OF ENGLAND: Translated into English*. (Printed for Richard Chiswell at the Rose and Crown in St. Paul's Church-Yard, LONDON, 1684) at 13.

2.2.1 The 'quality' of contractual entitlements

So far I have explained that the purpose of contract as an institution is to enable and encourage the creation of surpluses in an efficient manner, but the crucial aspect of contract that I have not yet explained is how they do this. Contracts perform a number of functions that are germane to the creation of surpluses, but the most fundamental is the creation or dissemination of rights and obligations. It is in fact those rights, or contractual entitlements, that are the means by which parties to a contract are able to go on and realise a surplus.⁴⁵ This may happen broadly speaking in one of two ways. First, the mere acquisition of the right or entitlement may provide some additional value to the acquirer over and above their cost of acquisition.⁴⁶ Second, the acquirer may go on to exploit the right in question in order to realise some further pecuniary, or objectively ascertainable, benefit.⁴⁷

2.2.1.1 The orthodox approach

As I have written in a previous article, the deprivation of a party's rights or contractual entitlements prevents them from realising any surplus.⁴⁸ There is of course one caveat to this, which is that a party who is so deprived, but compensated, may still effectively realise the 'benefit' of their bargain and attain their desired surplus.⁴⁹ That presumption is a fundamental plank of the doctrine of efficient breach, and a fundamental assumption

⁴⁵ Krish Maharaj, "Limits on the Operation of Exclusion Clauses" (2012) 49:3 *Alta L Rev* 703; See also Posner, "Utilitarianism", *supra* note 6 at 120; Melvin Aron Eisenberg, "The Principles of Consideration" in Craswell & Schwartz, *supra* note 5, 224 (the exchange of such gives rise to the surplus at 225).

⁴⁶ Posner, *The Economic Analysis of Law* 7, *supra* note 42 (contrast the pecuniary benefit of the party buying the wood carving with the party selling, and the presumable benefit to the party selling if they could afford to buy it back in) at 13.

⁴⁷ *Ibid.*

⁴⁸ Maharaj, *supra* note 46.

⁴⁹ Or in other words be indifferent as to performance and breach: see Robert Cooter & Thomas Ulen, *Law & Economics*, 5th ed (Boston, MA: Pearson/Addison Wesley, 2008) at 247.

from an economic perspective if we wish to describe the consequences of breach as 'efficient'. This is so because in choosing between the alternative options of breaching the contract or performing it, we must know which option, all other things being equal (*ceterus paribus*), will produce the greatest surplus.

The importance of the *ceterus paribus* is the acknowledgement that change to any factor other than the surplus realised by the contract-breaker renders comparison between the alternatives meaningless, as precise comparison between variables is difficult if not impossible. In terms of the surpluses realised by the parties, for instance, monetary values are only a proxy for the true value each party attaches to their entitlement and so does not reflect their surplus which must in theory exceed the monetary value paid.⁵⁰ Thus we cannot objectively compare one party's loss of surplus with another party's gain. Furthermore, to be sure that an overall gain has occurred we must be sure that no other party has suffered a loss as a result; this idea is identified in the economic literature as Pareto efficiency or optimality i.e. a change that makes a least one person better off, and no one else worse off.⁵¹ Although the breach of contract must have the effect of making the injured party worse off (in theory), the approach that contract law takes, which is known as Kaldor-Hicks efficiency to the economists, is to compensate the injured party, making the change neutral from their perspective by making the contract-breaker pay

⁵⁰ Posner, "Utilitarianism", *supra* note 6 at 120.

⁵¹ *Bank of America*, *supra* note 43 at para 31; Thomas Miceli, *Economics of the law: torts, contracts, property, litigation* (New York: OUP, 1997) at 4 [Miceli].

damages.⁵² This further guarantees an efficient outcome (again, in theory), because the contract-breaker should only breach the contract in such circumstances if they still see it as worthwhile after making reparations. Of course, the viability of this approach depends entirely on the ability to adequately compensate the injured party.

As noted earlier, the general view of contractual entitlements at common law is primarily facilitative, meaning that the common law implicitly assumes that the manner in which a party will realise their surplus is the second of the two possibilities explained above i.e. the further exploitation of the right for the realisation of some pecuniary or other objectively ascertainable benefit. In such cases the ascertainment of the surplus the injured party would likely have derived from their rights under the contract, and thus the presumed value of those rights to them, becomes a theoretically straight-forward evidentiary problem. The consequence of this is that if we can assess precisely what is lost, then we can be confident of the adequacy of compensation provided by a contract breaker, and that the injured party ultimately suffers no loss. Therefore, it is generally presumed that compensatory damages can always be assessed, that they are an adequate means of restoring the injured party's expected benefits, and thus that breaches are generally efficient and acceptable.⁵³

⁵² It appears that the common law adopts a modified form of Kaldor-Hicks efficiency, in that it *does* require that the 'losing' party *is* compensated, where the economic theory actually does not; See Miceli, *supra* note 52 at 5-6.

⁵³ See Waddams, *Damages*, *supra* note 41 at para 9.200.

The above exposition explains the sometimes explicitly stated position: that a contractual obligation at common law is to either “do the thing promised” or pay damages⁵⁴ (the two being seen, or presumed, to be commensurate). However, as illustrated above, that view rests on a number of important assumptions. In reverse order they are: that damages will provide sufficient compensation; that the value of the injured party’s entitlements and thus their loss is objectively ascertainable; and finally that the right/entitlement in question was to be ‘used’ to realise a surplus i.e. it was facilitative in character and thus extrinsically valuable as I shall henceforth describe them. Of these assumptions, the most important is the third, without which the second and first cannot flow. This brings us neatly to the key point in this section: the quality of the contractual entitlement in question is the ultimate determinant of the efficiency of the breach.

2.2.1.2 Where the contractual entitlement is not merely facilitative

If the characterisation offered in the previous section is correct, then the orthodox model of contracts, and efficient breach, breaks down when a contracting party’s surplus is realised in the first of the two ways explained earlier – where the acquirer of a right realises a surplus from acquiring the right at a cost less than its value to him. This differs from the second way of realising a surplus discussed above, for the reason that here the right is the source of the surplus in and of itself and is thus intrinsically valuable. The significance of this distinction is that the ascertainment of the value of the surplus

⁵⁴ See *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 849, Lord Diplock [*Photo Production*]; See also *AG v Blake* [2001] 1 AC 268 HL (Eng) at 297-299, Lord Hobhouse, dissenting [*Blake*]; *Bromage v Genning* (1617) 1 Rolle 368, 81 ER 540, Sir Edward Coke; Mr. Justice Holmes “The Path of the Law” (Lecture, delivered at the Hall of the Boston University School of Law, on 8 January 1897), (1896-1897) 10 Harv L Rev 457 at 462 [Holmes, “The Path of the Law”]; See also Letter from Mr. Justice Oliver Wendell Holmes Jr. to Sir Fredrick Pollock (25 March 1883) in Mark De Wolfe Howe ed, *Holmes-Pollock letters : the correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1893* (Cambridge, MA: Harvard University Press, 1944).

becomes an epistemological problem as opposed to an evidentiary one i.e. it is a problem pertaining to our ability to know, as opposed to our ability to investigate.

To illustrate this, consider the following. If a contractual entitlement is extrinsically valuable to a contracting party, the source of its utility is the further benefit that the holder will be able to realise from it, meaning its value to the holder is equal to the objective value of the further benefits it would allow them to obtain. The problem of determining value then, as noted, is an evidentiary one as to determining the value of those further benefits. This type of problem is often resolved by way of reference to a market where similar entitlements are traded, allowing the court to measure the likely benefits that would have accrued to the injured party had the contract gone ahead.⁵⁵

Where there is no market for similar entitlements this can make ascertainment difficult, but this is a different problem from that arising with respect to intrinsically valuable rights. With intrinsically valuable rights the value of the entitlement is subjective, meaning that no identifiable doppelgänger can exist whose objective value (such as a market price) could be used as a proxy to estimate the value of the entitlement denied to the injured party. Thus adequate compensation for the deprivation of such an entitlement, short of performance, is theoretically impossible.

If a contractual entitlement is intrinsically valuable, then the three key assumptions of the doctrine of efficient breach outlined in the previous section do not hold true. This has two consequences in my view. First, it means that breaches of contract that deprive a

⁵⁵ See *Chaplin v Hicks* [1911] 2 KB 786 at 792 (CA) [*Chaplin*]; See e.g. Tettenborn & Wilby, *supra* note 40 at para 19.54–19.54.

party of an intrinsically valuable entitlement cannot be adequately compensated for by damages premised on an objective assessment of loss, and therefore require some other response to ameliorate the harm. Second, the deprivation of such entitlements cannot be consistent with the doctrine of efficient breach if no greater remedy is available, in the sense that by definition an efficient breach is a compensated one. Furthermore, such contracts cannot be breached efficiently at all, since the deprivation cannot be effectively remedied short of actual performance.

In my considered opinion, the foregoing exposition of the fundamental assumptions of the doctrine of efficient breach explains why the doctrine does not always hold true, and therefore why a novel response may be necessary. My explanation however is very heavy on theory, begging the question whether such issues are of genuine concern in real life. To illustrate the issues of concern more clearly, as well as establish some real-world relevance for my analysis, I will consider two of the leading English cases on the subject, *Attorney General v Blake* and *Wrotham Park*.⁵⁶

2.2.1.2.1 *Attorney General v Blake*

The facts in *Blake* are, in the context of contract law, highly peculiar. This is advantageous for the reason that the case raised certain theoretical issues that no ordinary commercial dispute could possibly have done. As such they bear recital.

⁵⁶ *Blake*, *supra* note 54; *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch) [*Wrotham Park*].

Blake had at one time in the 1950's been a spy working for the British government as a member of the Secret Intelligence Service ("SIS").⁵⁷ As was standard, Blake signed a non-disclosure agreement with respect to his activities and any knowledge gained in the course thereof.⁵⁸ Unfortunately, Blake was a double agent who had been passing top secret information to the Soviets.⁵⁹ After being found out Blake was arrested and imprisoned, but later managed an escape to the Soviet Union, where he remained for many years.⁶⁰ After the collapse of the USSR, Blake committed to a contract with a British publisher to produce his memoirs and received substantial advances in expectation of strong sales, as well as royalties subsequent to publication.⁶¹ At no time did the Crown attempt to enjoin Blake from publishing, but, after the book had been published, a suit was brought claiming an account of the profits Blake had made from the book contract. The claim was advanced on a number of bases, but by the time the case reached the House of Lords the claim only stood on the basis of Blake's breach of his non-disclosure agreement i.e. for a breach of contract.⁶² No claims were viable in respect of breach of confidence or breach of fiduciary duty.⁶³ The court was asked to provide an equitable remedy never before deemed available in contract, on the basis of what was essentially a nominal breach.

The contractual entitlement in *Blake* is somewhat odd for a number of reasons, but as I will show it highlights precisely the type of entitlement the orthodox view of contractual

⁵⁷ *Blake*, *supra* note 54 at 268.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*, at 277.

⁶³ *AG v Blake* [1998] Ch 439 at 453-454 [*AG v Blake*].

entitlements does not contemplate. The information Blake included in his book had long been publicly available and the Crown had no intention of publishing a book of such material itself; as such, there was never any intention on the part of the Crown to realise a pecuniary benefit from the information Blake disclosed, nor could the Crown have realised any such benefit. In an objective pecuniary sense the Crown had been effectively deprived of nothing and, under the normal rules of contract damages, was entitled to receive nothing, while Blake was entitled to retain his profit.⁶⁴ This is the result of the orthodox understanding of efficient breach.

Such an outcome was clearly unacceptable to their Lordships, but there did not appear to be a way, in law or equity, to provide the Crown with a remedy or to deprive Blake of his profit. An action for breach of confidence, for instance, must fail where the information is public; likewise, an action for unjust enrichment would not lie given the absence of an identifiable interest in the information.⁶⁵ The only avenue with a chance of success may have been the argument that Blake was a fiduciary, and was thus obligated to account for a gain made by virtue of his office. This argument would, in my view, struggle to get off the ground as Blake was clearly no longer a fiduciary, and even if a fiduciary duty attached to information obtained while acting as a fiduciary indefinitely, once that information was in the public domain no further fiduciary duty could subsist.⁶⁶

⁶⁴ *Blake*, *supra* note 54 at 297-299, Lord Hobhouse, dissenting.

⁶⁵ John McGhee, ed, *Snell's Equity*, 32nd ed (London: Sweet & Maxwell, 2010) at para 9-008 [McGhee]; Mitchell, Mitchell & Waterson, *supra* note 37 at para 6.01-6.03.

⁶⁶ Michael Ng, *Fiduciary Duties: Obligations of Loyalty and Faithfulness* (Aurora, ONT: Canada Law Book, 2003) at para 8:10.50.

The Crown's decision to found its claim in contract, then, is explicable for the reason that it had the best chance of success. In my view, it was the appropriate choice given that the substance of the *lis inter partes* was the violation of a contractual duty, not the misuse of the information. The difficulty (alluded to above) was that the Crown's contractual entitlement was not amenable to a simple objective valuation. The reason for this in my view is that Blake's contractual duty not to disclose was tantamount to a contractual duty of loyalty and, if this is correct, it begs the question: how can we put a value on such a thing? If it has any value at all it must be intrinsic, otherwise a 'mere breach' such as this should not sound in substantial pecuniary relief at all. Their Lordships eventually found, for somewhat differing reasons, that the Crown was entitled to an account of profits in respect of the breach despite the absence of a recognised claim in equity, which would ordinarily be required for their Lordships to make such an award.

I have mixed feelings about the result of this case. I agree with the general outcome, but I am troubled by both their Lordships' reasoning and the choice of remedy, and the possibility that this case which is ideal for illustrating my point may simply be characterised as a decision on its own peculiar facts.

Turning to my first concern, it has never been previously suggested that an account was an appropriate response to a mere breach of contract; some other claim or cause of action would have to be present for such a response to be possible. Therefore the decision to

award one in *Blake's* case is highly significant, but I, and others, feel it is insufficiently explained even in the leading speech of Lord Nicholls.⁶⁷

Turning to my second concern, it is fairly clear that their Lordships detested Blake.⁶⁸ In fairness their Lordships were not openly biased, but it seems doubtful that any member of the court could fail to take umbrage with a known traitor attempting to profit further from their treason. As such, an observer of the case and the decision might conclude that this was a mere one-off, and that their Lordships simply set the law aside in the interests of pursuing 'justice'. If such an implication were true, it would be deplorable, and it brings to mind a passage from *A Man for All Seasons*:⁶⁹

...[w]hat would you do? Cut a great road through the law to get after the Devil? ... And when the last law was down, and the Devil turned round on you – where would you hide, Roper, the laws all being flat? This country is planted thick with laws from coast to coast, Man's laws, not God's, and if you cut them down -- and you're just the man to do it -- do you really think you could stand upright in the winds that would blow then?

The above quoted passage has no jurisprudential value, being a work of fiction, but I have always taken it as a sound statement of why everyone ought to be entitled to the benefit of the law, even traitors such as Blake. As such, I submit that *Blake* was not a case of the law being set aside, and that there is a principled legal response to the problem in *Blake's* case, which I have articulated above and will now apply.

⁶⁷ See Furmston, *Law of Contract*, *supra* note 42 at 1790.

⁶⁸ *Blake*, *supra* note 54 at 275, 290, 293 (A number of their Lordships referred to him as a traitor, and Lord Hobhouse emphasised that they should not be drawn to make bad law in pursuit of an apparently just result).

⁶⁹ Robert Bolt, *A man for all seasons: a play of Sir Thomas More* (London: Heinemann, 1996) (first published Heinemann 1960) at 39.

As already stated, Blake owed the Crown a contractual duty of confidentiality, and such a duty is best thought of as being intrinsically valuable, having no extrinsic value to the Crown. That intrinsic value has the consequence that Blake's duty had no 'monetary doppelgänger', meaning that Blake's primary obligation to maintain secrecy could not be replaced by the performance of a secondary obligation to pay compensation *in specie*. If that is so, then Blake's duty, and thus the Crown's entitlement and the source of their surplus, could either exist i.e. be actually performed, or disappear completely. In these circumstances compensatory damages were therefore insufficient, and the only appropriate remedy would be to require performance of the obligation.

Actual performance, however, may be problematic, if not impossible, and mandatory relief may be difficult to obtain for equitable or other practical reasons. At that point a gain-based remedy may become the appropriate means to remedy the harm created by the breach; although it might not be immediately clear why this is so. It becomes more apparent when one considers that by virtue of the existing rules of damages in cases involving extrinsically valuable rights, a court never actually sanctions a breach of contract (despite the name of the doctrine of 'efficient breach'), but instead only sanctions substitute performance.⁷⁰ Correspondingly, in cases involving intrinsically valuable rights (leaving the issue of special damages (and actual harm) aside), undoing the contract-breaker's benefit and thus returning the parties to the closest position to that

⁷⁰ *Photo Production, supra* note 55 at 848-849, Lord Diplock ("[l]eaving aside those comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to substituted or secondary obligations on the part of the party in default").

which they would have been in had the contract been performed, may be the best way to remedy the breach and thus substitute physical performance with a monetary award.

The award of an account in *Blake's* case, while not explicitly justified in this way, is consistent with this view and demonstrates the strength of this approach given the atypical nature of the contractual relations in that case.

2.2.1.2.2 *Wrotham Park*

The facts of *Wrotham Park* are comparatively more orthodox than those of *Blake's* case, but were still problematic for the court to resolve. The substance of the *lis* was that the defendant had acted in breach of a restrictive building covenant over a certain piece of land.⁷¹ The plaintiff was unable to obtain mandatory relief by the time of the hearing on account of the undue hardship that would have been caused by the demolition of the then nearly complete buildings.⁷² The issue became whether, and to what extent, the plaintiffs were entitled to damages in respect of the breach. The restriction in question had no pecuniary value to the plaintiffs; it is plain from the facts that no relaxation of the covenant would have been agreed to; and as such no objective price could be said to attach to it.⁷³ Again, as with *Blake*, the plaintiff could not point to any definable 'loss' arising from the breach per se.

As described above the council's contractual entitlement in *Wrotham Park* is much more mundane than the Crown's in *Blake's* case. However, it raises the same issue. The

⁷¹ *Wrotham Park*, *supra* note 56 at 799.

⁷² *Ibid* at 811 (Brightman J.).

⁷³ *Ibid* at 815 (Brightman J.).

essential problem appears to be that the court is unable to objectively assess the quantum of damages to award for violation of the breach. As noted earlier, the difficulty can be cast as evidentiary in the sense that the court has insufficient information to determine what value the plaintiff would have required before it would agree to relax the covenant. Alternatively, it could be argued that the plaintiff would simply not have agreed to relax covenant at all, and therefore that it was not a ‘commercial’ right that the plaintiff placed a pecuniary value upon, but that rather maintaining it had some other qualitative value. The latter seems to have been the problem in the present case, which is a problem of the epistemological kind referred to above i.e. that it is difficult to understand what the pecuniary value of something that has intrinsic value is, given that such a quality is subjective in nature.

The result of the case was that the Court of Appeal awarded the Council 5% of the profit made by the developer from the sale of the additional lots. The quantum of the award appears to be effectively arbitrary: the court’s estimate of what the council might have agreed to as reasonable consideration for relaxing the covenant.⁷⁴ That, of course, is an unsustainable basis upon which to have based the award (given that the council may not have voluntarily relaxed the covenant at all, for example), and further runs foul of the difficulty, at least in tort, that it has been generally held that damages should not be a means of forcibly acquiring another’s rights.⁷⁵ And a forcible acquisition effectively took place in the circumstances of the case, both theoretically and in practice.

⁷⁴ Ibid.

⁷⁵ *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683 (QB) at 703.

As already stated with respect to *Blake's* case, the orthodox rules pertaining to damages for the breach of extrinsically valuable rights do not sanction their breach, but instead only sanction their substitution *in specie*. This may seem like a somewhat vapid distinction to make, but must be the preferred interpretation of the law in light of the principle that the law does not suffer a wrongdoer profiting from their wrong (a principle of more general application than just to contract).⁷⁶ If this is so, then the only appropriate response to such a case, if actual performance is not possible, is likewise to provide full substitution of the primary obligation in monetary form. As with *Blake's* case the amount of the award would be the amount necessary to restore the injured party to the position they would have been in but for the breach. Given the binary nature of the obligation i.e. that it either exists absolutely or not at all, the award should be quantified according to the gain accruing to the contract-breaker, as to award this amount is the only way to simulate monetarily the state of affairs in which the contract-breaker had actually performed the contract. Thus I think the award of 5% of the profit made by the developer was in fact insufficient in the circumstances.

2.2.2. *The cost of foregone opportunity*

Benjamin Franklin once said that "...[l]ost time is never found again".⁷⁷ He was correct, for no unit of time, however small, can be replaced. Time on a human scale is a vast thing well beyond our comprehension, but our own time may simultaneously seem all too

⁷⁶ See e.g. *AG v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 286, Lord Goff ("[t]hat there are groups of cases in which a man is not allowed to profit from his own wrong, is certainly true. An important section of the law of restitution is concerned with cases in which a defendant is required to make restitution in respect of benefits acquired through his own wrongful act - notably cases of waiver of tort; of benefits acquired by certain criminal acts; of benefits acquired in breach of a fiduciary relationship; and, of course, of benefits acquired in breach of confidence.")

⁷⁷ Bartlett Jere Whiting, *Early American proverbs and proverbial phrases* (Cambridge, MA: Belknap Press of Harvard University Press, 1977) at 442.

little. Little surprise should it be then to discover that time is thought of as being inherently valuable. Indeed, Franklin was also known to have coined the phrase “...time is money”⁷⁸ – although I think this turn of phrase misstates the case to some extent, for time only creates the possibility of realising some benefit from its use, and so perhaps it is more accurate to say that ‘time is opportunity’.

The significance of time to breach of contract and the doctrine of efficient breach is that in being deprived of performance of one’s contract, one is also inevitably deprived of time and thus the opportunity to have capitalised on those benefits when one was supposed to have had them. That loss is often referred to by economists as the ‘opportunity cost’ i.e. the next best alternative opportunity the relevant party would have pursued.⁷⁹ In a contractual setting involving breach of contract, however, reference to ‘next best’ alternatives may not strictly speaking be correct, given that the opportunity of which the innocent party has been deprived was one they were prevented from pursuing by the delinquent party’s breach. Nevertheless, I will use that term to denote this type of harm, given that the two are thought to be the same thing.⁸⁰

The opportunity to realise further pecuniary benefits arising from benefits that a party should have received under their contract is, however, considered a step too far in the calculation of damages. The understandable difficulty is that the loss of time only implies a loss of opportunity, and one cannot know what use, if any, the plaintiff would

⁷⁸ *Ibid* at 441.

⁷⁹ Arleen J Hoag & John H Hoag, *Introductory Economics* (New Jersey, World Scientific, 2006) at 8.

⁸⁰ *Bank of America, supra* note 43 at para 22.

have made of it. Any harm caused may be too remote to ascribe as a consequence of the delinquent party's breach. There are circumstances where this might not be the case: if, for instance, the delinquent party has interpolated a benefit that would otherwise have come naturally to the plaintiff. Such a benefit, though, may take the form of something not readily inferred as part of the plaintiff's expectation at the time the contract was formed, which begs the question why it ought to be granted to the plaintiff at all? The soundest response would appear to be that in fashioning their contract and rendering themselves subject to the vagaries of fate for good or ill, the plaintiff has accepted risk, the corollary of which is reward. If the possible rewards of changes in circumstances and sudden shifts in markets were to be removed, leaving nothing but the potential risk of ruin, the plaintiff would be deprived of a significant benefit of being in private enterprise. Thus a party's opportunity cost for entering into a given transaction will be defined at least in part by the allocation of risk between the parties, as well as their unilateral assumption of risk.

Given the rarity of findings of frustration, it would seem that the aforementioned potential benefit of good fortune is indeed significant.⁸¹ In a common law system of contract the law provides little relief from the consequences of even unavoidable misfortune, so the possibility of immoderate gain even at the expense of others is perhaps the only consolation proffered by the law. The loss of such a possibility is clearly of some significance to the party affected, and should such harm persist without a remedy the delinquent party's gain must be said to be made at the innocent party's expense.

⁸¹ HG Beale, ed, *Chitty on Contracts* 30th ed (London: Sweet & Maxwell, 2008) at para 23-003 [Beale].

Accordingly, the suggestion above that the efficient breach doctrine and the law's concern to prevent parties profiting from wrongdoing can be reconciled on the basis that damages effect a type of substitute performance, does not hold true, and the breach cannot be said to be efficient.

This conclusion, derived as it is from the relationship between risk allocation, opportunity cost, and economic efficiency, is somewhat theoretical and so perhaps obtuse.

Fortunately, as with the problem of intrinsically valuable entitlements previously discussed, I think there are cases which are illustrative of this point of view. In particular, *Bank of America Canada v Mutual Trust Co* and *Transfield Shipping v Mercator* explain how circumstances would play out if my point of view were applied in practice.

2.2.2.1 *Bank of America Canada v Mutual Trust Co*

In essence, the respondent in this case (Mutual Trust Co) defaulted on a loan obligation to the appellant (Bank of America), forcing the appellant to realise its interest in the security against which it had lent the funds.⁸² Bank of America suffered a shortfall on the realisation of the security and sued in contract for the difference.⁸³ In addition to the shortfall, however, Bank of America also sought compound interest on the monies outstanding.⁸⁴ This request was granted at trial, but reversed by the Ontario Court of Appeal, who varied the order to cover simple interest only.⁸⁵

⁸² *Bank of America*, *supra* note 43 at paras 4-8.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

In a judgment delivered by Major J., the Supreme Court concluded that the opportunity cost of being out of its money for so long was a relevant consequence of Bank of America being deprived of its contractual entitlement.⁸⁶ As such, the court overturned the Ontario Court of Appeal's decision and reinstated the award of compound interest on the basis that it offered the closest monetary approximation of the return that Bank of America would have otherwise realised, and thus appeared to be the most appropriate remedy to provide. The crucial part of the Court's analysis was its reference to the fact that Bank of America's position with respect to compound interest in the circumstances conflicted with the doctrine of efficient breach.⁸⁷ Their Lordships' response to this problem mirrors my own reasoning. The court referred to Pareto efficiency as the touchstone for ensuring the overall efficiency of breach, meaning that breaches must be adequately compensated in order to be efficient and thereby implicitly recognising that there could be no certainty that a greater overall gain was in fact realised otherwise.⁸⁸

Their Lordships do not specifically refer to risk allocation in their judgment, but in my opinion risk allocation effectively defines the relevant opportunity cost. This can be explained as follows: As a lender, Citi Bank accepts a defined fixed return from its funds in exchange for providing those funds to borrowers to exploit in the pursuit of more speculative and potentially greater returns arising from commercial projects to which the funds are committed. Citi Bank can be seen to accept a modest return in exchange for the relative certainty of receiving a fixed income stream in addition to the return of its

⁸⁶ *Ibid.*, at para 28.

⁸⁷ *Ibid.*, at para 30-31.

⁸⁸ *Ibid.*, at para 31-32.

capital. This return adds to its existing capital base and facilitates more lending, and thus the generation of a greater volume of interest income. That is essentially the long-term benefit to the lender of providing funds to the borrower, although it is entirely contingent on the lender not being kept out of its money for any substantial period of time longer than contemplated. That, however, is not a risk that the lender undertakes from a legal perspective, by virtue of the normal practice of providing security and the invariable practice of requiring a covenant to pay. As such, the legal mechanisms governing the loan place the risk of default upon the borrower. Therefore the loss of the opportunity to relend both the principal and the interest arising from its loan to the borrower is a loss which the lender never agreed to bear, and therefore ought to be remedied.

This case and these circumstances provide a fairly straight-forward and easily understandable application of a more forward-looking approach to remedying a breach of contract. Coming as it does from the Supreme Court of Canada, it is also high authority from a Commonwealth common law perspective. It does, though, represent a very easy and unchallenging application of this type of reasoning; the time value of money being an almost universally accepted idea. Other, more difficult, cases involving more speculative forms of opportunity cost may help to flesh out the meaning of this approach and demarcate its frontiers.

2.2.2.2 *Transfield Shipping v Mercator (The Achilleas)*

In this case, the appellants (Transfield) were the charterers of a vessel (*The Achilleas*) owned by the respondents (Mercator).⁸⁹ During Transfield's charter, the market for tonnage had increased significantly and Mercator had negotiated a follow on fixture at a particularly lucrative rate.⁹⁰ Unfortunately however, the *Achilleas* was redelivered nine days late on account of an overrun on its final voyage under the charter with Transfield.⁹¹ As a result of the late delivery, Mercator was forced to renegotiate its follow on charter at a lower rate on account of a fall in the market.⁹² Ordinarily, this would have been understood to be simply Mercator's misfortune, as the measure of damages for late delivery was understood to be the difference between the charter rate and the market rate for the period of late delivery, and no more.⁹³ Mercator was unsatisfied by this, however, and sued for the difference between the higher rate of its follow on fixture and the lower rate it had been forced to renegotiate, for the entirety of the follow on fixture.⁹⁴

Surprisingly, Mercator succeeded at arbitration, on appeal to the High Court, and in the Court of Appeal, managing to convince all three that its claim was not too remote to bar recovery.⁹⁵ Mercator's success ended though at the final appeal to the House of Lords, where their Lordships held unanimously, if for different reasons, that the loss in value of

⁸⁹ *Transfield Shipping Inc v Mercator Shipping Inc, The Achilleas* 2008 UKHL 48, [2009] 1 AC 61 at para 1 [*The Achilleas*].

⁹⁰ *Ibid.*, at para 2.

⁹¹ *Ibid.*, at para 3.

⁹² *Ibid.*, at para 4.

⁹³ *Ibid.*, at para 6.

⁹⁴ *Ibid.*, at para 5.

⁹⁵ *Ibid.*, at paras 6-9.

the renegotiated charter was too remote a consequence of Transfield's breach to merit a claim for damages.⁹⁶

In essence, this case turned on the owner's ability to recover for loss of opportunity, a not infrequent problem when considering the generally volatile circumstances of the market for tonnage. Interestingly though, as Lord Hoffman pointed out, disputes such as this had never come before the courts to be decided.⁹⁷ As such, his Lordship noted that there were dicta on point, but little to no precedent.⁹⁸ This may make it surprising then that from the beginning the results were in the owner's favour, with the majority of the decision-makers, all the way up to the English Court of Appeal, holding that the loss of the more lucrative charter fell within the first limb of the test enumerated by Alderson B more than 150 years ago in *Hadley v Baxendale*, despite prevailing practice to the contrary and the absence of authority.⁹⁹ The decision-makers at all levels even noted that at the time of the initial charter between the parties, the prevailing opinion at the bar would have been that damages would be limited to the prevailing market rate per day, which makes the decisions up until the case reached the House of Lords all the more surprising.¹⁰⁰

The view of the facts that appeared to sway the adjudicators at lower levels was that the loss of a following fixture was a "not unlikely" consequence of the late redelivery of the vessel, and that accordingly the owner may claim for the loss of a particularly lucrative

⁹⁶ Ibid., at paras 26, 37, 63, 87, 93.

⁹⁷ Ibid., at para 10.

⁹⁸ Ibid.

⁹⁹ *Hadley v Baxendale* (1854) 9 Exch 341 at 354-355; 156 ER 145 at 150-151 [*Hadley*].

¹⁰⁰ *The Achilles*, *supra* note 89 at paras 6-9.

charter.¹⁰¹ Their Lordships' view of the matter, however, was substantially different. There appear two broad bases upon which the case could be said to have been decided, although neither represents a clear majority. The first and rather novel view, as espoused by Lord Hoffmann and supported by Lord Roger, was that in determining what losses a party should be held ordinarily liable for, the court should ask not only what were the ordinarily foreseeable consequences of the breach, but what were the ordinary consequences for which the parties would have assumed they were responsible.¹⁰² Their Lordships took this view based on their earlier decision in the *South Australian Asset Management* case, which developed the notion of determining the scope of professional liability for breach of duty of care by reference to the "scope of the duty" undertaken.¹⁰³ The second, more orthodox, view preferred by Lord Hope, Baroness Hale, probably Lord Walker, and raised in the alternative by Lord Roger, was that the consequences in question were simply not a "likely" or "ordinary" consequence of this breach.¹⁰⁴ While it is true that a particularly lucrative charter may come along given the volatility of the shipping industry and the market for tonnage, this view must be essentially correct. The analogy with *Victoria Laundry* is, I think, quite striking, for in that case too, a particularly lucrative contract was foregone as a result of a breach, yet damages for the loss of that peculiar opportunity were not allowed.¹⁰⁵ The similarity between the two is that while some loss of business could be understood as 'a not improbable' and ordinary consequence of the breach, the loss of particular business could not be (unless it was

¹⁰¹ *Ibid.*, at paras 6.

¹⁰² *Ibid.*, at paras 21, 63.

¹⁰³ *Ibid.*, at paras 16-18; *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 HL (Eng).

¹⁰⁴ *The Achilleas*, *supra* note 89 at paras 36, 60, 84, 93.

¹⁰⁵ *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528; [1949] 1 All ER 997 (CA) [*Victoria Laundry*].

ordinary). This may not seem like an entirely satisfactory answer in the context of this case, given that that volatility in the shipping industry is in fact ordinary, and therefore that wild fluctuation is perhaps to be expected. Indeed, this is what almost all of the decision-makers below the House of Lords concluded. There is, however, another perspective that explains why, notwithstanding the fact of such volatility, awarding damages for the particularly lucrative charter was not appropriate.

As already discussed, a plaintiff's 'opportunity cost' when a contract is breached and they are deprived of an extrinsically valuable entitlement is the loss of the opportunity to have exploited their entitlements under the contract to reap further gains. This opportunity is the source of a surplus that must be preserved in order to adequately remedy the breach and preserve the efficacy of the contract. Thus it may be germane to ask what the plaintiff understood the intended benefit to be, as opposed to what the defendant understood his responsibility to be. To some extent these questions are just different sides of the same coin, the basis of liability in contract being to provide the benefit contracted for.¹⁰⁶ However, we can then say that if a benefit of the contract to the plaintiff is not a benefit that could be thought of as being in the ordinary (or actual) contemplation of the parties at the time the contract was formed, then its deprivation cannot be a consequence of breach for which the defendant ought to be responsible. At a theoretical level this is no different to Lord Hoffmann's formulation, but I think that it would be more logically pleasing to the other sitting members of the House of Lords on the basis that the form preferred by Lord Hoffmann misplaces the focus of the inquiry,

¹⁰⁶ Furmston, *Law of Contract*, *supra* note 42 at 1700-1701.

placing the onus on the defendant to say that they had not undertaken responsibility for the unforeseeable consequences of their breach (the absence of a limitation clause notwithstanding).

The plaintiff's benefit here was the receipt of a fixed income stream based on the charter rate per day agreed with the defendant for the duration of the charter. The defendant charterers undertook the risk that the value of the tonnage it had secured might decrease during the period, and therefore anticipated the possible rewards that might accrue if the market for tonnage were to go up i.e. a profit. However, the intended benefit of the owner's entitlement to the timely return of the vessel was, in my view, not clear. It is possible that owner could have sought to have the vessel re-let for a period immediately after the cessation of its charter with the defendant, but, as noted by the arbitrators in the case itself, it was possible that the owner may instead have arranged to place the vessel in dry-dock, or arranged for the vessels sale.¹⁰⁷ Thus the benefit to the owner of having its vessel back on time was something of an enigma, and perhaps not really a component of realising an overall surplus from the contract at all. That is not to say that the owner did not suffer any form of 'loss' as a result of being deprived of access to their vessel during the overrun of the charter, but that the loss is equal to the market rate achievable during that period, not the value of the more lucrative charter (the attainment of which was simply not a readily countenanced part of the contract, and was not specifically brought to the charterer's attention).

¹⁰⁷ *The Achilles*, *supra* note 89 at paras 80.

Having reached the conclusion above I should, as alluded to in the previous section, elaborate on what this tell us about remedies for loss of opportunity. The most important conclusion that we can reach based on this case, is that remedies for loss of opportunity appear logically to be subject to, and consistent with, the classic test for remoteness of loss espoused in *Hadley v Baxendale* and *The Heron II*.¹⁰⁸ This may not be a particularly surprising or novel observation in the context of an orthodox claim for damages, but it is very significant in the context of a novel gain-based response to the same problem, which I will discuss in the following section.

2.3 What does this have to tell us about the availability of gain-based damages?

I think we can take away two things from the cases discussed above is. First, that opportunity is a valuable component of many contractual bargains; the opportunity to realise not only some further benefit from one's contractual entitlements, but to capitalise on those benefits as well, and or to benefit from fortuitous shifts in circumstances.

Second, that not all lost opportunities or benefits that might have accrued to the injured party had they received their entitlements will or should attract a corresponding remedy.

Both points are consistent with an economic perspective on the function of contract and must be observed if contract law's remedial framework is to promote efficiency, particularly with respect to gain based remedies.

¹⁰⁸ *Hadley, supra* note 100; *Koufos v C Czarnikow Ltd, The Heron II* [1969] 1 AC 350 HL (Eng).

Support for this view of the availability of remedies is found in the dicta of Wiles J in *British Columbia and Vancouver's Island Spar, Lumber and Saw-Mill Co Ltd v Nettleship*, quoted by Lord Hoffmann in his speech in *The Achilles* as follows: “I am disposed to take the narrow view, that one of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for.”¹⁰⁹ This passage encapsulates the point that in contract one is entitled to the benefit of one’s bargain, no more or less. This relatively straight-forward proposition may seem somewhat arbitrary – it is for instance not the civil law position as far as I understand it – but like many other rules of contract it is just the outward manifestation of a more sophisticated underlying theory. If we consider that an ‘advantage’ accruing to one party under a contract must represent a cost to the other party it is crucial that when parties are contracting that they are able to know with some certainty what those advantages and costs will be, enabling them to price their obligations accordingly. If a party’s cost of contracting were to suddenly increase from that envisioned in the contract i.e. they were called on to provide something more than they imagined they would have to when the contract was formed, that party’s surplus under the contract would be effectively undone. At the very least we would be precluded from knowing whether they had realised a surplus. Therefore the opportunities or potential gains, whose losses are amenable to being remedied whether by gain-based or compensatory relief, ought to be limited to those within the parties’ contemplation under the ordinary rules of remoteness. To do otherwise would be economically inefficient, and discourage genuinely efficient breaches. By the same token though, this indicates that

¹⁰⁹ (1868) LR 3 CP 499 at 508.

breaches that reallocate a contemplated gain from an injured party to a contract-breaker are examples of economically inefficient breaches and must be remedied.

2.3.1 Application to a situation involving a plea for an actual gain-based remedy

The cases discussed above involve claims for either a demonstrable loss, or a theoretically presumed loss in the case of the time value of money. What the plaintiffs did not claim in either of the cases is that they were entitled to any profits made by the defendants as a result of the breach. The likely reason for that being that the defendant did not profit as a result of their violation of the contract in either case. However, as stated above, my position is that in such circumstances the same principles ought to apply and the profit made by the contract-breaker ought to be (potentially) available to the injured party. I will illustrate this proposition with two examples.

Example 1: The owner of a particular vessel of a specialised nature enters into a one-year charter party with a charterer who is also in the business of chartering vessels. Both parties are aware of the volatility of the market and the potential for sudden fluctuations in demand. The charterer, however, believes that they may be able to reap the benefit of certain events that will affect the market for tonnage, pushing the achievable daily rate significantly above the charter rates agreed with the owner. As predicted by the charterer, circumstances transpire that cause the market for tonnage to spike upward, particularly in respect of this type of vessel, and the charterer seeks to exploit this sudden upsurge in demand to realise a profit over its cost of chartering. Unfortunately for the charterer, the owner also appreciates that the events have had this effect, but suspects the

effects will be short lived and rates will traverse downward later in the charter period.

The owner informs the charterer that they are repudiating the present charter-party and will pay damages equivalent to the average market rate per day less the agreed charter rate for the remainder of the agreed charter period. In the meantime, the owner negotiates a new charter for a similar period as that which the charterer had negotiated, at the temporarily substantially higher daily rate. The charterer is understandably aggrieved and wishes to obtain the profit that the owner has realised as a result of their breach, which I am of the opinion they should be able to do.

In the circumstances described above the owner has received a benefit that would have gone to the charterer had the charter gone ahead, one which, in my view, does not run foul of the general test for remoteness. The response might be based on *The Achilles*: the details of such a particular contract in the wider industry context could not be included within the first limb of *Hadley v Baxendale*, and that the appropriate remedy would only be the average market rate for the duration of the charter period. Based on my own interpretation of *The Achilles*, this is not the correct reasoning. If remoteness is as I suggest primarily intended to prevent the injured party from reaping benefits they did not pay for, and thus imposing costs on the contract-breaker they did not anticipate, we should ask what was understood to be the intended benefit of the contract to the injured party. In point of fact it was the exploitation of fluctuations in the market that allowed the owner to realise a significantly higher charter rate than that which it had contracted to be paid. This can be characterised as accepting greater risks in order to reap the benefits of potential opportunities that may have arisen subsequently. It may still be difficult to

say that the loss of any particular contract will be a likely consequence of the breach, but the problem of speculative indeterminacy against which remoteness also aims to protect is not raised in a situation where the contract-breaker has taken the particular contract that would have otherwise gone to the injured party; i.e. it ought not lie in the defendant's mouth to disclaim liability on the basis that it would be potentially infinite, if it is in fact rendered certain by their own actions.

Therefore a gain-based response that reallocates the gain that the owner made to the charterer is in fact explicable from an orthodox perspective and it is clearly necessary from an economic perspective, if the owner is not to be allowed to reverse the parties' agreed allocation of risk and thereby undermine the foundation of their contract.

Example 2: In contrast to the example given above, the following example will describe a situation in which a gain-based remedy would not be appropriate in order to allay fears that my proposal aims to undo efficient breach entirely. The circumstances of this example are precisely the same as that in Example 1, except for the identity of the charterer. Instead of being in the business of chartering, like the owner, the charterer in this example is instead a commercial grower of guavas wishing to export large quantities of guavas using this vessel on multiple voyages during the course of the charter. The owner again repudiates the initial charter, electing instead to pursue a substantially higher daily rate that becomes available to it as a result of a sudden spike in the market for tonnage. The charterer is obviously put out, and is forced to shoulder higher shipping costs for a period of time by negotiating individual voyage charters on the spot market at

a significantly higher cost while waiting for the market to stabilise so it can negotiate a longer term time charter at a lower daily rate.

Based on the analysis offered in earlier sections, a gain-based remedy to reallocate the profits of the owner to the charterer will be inappropriate here. If we examine the intended benefit of the contract to the charterer, it is clearly the ability to transport guavas over a period of time at a cost deemed affordable. The risk the charterer assumes is that charter rates may go down during the duration of the charter, meaning that it would be effectively overpaying compared to similar services available on the open market. The benefit of the contract to the owner in this scenario is that they have continuous employment of their asset for a period of time, and a guaranteed rate of return. The risk to the owner is that the market may go upward meaning that they lose out on potentially higher returns during the duration of the charter. The difference between Example 1 and this example is that now the charterer is effectively indifferent to increases in the market rate as compared to its rate under the charter. So long as the prevailing market rate stays at or above the charter rate, the charterer in this (the second) example is better off in the sense of not having overpaid for the use of the vessel, but it realises no pecuniary benefit from the higher prevailing rate.

If the foregoing analysis is correct, the ordinary and likely consequence of the breach for the second charterer is the imposition of greater expense, not the loss of profit *per se* or the ability to exploit profitable opportunities. The second charterer has not lost out on attaining a more lucrative charter rate (like the charterer in the first example) because it

was not understood to be intending to exploit its charter rights in that way. The second charterer's loss of opportunity, then, is the opportunity to have chartered another vessel on similar terms at a similar cost. As such, if the second charterer's higher shipping costs are lower than the owner's additional profit, reallocating the owner's profit to the second charterer may amount to over compensation, and thus be economically inefficient. This is because in such circumstances it would be possible for the owner to both reap a higher rate, and adequately compensate the second charterer while still realising an additional profit. Said compensation would be the difference between the contracted rate and the rates negotiated with third parties subsequently plus other incidentals.

2.4 Why conventional damages do not work in these circumstances

At the beginning of this chapter I stated that the doctrine of efficient breach had effectively prohibited the application of remedies to reallocate gains made by way of breach of contract, and in section 2.1 I examined two circumstances in which this prohibition is inappropriate. This explains why the reallocation of gains is not inherently contrary to the policy underlying the common law of contract, or to contracts functioning as an institution. This goes some way towards answering the larger question addressed by this chapter: why should we have gain-based damages for breach of contract at all? But there is one further link necessary to complete the chain.

The conclusions I derive from section 2.1 are that the orthodox view of efficient breach is inapplicable in certain situations, and that accordingly it would be wrong, in the absence

of any other reason, to deny the injured party a more than nominal remedy for the breach. These conclusions indicate that in certain cases something must be done to remedy the negative consequences of the breach for the injured-party, but they do not indicate what in particular ought to be done. It might be possible, for instance, that in a common law context the ordinary compensatory or expectation damages could apply to ameliorate negative consequences. However as I will explain, there is no way that either type of damage award could be made to apply so as to allow the reallocation of a gain made by a contract-breaker in the types of circumstances in which I have shown it would be appropriate. Against this background and in the absence of any other option, equity presently withstanding, any remedy that has the effect of reallocating a contract-breaker's gain intentionally in these circumstances can only properly be described as head of damages in its own right.

2.4.1 Why the remedy cannot be compensatory

As I will expand on later, one notable author in this field is of the view that the remedy I propose is essentially compensatory in nature.¹¹⁰ I disagree with that point of view for a number of reasons elaborated in the next chapter, but addressing his argument is a separate issue from addressing whether traditional compensatory damages could apply to ameliorate the consequences of a breach for the injured party in circumstances such as those discussed in section 2.1. There is some measure of overlap between them, but it is the latter issue I will presently address, leaving the theoretical discussion for the next chapter.

¹¹⁰ Francesco Giglio, *The Foundation of Restitution for Wrongs* (Oxford: Hart Publishing, 2007) at 33-34 [Giglio].

To explain why traditional compensatory damages for breach of contract do not, and cannot, apply to the types of ‘harm’ I have discussed above, let us first consider what the scope of such damages awards are. The standard definition is: “On principle there can be no claim for substantial damages save where some compensable loss or damage *is suffered*”¹¹¹ (emphasis added).

The important point to note from the definition offered above is that the remedy deals with harm in the ordinary sense of the word. This means actual physical loss of or damage to property or persons, non-pecuniary loss such as disappointment and pain, or pecuniary loss or out of pocket expense that would not have otherwise been suffered.¹¹² The significance of this is that in order for damages to be available or invoked, something negative must have happened to the injured-party; in other words they need to be ‘worse off’. The only exception to this would be compensatory damages awarded in respect of continuing or apprehended future harm, but even then the focus of the assessment of damages is the likelihood of harm actually being suffered, or its likely severity.¹¹³ Given these parameters, there can be no application to either the loss of an intrinsically valuable right, or loss of opportunity, and I will explain each in turn.

As already explained with respect to the loss of an intrinsically valuable right in section 2.1, there is no ascertainable pecuniary or physical harm upon which a court can anchor

¹¹¹ Tettenborn & Wilby, *supra* note 40 at para 3.01.

¹¹² *Ibid.*

¹¹³ *Ibid.*, at paras 3.27-3.28.

its assessment of compensatory damages, and potentially no identifiable ‘non-pecuniary’ harm either. This of course does not mean that a court cannot award damages in such circumstances; the process of quantifying damages being an ‘assessment’, as opposed to a mechanical calculation.¹¹⁴ However, as noted earlier in respect of circumstances such as those in *Blake’s* case, there may be no tangible harm and nothing to suggest intangible harm either. This being so, a court faced with the assessment of compensatory damages in respect of such a breach would be taking a genuine stab in the dark. If that is the case, it is very difficult to imagine a court making substantial awards because it would be unable to offer any principled justification for doing so, which is contrary to the fundamental obligation of a court to provide its ratio. This renders a compensatory approach effectively inapplicable then, because the award necessary to put matters right from an economic perspective is the quantum of the contract-breaker’s gain, which would be a substantial award definitely requiring some principled explanation.

In contrast with intrinsically valuable rights, the reasons for the inapplicability of compensatory damages to situations involving loss of opportunity are less obvious. After all, is not the loss of future income that would have arisen but for the breach an example of actual harm that has not accrued yet? The answer is in fact no, if we are referring to income that would have been made by virtue of the injured party having the benefit of their contract, as opposed to income that would have been made irrespective of whether the contract had ever been made or performed. Logically this must be so if we consider that the loss of an improvement in one’s circumstances does not actually make one worse

¹¹⁴ *Chaplin*, *supra* note 56 at 794 (Fletcher Moulton LJ).

off *per se*, whereas the degradation of future circumstances does. Consider for example a dairy farmer who contracts to buy a cow. If the seller reneges and fails to deliver, the buyer will lose out on having the benefit of one cow's worth of additional dairy production, but he is no worse off than he would have been had he never contracted, he is simply not better off. By contrast, if the seller delivers a diseased cow (in breach of warrant) that infects one of the dairy farmer's other cows and both die, the farmer has actually lost one cow's worth of dairy production. This is because he would have had that production presumably whether he had contracted or not, and is accordingly worse off as a result of contracting for the additional cow and suffering the consequences of the seller's breach of warranty. While potentially uselessly semantic to some, this explanation appears to be the implicit rationale of the common law and equity.¹¹⁵ This must be correct; if the position were otherwise, the loss of every gratuitous promise would result in a detriment that could potentially found an estoppel.¹¹⁶ So the loss of a future benefit arising from a contract cannot constitute 'harm' in law vis-à-vis the contract-breaker, and must instead be classed as an expectation whose legitimacy and compensability must be considered in a different light.

2.4.2 Why gains not specifically expected cannot come within 'expectations'

Compared with compensatory damages discussed above, the inapplicability of expectation damages to either the loss of intrinsically valuable entitlements or loss of opportunity is easier to explain. I will begin with the potential applicability of the

¹¹⁵ Tettenborn & Wilby, *supra* note 40 at paras 19.03-19.05.

¹¹⁶ *The Commonwealth v Verwayen* (1990) 170 CLR 394 (HCA) at 453, Dawson J.

expectation measure to the loss of intrinsically valuable entitlements, and move on to explain it's inapplicability to loss of opportunity.

The whole point of damages for loss of expectation is to provide the injured party with the 'benefit' they would have realised from the exploitation of their contractual entitlement.¹¹⁷ This only works, however, where the point of having the entitlement was its further exploitation, which provides a basis on which to assess the value of the benefit, and thus the entitlement. Where further exploitation of the entitlement was not the point of its acquisition, which as we know is the case with respect to intrinsically valuable entitlements, there is no such basis to assess the quantum of the remedy. Q.E.D where a contractual entitlement is intrinsically valuable, there is no way to remedy its deprivation with damages for loss of expectation.

The situation in respect of loss of opportunity, and the reasons why this cannot be remedied by expectation damages, is somewhat more complicated as it requires consideration of the metaphysical nature of expectations. In a general sense, damages for expectation are subject to the same two-limb test of remoteness as compensatory damages for harm caused by a breach. This test limits the expectations for which the injured party is entitled to damages as of right to those which may be objectively ascertained as within the parties contemplation, or actually referred to, at the time of contracting.¹¹⁸ What this means in respect of particular opportunities that arise

¹¹⁷ Tettenborn & Wilby, *supra* note 40 at para 19.54.

¹¹⁸ Sir Jack Beatson, Andrew Burrows & John Cartwright, *Anson's Law of Contract*, 29th ed (New York, OUP, 2010) at 544.

subsequent to contracting – those that are somewhat out of the ordinary or better than average – is that their loss cannot sound in expectation damages. This is because the rule requires that parties actually, or presumably, foresaw the benefit that would be lost.¹¹⁹ A contract-breaker can obviously be understood to have foreseen benefits that would be lost subsequent to a breach if they were specifically brought to his attention, or if they are benefits of an ordinary nature (the market price of the goods for instance if we are referring to a contract of sale).¹²⁰ What he cannot be understood to have foreseen, without notice, are benefits outside of the ordinarily understood course of things i.e. the duration of a follow on fixture as in *Transfield Shipping v Mercator*.¹²¹ These benefits may very well have been foreseeable, but not all things within our potential foresight are deemed to be so likely, or possible, that we could be said to have seen them coming. Where this is so, the relevant opportunity cannot be said to have formed a part of the parties' expectations, and if it was not expected it cannot properly be the subject of 'expectation' damages.

The conclusion in the preceding paragraph, as straightforward as it may seem in the abstract, is of course far more complicated as we grapple with the question of what degree of certainty is necessary before an event is not merely foreseeable but arguably foreseen. This is not a question I propose to answer, but I will say that for present purposes the types of opportunities I have referred to in my examples are, on the authorities, examples of opportunities that would be deemed to fall outside the parties'

¹¹⁹ *Victoria Laundry*, *supra* note 106; Beatson, Burrows & Cartwright, *supra* note 119 at 545.

¹²⁰ *Chaplin v Hicks*, *supra* note 56 at 792.

¹²¹ *The Achilleas*, *supra* note 90.

expectations. Yet in spite of this I still argue that redress equal to the contract-breaker's gain is necessary, and in section 2.5 I will explain, by analogy with the doctrine of frustration, when it can be done and why it is not inconsistent with principle.

2.5 Frustration – an odd inversion of my point

I have referred above to the opportunity to potentially reap immoderate gains by virtue of the vicissitudes of fate, the important corollary to the risk of ruin arising from change in the opposite direction. Such a risk is one from which the law occasionally but rarely provides relief through the infrequently applied doctrine of frustration. If this is correct, then logically the law should rarely deny a party access to an immoderate gain, if it will only rarely provide relief from immoderate hardship, and only a similar basis in either case.

Fortuitously, the basis for the doctrine of frustration as it has been expressed 'classically', exhibits a serendipitous symmetry with the view expressed in this section as to when a party ought to be able to recover a gain made by a defendant.¹²² To explain the similarity, let me first set out the classic exposition of the basis of the doctrine by Lord Radcliffe in *Davis Contractors v Farenham*:

So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni. It was not*

¹²² See Beatson, Burrows & Cartwright, *supra* note 119, Lord Radcliff (the authors explain that Lord Radcliff's use of the phrase *non "haec in foedera veni"*; "it was not this that I promised to do", to describe the basis for a plea of frustration, was drawn from Virgil's *Aeneid* at 487 n 81).

this that I promised to do. [Emphasis added.]

Based on the statement of principle above, the basic inquiry when frustration is raised is whether the supervening event is one which has fundamentally changed the nature of performance required to fulfil the obligation. Change, of course, is only meaningful relative to the start position, and so to answer this question we must consider what the nature of the performance within the ordinary or specifically understood course of things would have been (in other words we must identify what the defendant had ‘undertaken’ to do). This prevents those events that are foreseeable but are not foreseen from acting as the basis for a plea of frustration: the possibility of such events is a risk that the defendant bears. As such, it lays no more in the mouth of a defendant to make a plea for relief from the consequences of events the defendant ostensibly undertook responsibility for, than it does if the defendant undoes his own endeavours by way of some type of default.¹²³ So long as the events could have been within the parties’ contemplation, it matters not whether they were so contemplated.¹²⁴

My suggestion in section 2.3 with respect to when a gain-based remedy ought to be allowed for a breach of contract was that where the benefit appropriated by the contract-breaker is one that would otherwise have flowed to the injured party, it ought to be reallocated. In more detail, the test could be stated to be whether the benefit(s) realized by the defendant, which would otherwise have naturally flowed to the plaintiff, is not fundamentally different from that which the plaintiff was meant to have under the

¹²³ *J Lauritzen AS v Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd’s Rep 1 at 8; See also Beatson, Burrows & Cartwright, *supra* note 119 at 493.

¹²⁴ *Ibid.*

contract. This difference must be likewise relative to the position understood at the time the contract was entered into, which, consistent with *Hadley v Baxendale*, would be defined by what was inferable or specifically known by the defendant. With reference to the test for frustration outlined earlier, my prescription in this thesis in respect of gains appropriated by a contract-breaker appears to be the application of the same reasoning in reverse.

Assuming that equality between our exposure to the possibility of riches or ruin is desirable, the foregoing reinforces my earlier arguments in favour of providing a remedy for loss of opportunity on the basis that it accords the same weight to aspirations as the law already does to obligations. If this is correct, then the consideration afforded to a plea of “*Non haec in foedera veni, It was not this that I promised to do*”, ought to be likewise afforded to a plea of *hoc est quod mihi habendum esset* i.e. this is what I was meant to have.

2.6 Further similarity to unexpected events inflicting loss

A principal objection that can be raised to allowing recovery for the loss of opportunities that have developed subsequent to the formation of the contract is that they are simply outside of the scope of the parties’ agreement. Going back to the classic test of remoteness, we know that in the majority of cases this will be deemed true, and in my view this is appropriate and correct. If we refer back to the earlier discussion under Example 1 in section 2.3.1, one reason I gave in support of this was that it would

undermine the process of surplus creation if the contract-breaker were required to bear costs/provide benefits it had never undertaken to. This is something of a novel objection, however, premised as it is on the paradigmatic view of contract I have adopted within this thesis. The more orthodox objection, which may be more pressing in the mind of the reader, is whether providing a remedy for the loss of such opportunities runs the risk of imposing a potentially unlimited and unquantifiable liability on the contract-breaker. In my view, at least in the form I have prescribed, it does not and I will try to explain why this is so by analogy with the availability of compensatory damages.

It is no bar to the availability of compensatory damages that a particular harm was not foreseen. What matters is only whether it was of a type that was foreseeable; beyond this even magnitude is no bar to recovery, and frustration cannot be successfully plead.¹²⁵ Nor could it realistically be otherwise, because were the particular harm to be foreseen there would either be no contract, or it would be a different contract altogether. Yet in principle there is no difference between the post-contractual development of particular opportunity, and the occurrence of particular harm. The difference practically speaking between claims for either is that with the former the plea is generally premised on a possibility that has not been realized, whereas the latter is premised on a possibility that has crystallised and become fact. Where a court is faced with the problem of assessing damages for continuing or future harm the position is no different from that with respect to opportunity, and the court will assess damages at the midpoint of what is possible, or

¹²⁵ Beale, *supra* note 82 at para 23-021.

most probable where they differ, which is typically neither the worst-case scenario, nor the best-case scenario.¹²⁶

Damages for the loss of benefits a party would have realised from the exploitation of their entitlements generally take the same approach as compensatory damages awarded for future or continuing harm referred to above; they are assessed on the basis of the probability that such benefits would have been realised.¹²⁷ This is appropriate where those benefits were never realised, and it is impossible to know whether they would have been realised or to what extent. However, I argue that by stepping into the injured party's shoes and usurping a profit that would otherwise have naturally gone to the injured party, the contract-breaker crystallises the otherwise speculative possible event, in the same way that the occurrence of actual harm does. Thus the gulf between the general and the particular is closed by the occurrence of the thing not specifically contemplated, but not outside contemplation. Accordingly, there is no reason in principle to disallow recovery of the profit made by the contract-breaker on the basis that we cannot be sure it would have accrued to the injured party, because the profit has actually been made.

Furthermore, it ought not lie in the contract-breaker's mouth to quibble as to probabilities if the injured party was equally capable of making said profit.

To my mind, there is nothing novel about the approach described above because it is effectively already applied with respect to commodity type goods. By quantifying damages at the market rate as at the date of delivery, the law already allows for

¹²⁶ Tettenborn & Wilby, *supra* note 40 at para 3.27-3.28.

¹²⁷ See e.g. *Canada West Tree Fruits Ltd v TG Bright & Co Ltd* [1992] BCJ No 1386 (QL) (BC CA).

subsequent changes in circumstance to define the precise value of the entitlement, even though the future market price was obviously only a matter of speculation at the time of the contract.¹²⁸ There are two possible explanations for this. The first is that courts in centuries past lacked the institutional capacity to assess the present value of a future sum, or that the ‘occurrence’ of the particular market price on the particular day effectively “collapsed the wave function” that defined the value of the entitlement by substituting the speculative future market price with an actual price.¹²⁹ Of these two possible explanations, I prefer the latter, despite the fact that our forebears in the law did not have a well-developed appreciation of quantum mechanics. This is so, because despite the increasing sophistication of the courts and professionals who could be called upon to provide evidence of such present values, the ancient rule appears to be in no danger.

The continuation of the aforementioned general rule could be ascribed to factors such as convenience and ease of calculation, as well as elevation to the level of custom within various merchant communities. Yet if this were so, it would have to be seen as an exception to the general rule in *Hadley v Baxendale* and *The Heron II*; the particular market price obviously being in the nature of a particular state of affairs that could not have been foreseen in spite of being foreseeable. To my knowledge, however, no such suggestion is actually made, which tends to support my view that the real dividing line between particular ‘events’ for which damages can be claimed and those that cannot is whether the range of possible outcomes has in fact collapsed into a single observed

¹²⁸ Tettenborn & Wilby, *supra* note 40 at para 22.18.

¹²⁹ A wave function being a quantum physicist’s term for an outcome that has not yet been observed, and is thus still open to a range of possibilities.

outcome. If this is correct then there is in principle no difference between possible benefits rendered certain subsequent to contract formation and possible harm.

Based on the foregoing, I think it is clear that even if contract-breakers are required to disgorge gains in the manner I have described, they are no more ‘on the hook’ financially for loss of opportunity than they are for compensatory damages. In fact, it may be apt to say that they are comparatively less burdened by liability for loss of opportunity than they are by liability for harm, because in order to be liable for the particular unexpected benefit, the contract-breaker has to have actually made the profit in the first place.

2.7 Summary: when efficient breach does not hold true

The two broad sets of circumstances discussed above in which I argue that the efficient breach hypothesis does not hold true make the case for introducing a gain-based remedy into contract law’s remedial palette. This leaves the question of what is meant precisely by a gain-based remedy; this being a subject of some weighty academic debate. I have suggested that the need for such a remedy is rooted in the protection of contract’s underlying institutional function, but this is merely one possible justification for gain-based remedies acknowledged in the jurisprudence on the topic and the academic literature. As such, it is illuminating to discuss what some of these other justifications might be, and to contrast these with my own prescription, which will clarify the nature of my own proposal. This will be done in the following chapter, at the end of which I will explain how the remedy is appropriate in the circumstances discussed in this chapter.

CHAPTER 3: What are gains-based damages?

In the previous chapter I established that in some circumstances the pre-conditions for efficient breach do not hold. It follows that the traditional approach to damages for breach of contract in such circumstances is insufficient, and that that a different remedial response may be necessary. This section will set out what those potential remedial responses should be, as well as identifying their function, and addressing potential criticism.

3.1 Types of remedies

As the existing literature indicates, there is more than one form of gain-based damages, and a number of different theories or reasons that can be used to justify why they should be awarded, which in turn has a direct correlation with how they are calculated. Before discussing these alternatives, however, I should address the difference between the two sets of circumstances referred to earlier: the loss of time and opportunity is, I think, a different problem to the invasion of an intrinsically valuable right. Nevertheless, they can both be addressed under the same umbrella rationale.

The award of a monetary remedy for breach of contract that is calculated by way of reference to the gain made by the contract-breaker has as its underlying rationale the need to protect the efficacy of contract as an institution. There are at least two other possibilities, however, that should be considered in order to distinguish them from the

reason/rationale I have just suggested. The first is the reversal of unjust transfers of value, otherwise known as the concept of “unjust enrichment”.¹³⁰ The second is deterrence from wrongdoing i.e. that by depriving the wrongdoer of their gain the law aims to discourage such wrongs.¹³¹

3.2 The unjust enrichment principle

First and foremost one might object to the interpolation of the unjust enrichment principle into contract law on the basis that it is strictly speaking unnecessary. If a party has suffered an involuntary transfer of ‘value’ to a third party, a claim for restitution may be made out as a claim based on unjust enrichment. More precisely, the test to make a claim in unjust enrichment is as follows: there must be an enrichment of the defendant, a corresponding deprivation of the plaintiff, and a factor that makes that enrichment unjust.¹³²

At first blush this may appear to be a useful solution to the problems identified above. However, while not limited to deprivations of property *per se*, this test developed in order to deal with infringements of property rights, and the concepts of ‘enrichment’ and ‘deprivation’ reflect this.¹³³ This is significant because in law there is a difference between ownership of property and an entitlement to ownership of property, which of

¹³⁰ Mitchell, Mitchell & Waterson, *supra* note 37 at 1-02.

¹³¹ Edelman, *supra* note 41 at 80-81.

¹³² Mitchell, Mitchell & Waterson, *supra* note 37 at 1-09.

¹³³ *Ibid.*, at 1-15-1-17; See also *Blake*, *supra* note 55 at 296-297 (Lord Hobhouse, dissenting).

course frequently arise in contracts of sale.¹³⁴ The former entitles one to the property itself as well as the fruits of that property. The latter, unless the goods are specified with uncommon specificity, entitles the buyer only to such a piece of property, not necessarily the particular property, and not the fruits of that property. Such rights, depending on the terms of the contract, only pass upon the actual transfer of ownership.¹³⁵

Consider the following example: A contracts with B for the purchase of a sports car with a V8 engine. Between payment and delivery B learns that new emissions regulations will soon be enacted that will prevent the sale of such cars in the future, making the vehicle currently in B's possession far more valuable. B refuses delivery of the car and, subsequent to the delivery date when the market has realised the significance of the impending change, sells the car realising a two-fold profit. After this change in circumstances A may be left unable to afford the vehicle he had initially contracted for as a result of the sudden spike in market value. His only remaining option to enable him to have his dream car would be to obtain some measure of the profit made by B. However, A could not bring a claim for unjust enrichment on the basis of these facts; assuming the court applies the date of breach rule to assess the damages for A's loss of expectation, he would receive only the market value of the car as at the date of delivery, leaving B with the subsequent increase in value.¹³⁶ The reason A could not bring a claim in unjust enrichment, is that A cannot demonstrate any kind of qualifying deprivation. In order to demonstrate this, he would have to be able to identify some interest in the *particular*

¹³⁴ AG Guest, ed, *Benjamin's Sale of Goods*, 7th ed (London: Sweet & Maxwell, 2006) at 1-026.

¹³⁵ *Ibid.*

¹³⁶ Beatson, Burrows & Cartwright, *supra* note 119 at 535-536; Furmston, *Law of Contract*, *supra* note 42 at 1743.

article whose disposition has resulted in the enrichment of B. A cannot do this, leaving aside the possibility of specific performance, because A never had “property” in the car.¹³⁷

Generally, therefore, a breach of contract involving the sale of goods (for instance) would fail to meet the requirements for a claim in unjust enrichment. Even in circumstances in which one could identify an interest in particular property, such as land or some other chattel so specific as to enable a contracting party to invoke specific performance – which is extremely rare – one can only seek the property itself. Thus unjust enrichment generally seems to be inapplicable to contract except in one specific set of circumstances: namely, where the contractual rights in themselves have some characteristic or quality of property. The example that most readily comes to mind would be an option contract which conveys some right of purchase or pre-emption, although the likelihood of a finding that such a contractual right conveyed a property interest is questionable.

The situation with respect to intrinsically valuable entitlements, as opposed to extrinsically valuable entitlements, is similarly fraught. This is because the transfer of value between parties in a restitutionary claim requires some objective assessment of the value in question, which, as discussed, is epistemologically impossible with respect to a subjectively valuable entitlement. Certainly it is possible to argue that the profit to the defendant is equivalent to the value lost to the plaintiff, but, as has been said of cases in

¹³⁷ Guest, *supra* note 135 at 1-026.

which such reasoning has been used, that is not necessarily the case and reasoning in this vein appears to some to be highly fictitious.

3.3 The deterrence of wrongdoing

Some authors, including James Edelman, author of the influential monograph *Gain Based Damages*, suggest that apart from restitutionary ‘gain-based damages’ such as those referred to above, there is or ought to be a category of gain-based damages to respond to “wrong-doing”.¹³⁸ The purpose of this category of gain-based damages is effectively the elimination of any profit motive for engaging in the relevant behaviour.¹³⁹ Such a sentiment may be laudable in a tort context, particularly in relation to wrongs committed against the person, but in a contractual setting this goes much too far.

My point of view in relation to contractual-remedies may be unorthodox, but I am still a common-lawyer. As such I do not think that the law should aim to deter all breaches of contract, nor do I think that all voluntary breaches of contract are morally reprehensible, or that any more than a minority could be described so. I am not advocating for a change in contract law’s remedial palette that would effectively undo the doctrine of efficient breach or effectively introduce a civil model of contractual obligations. I think that deterrence is an inappropriate guiding principle for any form of contractual remedy. It may be true that deterrence is an incidental consequence of any gain-based damages remedy, however, the same may be said of compensatory damages, and even liquidated

¹³⁸ Edelman, *supra* note 41 at 81 – 83.

¹³⁹ *Ibid.*

damages provisions that fall well short of being described as a penalty.¹⁴⁰ As such, in order for the approach I prescribe to be genuinely premised on the deterrence of wrongdoing as opposed to effectuating it only incidentally, my prescription would require advertence to the quality that makes breaches worthy of sanction from Edelman's point of view. This 'quality' is intention or mala fides.¹⁴¹ Yet, the approach I have prescribed in Chapter 2 is entirely inadvertent to the existence or non-existence of such factors. To illustrate the point, let us revisit the example of the charterer and owner from Chapter 2.

In Examples 1 and 2 under section 2.3, I attempted to illustrate that the misappropriation of benefits that would have otherwise gone to the injured party justifies a gain-based remedy to reallocate the gain, and that where no such misappropriation has occurred no such remedy ought to be granted. In both examples the owner of the vessel acts intentionally, and yet only in one scenario do I argue that there is any justification for gain-based intervention. It is, however, the fact of the deprivation or misallocation that is crucial to the economic efficacy of the parties' transaction, not the intention to so deprive. Therefore I argue that any breach causing deprivation or misallocation should attract the same response, irrespective of whether the breach or its consequences are intended or not.

To illustrate this, consider the following example that differs from Example 1 under section 2.3 in only one respect:

¹⁴⁰ See *Royal Bank of Canada v W Got & Associates Electric Ltd* [1999] 3 SCR 408 at para 28.

¹⁴¹ Edelman, *supra* note 41 at 86.

The owner of a particular vessel of a specialised nature enters into a one-year charter party with a charterer who is also in the business of chartering vessels. Both parties are aware of the volatility of the market, and the potential for sudden fluctuations in demand. The charterer believes that he may be able to reap the benefit of certain events that will affect the market for tonnage, pushing the achievable daily rate significantly above the charter rates agreed with the owner. As predicted by the charterer, events transpire that cause the market for tonnage to spike upward, particularly in respect of this type of vessel, and the charterer seeks to exploit this sudden upsurge in demand to realise a profit over its cost of chartering. Unfortunately for the charterer, the owner has made a significant error in their shipping manifests and directs the chartered vessel to a location thousands of nautical miles away from the designated port of delivery, leaving no possibility of timely delivery. The owner informs the charterer of the grievous error, cancelling the charter, and offers damages equivalent to the difference between the charter rate and the average daily rate prevailing throughout the charter period. In the meantime, the owner also does its best to ensure the reemployment of its asset and negotiates a new long-term charter at a daily rate that happens to be substantially higher because of the sudden upswing in the market that the initial charterer had hoped would occur. The initial charterer is understandably aggrieved and wishes to obtain the profit that the owner has realised as a result of the breach.

This scenario is almost identical to that described in Example 1 under section 2.3, with the key difference that the breach which deprived the charterer of his intended gain in this scenario was accidental. Nonetheless, I am of the opinion that the charterer ought to be

able to recover the owner's gain: the owner has effectively misappropriated a benefit that would have otherwise been realised by the charterer, and in so doing the owner has disturbed the equilibrium position of the transaction under which the charterer would have been able to realise a surplus.

3.4 The protection of contract as an institution

The analysis of contract as an institution, as well as the identification of its functions and underlying purpose, has already been undertaken in Chapter 2. So, in explaining how gain-based damages may be able to protect these aspects of contract as an institution I will be revisiting previously covered territory; however, I think it may be useful to recap these ideas before moving forward.

Contract law's orthodox view of contractual rights is that they are a means to the realisation of some benefit. In the same vein, I think that common lawyers and the common law perceive contract as a means to an end, and this explains the former view that contracts do not represent "sacred promises" that must be enforced at all costs.¹⁴²

Further to this, there is an implicit assumption by economists that the benefits of contract extend beyond any contract's parties, and that in fact the existence of private contracts, or the benefits that they create, are of benefit to wider society.¹⁴³ In my opinion, this conveys an important but largely unspoken part of the *raison d'être* of the common law of contract and forms the fundamental underpinning of the doctrine of efficient breach.

¹⁴² Holmes, "The Path of the Law", *supra* note 55 at 462.

¹⁴³ Kronman & Posner, *supra* note 2 at 2; Posner, "Utilitarianism", *supra* note 6 at 123.

The relationship between this wide view of the benefit of contract and efficient breach is that if an alternative contract could yield a greater benefit than one party currently has, and the benefits created by contracts are of benefit to wider society, then to break the current contract and reach a new one is in the interest of the greater good not just the interest of that party. In other words, efficient breaches are indirectly in everyone's interest. Fundamentally I do not disagree with this view. It should be clear that my objection is more a question of nuance in interpretation as to what counts as efficient – and efficiency is largely a question of the impact on the party who has had their contract broken. Contract laws' remedial palette must then expand to ensure adequate reparation in circumstances in which the remedies presently available for breach of contract fail to adequately restore to the injured party the benefit of their bargain, ensuring the fulfilment of the functions and institutional purpose of contract.

So what is to be done? In response to the two types of situations I have identified where compensatory/expectation damages are insufficient to adequately remedy the harm done to the injured party, I argue that some measure of the contract-breaker's gain from that breach ought to be redistributed to the injured party. The next question to consider is the proper quantification of the remedy. Before moving on to address this question however, I feel that I should note that the approach I suggest above is categorised as effectively compensatory by some authors, notably Francesco Giglio.¹⁴⁴ Indeed, when using terms such as 'harm', 'reparation', 'restoration of benefits' or 'entitlements', such an inference

¹⁴⁴ Giglio, *supra* note 111 at 33-34.

seems fair and natural. It is, however, mistaken, and that mistake may lead us to err in the application of the remedy if we are not careful. I will address this point first.

3.4.1 Why 'compensatory' may be misleading

Giglio's position, as I understand it, is that a monetary remedy in response to a 'wrong', whether it is calculated on the basis of ascertainable harm to the injured party or the gain made by the wrongdoer as a result of the wrong, is compensatory¹⁴⁵ (albeit in the latter case the compensation is calculated in a different way, using the wrongdoer's gain as a proxy for the injured party's loss in circumstances where that loss is difficult to ascertain). There is some force in this contention, but there is a more principled response. Rationally, the purpose of the remedy must dictate the means of quantification of the remedy if the remedy is indeed to serve that purpose. A fortiori the method of quantification employed must indicate the purpose of the remedy. Therefore a remedy that is not calculated with reference to actual harm suffered must either be arbitrary or referable only to some purpose other than compensation.

In relation to breach of contract, and this is true of other gain-based remedies available for other causes of action, the appropriate purpose is the protection of the relevant institution. What is necessary though for the protection of a given institution will vary according to the purpose and peculiarities of that institution. So, for instance, where a gain is made in breach of fiduciary duty, that gain is always amenable to disgorgement by way of an account of profits in order to reinforce public confidence in that institution.

¹⁴⁵ Ibid.

This is true even where the breach has also benefitted the recipient of that fiduciary duty; public confidence being (in my view) essential to the proper function, and thus social utility, of fiduciary relationships as a form of institution.¹⁴⁶ By contrast, only those breaches of contract that undermine the function of the contract in a way that cannot be adequately addressed by traditional compensatory or expectation damages should attract a gain-based remedy to reallocate the contract-breaker's profit to the injured party. In my view, it is fair and accurate to say that compensation of the injured party is not the *sine qua non* of a gain-based remedy that operates in the manner that I have described in relation to the deprivation of intrinsically valuable entitlements and loss of opportunity.

3.4.2 Back to quantification

My earlier conclusion that an appropriate gain-based remedy for breach of contract is not one driven by compensation has a number of important consequences that differentiate it from remedies that could be argued to be compensatory. I will use restitution for unjust enrichment and the account of profits for breach of fiduciary duty as examples.

As already discussed, the law of restitution for unjust enrichment requires a transfer of value from plaintiff to the defendant and a corresponding deprivation of the plaintiff.¹⁴⁷

If no such transfer/deprivation exists, there can be no restitution and therefore the restitutionary remedy for this cause of action aims to compensate the plaintiff for the diminution in their "dominium" or personal reservoir of stored "value".¹⁴⁸ Mere breaches of the plaintiff's rights or transfers of value that do not deprive the plaintiff of anything

¹⁴⁶ See e.g. *Boardman v Phipps* [1967] 2 AC 46 HL (Eng) [*Boardman v Phipps*].

¹⁴⁷ Mitchell, Mitchell & Waterson, *supra* note 37 at 1-09.

¹⁴⁸ *Ibid.*, at 1-02.

measurably within their “dominium”, as illustrated with the example of the V8 car above, will not qualify.

In contrast to the position with respect to restitution for unjust enrichment, mere breaches of fiduciary duty, even those that are actually of benefit to the recipient of the duty, are amenable to an account of profits where the fiduciary has profited.¹⁴⁹ This could be taken to exemplify a compensatory approach, which treats any breach as harmful in and of itself; perhaps similar to my analysis in respect of the deprivation of intrinsically valuable contractual rights. This approach is capable of rendering a remedy without some quantifiable proof of loss, and thus appears to overcome the limitation of the ‘restitutionary’ approach. However, it is then unable to discriminate between genuinely harmful breaches and ‘benign’ ones.

In practice, both of the ‘compensatory’ approaches above are inconsistent with the view I have expressed in Chapter 2, and neither would usefully develop contract law’s remedial palette to address the problems I have described. Thus I submit that the only proper way to determine the availability, and thus quantum, of a gain-based remedy for a breach of contract is to ascertain what is necessary to restore the injured party to the equilibrium position of their contract. In other words, what is required to return their intended known or inferable benefits together with their prospective benefits consistent with their adoption of risk and their opportunity cost of contracting. I will now illustrate what this

¹⁴⁹ See *Boardman v Phipps*, *supra* note 147.

means practically with respect to both loss of opportunity and intrinsically valuable contractual rights.

3.4.2.1 Loss of opportunity

Referring back to the first example used in section 2.3 regarding an owner of a specialised vessel and a charterer looking to exploit a sudden upswing in the market for tonnage. In that example, if the owner had repudiated the initial charter party, and entered into the more lucrative subsequent charter party that the charterer hoped for, that was a circumstance in which I argued that the charterer ought to be entitled to the owner's profit. The difference between this example and the second was that the more lucrative subsequent charter party was an intended or prospective benefit that would have otherwise naturally gone to the charterer, whereas in the second example it was not. If we focus solely on purpose of the contract, and the intended exploitation of contractual entitlements to reap particular benefits, this may enable us to reach what I consider a sensible conclusion in many circumstances, though not all.

Consider the circumstances if, as in Example 1, the owner had repudiated the initial charter party and taken a more lucrative one, but with the difference that the owner had for reasons peculiar to them been able to attain an above market rate for their vessel. The higher rate is significant in my view, because the premium over the market rate was not a gain that the charterer could have made. The fact that a wrongdoer could or would not have made such a profit is not relevant to the availability of a number of gain-based remedies such as the account of profits in equity, or an action grounded in unjust

enrichment, but it *should* be relevant to a claim in contract, where, as is the case here, the injured party seeks a gain-based remedy on the basis of loss of opportunity.¹⁵⁰ If the injured party could not have made such a gain, to reallocate it to them would exceed the remedial response necessary to restore them to their equilibrium position; it would also effectively grant them an interest in the underlying property of the vessel. I argue that such a response would be inefficient because it would discourage the creation of the additional gain, and thus a larger overall surplus. Thus while the charterer ought to be able to attain the component of the owner's gain that could be described as 'ordinary', and thus actually attainable by the charterer if they had had the opportunity, they should not be able to attain the more extraordinary gain component, which should be left with the owner.

3.4.2.2 Intrinsically valuable rights

The quantification of gain-based damages to remedy the deprivation of intrinsically valuable rights is a different matter from quantifying the remedy for the deprivation of opportunity. As discussed in Chapter 2, the inability to quantify any harm arising has the effect of rendering traditional compensatory or expectation damages approaches untenable. This means that substitute performance *in specie* in the traditional sense is impossible with respect to these kinds of entitlements, with the result that 'performance' is ultimately necessary in order to effectuate an adequate remedy. Of course, as in *Wrotham Park*, enforcement of performance may not be possible.¹⁵¹ Therefore a different monetary paradigm of enforcement must be applied, which, as I have argued

¹⁵⁰ McGhee, *supra* note 66 at para 7-041; *Penarth Dock Engineering Ltd v Pounds* [1963] 1 Lloyd's Rep 359 (CA).

¹⁵¹ *Wrotham Park*, *supra* note 56.

earlier, involves resetting the parties as closely as possible to the position they would have been in had the breach not occurred by requiring disgorgement of the contract-breaker's gain. The quantification of the remedy, then, is done from the inverse perspective to that of traditional contract damages, by assessing the effect on the contract-breaker as opposed to the injured party.

CHAPTER 4: Can we find the Equity?

The question this Chapter will seek to address is whether there is scope for pre-existing equitable remedies to fill the gap in contract law's remedial framework that I have previously identified, or potential for equity to develop a response to do so. At the outset, I should state that neither possibility appears to be ideal, or desirable in my view. To explain why this is so I will first consider what obstacles prevent equity from applying effectively. I will then use the expansion of the fiduciary principle in Canada to illustrate what the potential consequences may be if an existing equitable 'mechanism' is deployed to address a problem outside of its traditional scope. Finally, I will look to the two existing equitable remedies that appear to be the best candidates to fill the remedial lacuna I have identified, and explain why their redeployment is inappropriate in light of the preceding discussion.

4.1 Equitable obstacles

As any student of equity will know, it is a jurisdiction that operates *in personam* i.e. in the realm of "conscience".¹⁵² The peculiar story of English legal history, which led to the development of such a body of jurisprudence separate and distinct from the common law, is an interesting tale (although far too long for this project, constrained by both time and space). It suffices to say that modern equity has come a long way from the days of

¹⁵² McGhee, *supra* note 66 at paras 5-032-5-033; RP Meagher, WMC Gummow & JRF Lehane, *Equity: Doctrines and Remedies* (2nd ed, Sydney (NSW), Butterworths, 1984) at para 342 [Meagher, Gummow & Lehane].

infinite discretion, and the measure of justice being equated with the length of the “Chancellor’s foot”.¹⁵³ It is now a body of precedents and principles as robust in many ways as the common law, and in some respects more so.¹⁵⁴ Nevertheless, as a body of jurisprudence it retains some vestige of the ecclesiastical thinking that inspired and informed the clerical chancellors of the Middle Ages and, in addition to the overt moral overtones of its rhetoric, it also retains a certain patina of subjective morality.

The beauty of, and need for, such a system is that there are certain places to which the ‘law’ ordinarily will not go; places it cannot reach. As such, equity as an auxiliary jurisdiction allows for Anglophone law to attain certain outcomes that would be difficult (or impossible) to explain in principle at common law. This should not be taken to mean that common law is defective and in need of some drastic overhaul. Many, if not all legal systems incorporate some notion of ‘equity’, and the concept itself goes back at least as far as Aristotle; it is, however, crucial that we remember what the essence of that notion is.¹⁵⁵ ‘Equity’, in the broad sense, is the exception. It is the ameliorative hand of mercy that shelters the weak, and sometimes the strong, from the mechanistic application of the law that would otherwise wreak “injustice”.¹⁵⁶ That is I think what Anglophone jurists and common lawyers would understand equity’s role is with respect to intercession in common law matters. The obvious corollary that goes along with this is that if equity is indeed the exception, it must be because it cannot be the rule.

¹⁵³ Meagher, Gummow & Lehane, *supra* note 153 (foreword to the first edition by the Right Honourable Sir Frank Kitto, KBE at v)

¹⁵⁴ *Ibid.*

¹⁵⁵ McGhee, *supra* note 66 at para 1-002.

¹⁵⁶ Meagher, Gummow & Lehane, *supra* note 153 at paras 101-103; McGhee, *supra* note 66 at para 1-002.

The aforementioned moral complexion of equity, and by extension equitable relief, reflects this limitation. Such remedies as equity is able to provide outside of equitable causes of action are said to be ‘extraordinary’, and indeed this must be correct if relief is premised or justified on the basis of the immoral or unjust outcome that would otherwise ensue.¹⁵⁷ The expression of more ordinary notions of morality provides, in Luban’s words, “the institutional excuse” for equity’s interference in the otherwise settled operation of the ‘law’.¹⁵⁸ That same “excuse” then must also form the limit of equity’s jurisdiction. Contract by contrast is ordinarily non-advertent to such notions of morality, as should be the case if I am correct in asserting that the enforcement of contracts in modern times is no longer premised on the moral value of promises themselves. As such, it would appear that equity and contract make somewhat awkward bedfellows, and that to pursue the purposes of one will most likely not be coextensive with pursuing the purposes of the other.

Against this background, an equitable remedy will likely struggle to attain an outcome that is consistent with the purpose of contract as I have described it. The reason for this is that the exceptional character of such remedies precludes regularity and predictability, which conflicts with my explanation of the need for change – the need to maintain the equilibrium position of the parties bargain in economic terms when a breach of contract would otherwise undo or reverse such a position. The prevention of such outcomes, as I have demonstrated is essential to the proper functioning of contract not only in the

¹⁵⁷ Ibid.

¹⁵⁸ D Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988), (includes an exposition of this concept which has been called the “institutional excuse” at 56).

particular case, but to contract generally, ought to flow as the natural and ordinary consequence of the operation of the law. This outcome is, however, far less likely if the response developed to address the problem is chiefly equitable in character. To illustrate this point I will elaborate on a number of the equitable doctrines or principles that I believe would hamper any attempt to resolve the problem I have identified with an equitable solution, and thereby demonstrate why a moral solution cannot adequately address an economic problem.

4.1.1 Clean hands

The notion of ‘clean hands’ stems from the fact that a plaintiff beseeching a court of equity for relief from the rigour of the common law is in effect pleading for an exercise of the Sovereign’s conscience in their favour.¹⁵⁹ Logically a court cannot accede to such a request in good conscience unless the petitioner themselves has also made their prayer for relief in good conscience. Behaviour by a given party not in keeping with good conscience (so harsh or unmeritorious behaviour) disentitles that party from receiving equitable relief.¹⁶⁰

As one would imagine, the precise nature of conduct required to run foul of the doctrine is not clearly defined, conscience being an amorphous concept. It does not, however, extend to being a ‘bad egg’ generally.¹⁶¹ The disentitling conduct must have occurred in

¹⁵⁹ Meagher, Gummow & Lehane, *supra* note 153 at para 322; McGhee, *supra* note 66 at para 5-015.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

the context of the particular matter before the court.¹⁶² The possibility remains though that in the context of any contractual dispute the injured party may be barred from relief on the basis of having reacted acrimoniously to the contract-breaker's breach of obligation.

Based on the foregoing, the possibility for this doctrine to interfere in the proper operation of a remedy intended to preserve the economic equilibrium between parties to a transaction is fairly clear. Effectively, the clean hands requirement steps in to disentitle a party to relief in circumstances where they do not 'deserve' it. Such a consideration is, though, beside the point as far as the analysis I have presented in earlier Chapters is concerned, because the remedy is meant to respond to the deprivation of an 'entitlement' i.e. a right. Yet equity does not deal in rights. A party may have 'equity', and if the 'equity' is sufficient a court may intervene, but the existence of 'equity' in either party and the relative weight thereof is for the court to decide. As such, one can never be certain of the exercise of equity where there is any ground to contest the good behavior of either party.

4.1.2 Discretionary nature of relief

In line with my description of equity as the 'exception', there is a long-standing principle of discretion with respect to the provision of equitable relief.¹⁶³ It need not be shown for instance that a party is particularly unworthy, or that there is particular reason for which a

¹⁶² Ibid.

¹⁶³ Meagher, Gummow & Lehane, *supra* note 153 at para 311.

court to declines to act. It is always open to a court to do so, if in its wisdom it does not perceive a need to intervene or that it would be wise to refrain.

The factors that may be considered in the process of reaching the decision as to whether to act or not, are thus very broad. One consideration that is frequently brought to mind is the effect of the remedy upon the party against whom it is issued. It is often said that “equity and penalty are strangers” or that “equity does not seek to oppress”.¹⁶⁴ As such, a court of equity may very reasonably in accordance with established principle decline to act where a remedy sought would cause hardship to the defendant that is disproportionate to the benefit obtained by plaintiff.¹⁶⁵ This is often most acute in cases involving injunctions or prayers for specific performance, but could also apply to the application of a gain-reallocating remedy. Indeed, it is already clear that no account will be granted in respect of the infringement of intellectual property if no actual ‘profit’ is made, and probably not even if an expense is saved.¹⁶⁶ The same could be true where a profit is made by a contract-breaker who has misappropriated opportunity or intrinsically valuable entitlements but ultimately failed to better their financial situation as a result of their own folly.

The relevance of a contract-breaker’s ineptitude is questionable given the analysis I set out in Chapters 2 and 3; however, it may well come into play if a court is concerned not

¹⁶⁴ *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 (HC) at 302, Somers J; *Australian Consolidated Press Ltd v Morgan* [1965] HCA 21, (1965) 112 CLR 483 at 498, Windeyer J.

¹⁶⁵ *Wrotham Park*, *supra* note 56 at 811.

¹⁶⁶ Richard Miller, et al, *Terrell on the Law of Patents*, 17th ed (London: Sweet & Maxwell, 2011) at paras 17-72-17-73; See also *Dart Industries Inc v Décor Corp Pty Ltd* [1994] FSR 567 (HCA).

to oppress the defendant in a given case. The point should be made again, though, that the fortunes of the contract-breaker and the scale of the burden imposed by the award made are not relevant factors in the analysis underpinning the case for the remedy I propose. Much like the moral turpitude of the contract-breaker, the depth of the contract-breaker's pockets is of no moment to the problem of maintaining the balance in the contractual and economic relations of the parties. As I demonstrated in Chapter 3, the need to reallocate gains made by the inefficient misappropriation of opportunities is really only the corollary of the law's present attitude to the enforcement of obligations. That being so, it must be asked why the hardship of the defendant is logically germane to the vindication of aspirations, when in reverse circumstances the hardship of the same plaintiff (now defendant) in meeting unexpectedly onerous obligations is not? There is, I think, no principled answer from an economic point of view and I must stress again that we are dealing with an essentially economic problem.

4.2 Attempting to force a fit

There is something of a trend in modern times of attempting to ameliorate any problem for which there is not an immediately obvious common law solution with an equitable response. In certain circumstances recourse to equity has proven extremely fruitful; in a number of other cases the results have been far less positive. Furthermore, the consequences in these cases have at times not only been negative for the state of the law on the particular point, but for the integrity of equity itself.

There are a number of examples I could discuss in order to make this point; however, for the sake of brevity I will confine myself to one example that is to my mind the most troubling and explain what this change has meant for the original doctrine.

4.2.1 The fiduciary principle

No other equitable doctrine's expansion has been more acutely felt in Canada in the past fifty years, than that of the fiduciary principle. From a narrow range of traditional categories, the most important of which was the trust, the fiduciary principle has gone on to be applied to an increasing number of private and public law relationships. A prime example of this trend is its interpolation into the commercial/contractual sphere. In my opinion, like the other examples alluded to above with respect to the novel use or introduction of equitable ideas, this has arisen because of the actual or perceived shortcomings of the existing (strictly speaking common law) framework.

There are two shortcomings in particular that I have in mind, which are at times particularly acute in a contractual context. The first is the perceived remedial inadequacy of contract law, which has in my opinion attracted findings of fiduciary relationships in order to justify the application of equitable remedies. The second is contract law's inability to sanction certain kinds of 'wrong'.¹⁶⁷

In order to comment on the doctrinal significance of this development, I will first briefly explain how the doctrine has been applied in two highly significant commercial cases.

¹⁶⁷ I qualify use of the term because the types of conduct often complained of strictly speaking do not qualify as wrongs in an ordinary contractual setting.

4.2.1.1 Fiduciary relations in the commercial sphere

The existence of fiduciary relationships in a commercial setting is not novel. They have for instance been recognised for a long time as an incident of the solicitor client relationship, the agent principal relationship, and the relationship of directors to their companies.¹⁶⁸ Those relationships were, however, much more clearly analogous with the trust context in which the fiduciary principle first arose. The hallmark I would identify as present in all of these examples is the characteristic vulnerability of one party to the other in circumstances where one had reposed a largely unqualified trust in the other to protect their interests or manage their affairs, or those of another for whom they are concerned.¹⁶⁹ Such vulnerability gives rise to a strong justification for a higher standard of conduct on the part of the party in whom the trust is reposed, that is after all the source of the principle, given that the word fiduciary itself comes from the Latin *fiducia* or “trust”.¹⁷⁰

The application of the concept in the commercial sphere took a fairly large step forward in Canada, however, with the Supreme Court’s decision in *LAC Minerals Ltd v International Corona Resources Ltd*.¹⁷¹ The finding of a fiduciary duty on the part of LAC to Corona was not essential to the disposition of the case as LAC was also found to be liable for breach of confidence, which would have resulted in the same remedy in any

¹⁶⁸ McGhee, *supra* note 66 at para 7-004.

¹⁶⁹ *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574 at paras 32 – 35, Sopinka J [*Lac Minerals*].

¹⁷⁰ See *Girardet v Crease & Co* (1987), 11 BCLR (2d) 361 (SC), Southin J (“[t]he word ‘fiduciary’ is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But ‘fiduciary’ comes from the Latin ‘fiducia’ meaning ‘trust’” at 362)

¹⁷¹ *Lac Minerals*, *supra* note 170.

event.¹⁷² In spite of this, the five-member court felt it appropriate to comment on the issue to clarify whether such a finding was indeed possible. Two members of the three-member majority (with respect to the final result), La Forest and Wilson JJ, were of the opinion that a fiduciary duty did exist.¹⁷³ They differed as to their reasoning.

Wilson J's reasons were very brief; however, as pointed out by La Forest J, Wilson J had offered more elaborate comments and a rough test to determine the existence of a fiduciary relationship in *Frame v Smith* as follows:

...there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.¹⁷⁴

I agree that if the court were to investigate the existence of a fiduciary relationship outside of the categories traditionally recognised as fiduciary, the most apt unifying concept to refer to by way of analogy would be vulnerability created by the delegation and assumption of discretion or power i.e. such a quality in a relationship may render it not dissimilar from the classic relation as between trustee and beneficiary.

In the present case, however, Wilson J appeared to take a different line. Wilson J stated that negotiations about a possible joint-venture arrangement did not in themselves give rise to a fiduciary duty, but that the disclosure of confidential information relating to a

¹⁷² *Ibid.*, at 614, 631.

¹⁷³ *Ibid.*, at 655, 630.

¹⁷⁴ *Frame v Smith* [1987] 2 SCR 99, at 136.

potential mining property by Corona created a fiduciary obligation on LAC's part not to use the information for its own benefit.¹⁷⁵ For reasons I will elaborate below, I struggle to understand this conclusion.

La Forest J by contrast provides a much more thorough discussion, differentiating between the traditional categories of fiduciary relationship such as trustee/beneficiary, and relationships which may be found to exist in specific circumstances.¹⁷⁶ In relation to the latter, La Forest J cites Wilson J's comments in *Frame v Smith* as a useful rough and ready guide before going on to consider the facts of this case.¹⁷⁷ The first factor considered by La Forest was the "relationship of trust and confidence" which developed between LAC and Corona by virtue of the disclosure of confidential information.¹⁷⁸ Her Ladyship noted the similarity between the law of confidence and the law of fiduciary obligations, and considered that while they are distinct, they are intertwined and circumstances which give rise to the former are also a necessary precursor to the finding of the latter.¹⁷⁹

The second factor La Forest J considered was the background of the relevant industry practice in these types of negotiations, which were said to give rise to an expectation that LAC would have been legally obliged not to act contrary to Corona's interests.¹⁸⁰

¹⁷⁵ *Lac Minerals*, *supra* note 170 at 630.

¹⁷⁶ *Ibid.*, at 643 – 668.

¹⁷⁷ *Ibid.*, at 645 – 646.

¹⁷⁸ *Ibid.*, at 656 – 659.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

The third factor La Forest J considered was the requirement of vulnerability and its presence in this case. In relation to vulnerability, La Forest J gave the opinion that it was not a necessary ingredient in all fiduciary relationships and, citing *Keech v Sanford*, pointed out that many breaches of fiduciary duty will not occasion any harm to the party to whom it is owed.¹⁸¹ In the particular context of this case La Forest J stated that the “power or discretion” referred to by Wilson J in *Frame v Smith*, and relied on by Sopinka J to deny a fiduciary relationship existed in his dissenting judgment, only meant the ability to cause harm.¹⁸² In La Forest J’s opinion, such ability was clearly present in the case by virtue of LAC’s acquisition of the property concerned, which it would not have acquired but for Corona’s disclosure of confidential geological information.¹⁸³ The appropriate question when ascertaining whether an ad hoc fiduciary relationship exists then becomes (in La Forest J’s opinion): “...whether, having regard to all the facts and circumstances, one party stands in relation to another such that it could reasonably be expected that that other would act or refrain from acting in a way contrary to the interests of that other”.¹⁸⁴

4.2.1.2 Doctrinal significance

If La Forest J’s opinion is correct, it would represent a paradigm shift in the focus of the fiduciary principle and correspondingly a tremendous expansion in its breadth. Some commentators reject this conclusion, stating that the degree of vulnerability necessary is unclear, while others assert that by virtue of *LAC v Corona* the fiduciary concept has

¹⁸¹ *Ibid.*, at 663 – 664; *Keech v Sandford* (1726) Sel Cas T King 61, 25 ER 223.

¹⁸² *Lac Minerals*, *supra* note 170 at 664.

¹⁸³ *Ibid.*, at 663 – 667.

¹⁸⁴ *Ibid.*

expanded dramatically to almost universal application.¹⁸⁵ Later case law tends to support the latter conclusion. The subsequent Supreme Court case of *Hodgkinson v Simms* gave rise to similar issues, but whereas La Forest J was in a minority with respect to the fiduciary issue in *LAC v Corona*, her Ladyship was in the majority in *Hodgkinson* and appeared to reaffirm her own dicta from *LAC*.¹⁸⁶

There appear to be two distinct bases upon which La Forest J premises her finding of a fiduciary relationship in *LAC*. The first is open to substantial criticism for the reasons outlined below, and the second is to my mind far more germane to the imposition or development of a general standard of ‘good faith’ rather than the imposition of fiduciary duties. To elaborate these points I will consider each potential basis in turn.

4.2.1.2.1 Vulnerability

The definition of vulnerability espoused by La Forest J as noted above goes too far in my opinion by suggesting that the ability of one party to adversely affect the interests of the other constitutes vulnerability which may attract the imposition of a fiduciary duty. In the ordinary course of life we are all able to adversely affect the interests of others, but the mere fact of our doing so does not create responsibility on our part for the consequences. In the law of negligence, for instance, it was said in *Donoghue v Stevenson* by Lord Buckmaster that a “... man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.”¹⁸⁷ That encapsulates the point neatly. It is not the fact of the wrong that justifies the imposition of a duty, but rather the duty that

¹⁸⁵ Mark Ellis, *Fiduciary Duties in Canada* (Don Mills (ONT), R DeBoo Publishers, 1988) at 1-2.1 [Ellis].

¹⁸⁶ *Hodgkinson v Simms* [1994] 3 SCR 377 [*Hodgkinson*].

¹⁸⁷ *Donoghue v Stevenson* [1932] 1 AC 562 at 574 – 575, Lord Buckmaster) [*Donoghue v Stevenson*].

creates the wrong. La Forest J's prescription has the effect of reversing the focus of the inquiry by emphasising the adverse effect.

This criticism that La Forest J has to some extent placed the cart before the horse is ironic given her own insistence that some courts have gotten it wrong by using the fact of the wrong to justify the duty.¹⁸⁸ This may be understandable if vulnerability is considered on its own. We must of course remember the precursor to vulnerability that appears from factors listed by Wilson J: that factor is the reliance upon the fiduciary of the party to whom the duty is owed, created by the discretion granted to, and assumed by the fiduciary to conduct or affect some aspect of the former's affairs. It is upon that basis that equity has imposed the duties of the fiduciary.¹⁸⁹ In sum: in light of the trust reposed by the grant of the discretion, and the inability of the party to whom the duty is owed to safeguard their own interests, equity has required that the fiduciary prefer the interests of the recipient of the duty even at the expense of the fiduciary's own interests.¹⁹⁰

If my view is correct, then in the context of a fully-fledged joint-venture agreement equity may find that the requisite reliance and vulnerability are present. In the context of parties negotiating at arms-length, however, I am not so sure. I do not find La Forest J's suggestion that the transmission of confidential information gave LAC some discretion to adversely affect Corona's interests convincing. It placed LAC in a position to do so, but so would leaving my wallet in the street vis-à-vis an unscrupulous finder. That should

¹⁸⁸ *Lac Minerals*, *supra* note 170 at 652

¹⁸⁹ *Ibid.*, at 598 – 599.

¹⁹⁰ *McGhee*, *supra* note 66 at para 7-008.

not be enough to make such a person a fiduciary.¹⁹¹ The act that confers upon the fiduciary some power that renders a party vulnerable to the fiduciary must be coupled with the relevant expectation as to how the power will be exercised.¹⁹² In the circumstances, one can understand how this would include an expectation that LAC would not use the information contrary to Corona's interests, but surely there would be no expectation that LAC would be required to use the information, if at all, only to promote Corona's interests. Instead, the expectation that would have arisen in the circumstances is that LAC would refrain from abusing the confidence reposed in it. La Forest J agrees that such an expectation would have arisen, but as noted above also thought that the duty of confidence is so intertwined with fiduciary duties that circumstances giving rise to the former may equally give rise to the latter.¹⁹³

In my opinion this misstates the case. A duty of confidence is generally considered a component of fiduciary duties; as such, the duty of confidence can be seen as an aspect of the duties of a fiduciary. But where fiduciary duties must imply a duty of confidence, I would be wary of making any similar inference in the other direction. If we are mindful of Occam's razor we may see that to do so is not just unnecessary for the disposition of the particular case, but that it also casts the applicability of the fiduciary principle in terms that are broader than necessary to explain the basis for liability in respect of this type of wrong.

¹⁹¹ *C.f. Goodbody v Bank of Montreal* (1974) 47 DLR (3d) 335 (Ont HC) (where this was not so, in the case of a thief, who was found to be a fiduciary).

¹⁹² Contrast the duties between the holder of a bare power of appointment with that of a trustee.

¹⁹⁴ *Lac Minerals*, *supra* note 170 at 663.

4.2.1.2.2 Vulnerability is unnecessary

Although La Forest J discusses the existence of vulnerability as between Corona and LAC, it appears from the end of her judgment that she does not consider it essential to the finding of a fiduciary duty:

I cannot therefore agree with my colleague, Sopinka J., that vulnerability or its absence will conclude the question of fiduciary obligation. *As I indicated above, the issue should be whether, having regard to all the facts and circumstances, one party stands in relation to another such that it could reasonably be expected that that other would act or refrain from acting in a way contrary to the interests of that other.* In any event, I would have thought it beyond argument that on the facts of this case Corona was vulnerable to Lac. [Emphasis added.]¹⁹⁴

If there was any doubt that La Forest J's discussion of the concept of vulnerability signified an intentional widening of the fiduciary principle's scope, as opposed to a mere mistake of law, the justification for finding a fiduciary relationship espoused above clearly supports the former interpretation. It also explains why La Forest J has attempted to widen the scope of the fiduciary principle in the way that she has.

It would be generally accepted, I think, that as a general rule at common law people as independent and autonomous entities are legitimately entitled to prefer their own interests to detriment of others. This is not an unqualified right, but in the absence of some duty to the contrary we are not held responsible for the wellbeing of others. There are, of course, circumstances in which it is perceived as illegitimate for an individual to solely prefer their own interests, such as contracts of 'utmost good faith', and means of promoting one's interests that are considered illegitimate such as fraud, duress and so on. These are, however, narrow and limited exceptions to this general rule, and there may be other

¹⁹⁴ *Lac Minerals*, *supra* note 170 at 663.

circumstances of a more general nature in which it is felt that to solely prefer one's own interests is illegitimate as well. Indeed, in Canadian contract law there is an increasing trend towards finding duties of 'good faith' as a necessary incidence of some classes of contract, including long-term commercial contracts and contracts of employment.¹⁹⁵ Such duties generally require the parties to have regard to each other's legitimate interests when acting within the scope of that relationship, but do not require that either party entirely prefer the interests of their opposite to the exclusion of their own. In my opinion, La Forest J's comments appear far more consonant with the imposition of a general duty of good faith than they do with a duty of undivided loyalty. The general antipathy of commercial lawyers to any such concept has made its imposition impractical for centuries; it is thought, for instance, that this is what Lord Mansfield was attempting to do in *Carter v Boehm*, despite the subsequent confinement of his dicta to insurance contracts.¹⁹⁶

As such, La Forest J's broadening of the scope of the fiduciary principle appears to be an attempt to introduce a general requirement of good faith into contract law through the back door. Recently, however, La Forest J seems to have stepped back from her comments in *Hodgkinson v Simm*:

Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.¹⁹⁷

¹⁹⁵ John D McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 785-788, 800-803.

¹⁹⁶ Eric M Holmes, "A Contextual Study of Commercial Good Faith: Good-Faith Disclosure in Contract Formation", (1977-1978) 39 U Pitt L Rev 428 at 426-428.

¹⁹⁷ *Hodgkinson*, *supra* note 187 at 409-410.

It should be noted however that *Hodgkinson* was a case involving an investment adviser who had not disclosed their interest in the investments they had recommended.¹⁹⁸ As such, this was a much more conventional example of a fiduciary relationship and, given La Forest J's support for her earlier judgment, I do not think she would have found differently in *LAC* even after *Hodgkinson* in spite of the apparent change in position.

4.3 Significance for the original doctrine

For me these developments and the resulting change to the parameters of the fiduciary principle give rise to a general sense of disquiet. The changes that the minority view in *LAC* attempted to make effectively recast the concept of a fiduciary relationship in terms broad enough to capture all but the most arms-length of commercial relationships. To my mind these changes are prima facie objectionable, but if the justification for my view only went to so far as inconsistency with authority, then one could say it is more touching than persuasive. On the contrary though, my unease does not stem from the prospect of change in and of itself, but the potentially negative consequences thereof. The consequence which most concerns me is that, given the reduction in the low watermark of fiduciary relationships, and thus the characteristics required to be a 'fiduciary', the corollary i.e. the standard to which they are held, must also lessen over time.

This may be seen by the rise in the availability of allowances when a delinquent fiduciary is found to have profited from a breach of duty, and calls for a change in the assessment

¹⁹⁸ *Ibid.*, at 378.

of awards against delinquent fiduciaries to more closely align with orthodox commercial assessments. My learned friend and mentor Dr. Peter Devonshire, for instance, opined in a recent article that the assessment of an account of profits in commercial-fiduciary type relationships ought to be governed by similar principles of remoteness and causation as damages for breach of contract.¹⁹⁹ I agree with him that such an approach is desirable from the commercial perspective, encouraging as it does predictability and consistency, but question how such an approach can be reconciled with a duty of absolute fidelity. If a duty is absolute, then in principle its sanction should be coextensive and similarly broad, as has traditionally been the case except where good conscience militated in favour of a lesser sanction. The inescapable conclusion that one comes to when considering what such a change to quantification means, is that that the content of the duty itself must effectively change, and that it is perhaps inevitable that this should carry over into more traditional contexts. Such a trend left unabated will supplant the rigour of an absolute duty of loyalty, and replace it with one merely of good faith, which can tolerate such self-regard as a weakening remedial response would appear to allow.

4.4 Significance for Equity

Notwithstanding the criticisms discussed above, I think that the attempt to respond to a clear lacuna in the law to in relation to a particular problem, or type of problem, is laudable. It displays both an awareness of changing attitudes and values and a willingness to depart from authority that is incompatible with such changes.

¹⁹⁹ See Peter Devonshire, “Account of Profits for Breach of Fiduciary Duty” (2010) 32 Sydney L Rev 389.

In essence, my central objection is that the means chosen are not always the wisest in light of the unintended consequences. The potential undoing of the fiduciary principle is a good example of this – a principle which served its purpose well in its environment, but is now being eroded as a result of being forced to change to meet the needs of another environment without any clear dividing line between the two. The same will be true for any other equitable device or doctrine that is transposed without a clear distinction between the contexts in which it operates i.e. common law, or equity. As such, the short-term benefit of ameliorating particular wrongs may lead to a longer-term problem resulting from the piecemeal destruction of the Court's *in personam* jurisdiction, which may suddenly become problematic when genuinely extraordinary measures are needed.

4.5 Present remedies

4.5.1 Specific performance

4.5.1.1 Function of the remedy

As explained in Chapter 2, the only way to remedy the deprivation of an inherently valuable contractual entitlement is to provide a monetary remedy that is tantamount to requiring performance itself. I argue that such an approach is not novel, as this already appears to be the effect of 'expectation damages' as traditionally applied, with the only difference being the means of quantifying the damages. In order to effectuate substitute performance in the context of intrinsically valuable rights, the quantum of the award is decided by reference to the contract-breaker's gain (there being no 'objective value' to

speak of); this is different to the approach traditionally employed with respect to extrinsically valuable rights where the objective value of the injured parties loss is used. In that context, the existing remedy of specific performance would appear to be an ideal solution to remedy the present unavailability of a contractual common law remedy. Specific performance is geared towards protecting interests or entitlements that are of particular value, or of a peculiar nature, so as to be incapable of adequate monetization.²⁰⁰ The canonical example of this is land, but in some instances may also include highly specific and irreplaceable chattels, such heirlooms.²⁰¹ Obviously in many circumstances, including those I have discussed in Chapter 2, actual performance will be impossible, rendering the specific performance inapplicable. There is, of course, scope in most common law jurisdictions (under Lord Cairns' Act or its equivalent), for a court to make an award of damages in lieu of an order specific performance where the latter is not possible. Thus on the face of it, leaving other equitable restrictions aside for the moment, there would appear to be ample scope for specific performance to apply.

Despite the initial promise though, specific performance as it is currently conceived, still cannot operate in the manner I have described. This is because the assessment of such awards, such as damages under Lord Cairns' Act, must follow the same principles as the assessment of damages at common law.²⁰² Thus, if common law damages will not work to address the problem I have identified, damages in lieu of equitable relief cannot either. Therefore, without significant revision, specific performance could not fill the gap.

²⁰⁰ McGhee, *supra* note 66 at para 17-007 – 17-008.

²⁰¹ *Ibid.*

²⁰² Furmston, *Law of Contract*, *supra* note 42 at 1743.

4.5.1.2 What if we revise?

Obviously any human law is open to change, and the technical limitation in the quantification of damages in lieu of specific performance is no exception. So it is possible that a change in emphasis when calculating the award to favour the value of the entitlement lost (to the injured party), could allow it to perform the remedial function I propose. However, in light of the discussion in sections 2 and 3 of this Chapter, this is clearly only the first hurdle that must be overcome.

As discussed above, equitable remedies granted in respect of common law wrongs or causes of action are an example of equity acting in its auxiliary jurisdiction, and such remedies are said to be ‘extraordinary’. That equitable character imports a host of limitations, which can generally be seen to be inimical to unsentimental commercial interests. At this point we are faced with two paths for amending the application of specific performance in order to have it fulfill the function of the remedy I propose.

4.5.1.2.1 De facto change

The first such path can be broadly described as the ‘de facto’ path, whereby a gap is created between that which the law is, and that which the law says it is. In some sense these two manifestations of ‘the law’ are (normally) coextensive, but where change is latent this is not the case. In such circumstances where the law has in fact changed it must in some sense be applied differently from the law as it was before. This break in continuity is not obvious, and is not intended to be for the reason that it allows a fiction of

respectable pedigree to be maintained. The great drawback of this approach for present purposes is that it will be unclear how far the change goes, and whether the original law has been jettisoned completely, or remains untrammelled in another context. This creates the possibility for change to ripple outwards from the initial point of ‘impact’ and potentially unseat the application of the previous law elsewhere. In relation to a de facto change allowing for an expanded application of an equitable doctrine, this may be reflected in a change in emphasis or a lessening in the rigour with which certain associated concepts are applied.

The example canvassed above with respect to the expansion of the fiduciary principle in Canada provides a useful illustration of this approach. As has been suggested, the change the minority attempted to enact in *LAC* with respect to broadening the scope of the fiduciary principle can be seen as an attempt to introduce a general duty of good faith in commercial dealings through the backdoor.²⁰³ This change is obviously not patent, however, and as such the court’s rhetoric still relies on the justification of finding a relationship that ought to attract the imposition of fiduciary obligations. The fact is though, that relationships of the type that existed between *LAC* and *Corona* in that case do not involve any expectation of ‘absolute fidelity’, meaning that principles and doctrines which developed historically to reflect such characteristics cannot easily apply. As such, their modification too seems likely, as suggested by the call referred to above for changes to the principles governing the calculation of accounts awarded against

²⁰³ RE Hawkins, "LAC and the Emerging Obligation to Bargain in Good Faith" (1990), 15 Queen's LJ 65.

delinquent fiduciaries in commercial contexts.²⁰⁴ If this does indeed occur, then it would become possible for the application of such concepts to be changed across the board, perhaps even going as far as the trust context, resulting in a complete transformation of the fiduciary principle.

If the same de facto approach were to be taken in respect of specific performance, by essentially broadening its scope to include not only intrinsically valuable entitlements, which are an easier fit, but the value of foregone opportunities misappropriated by a contract-breaker as well, a similar outcome may arise. Consider for instance the requirement that I suggest in Chapter 2, that a plaintiff should only be able to recover the value of foregone opportunities misappropriated by a contract-breaker, where they themselves were in a similar position to make such a profit. This requirement effectively reflects an economic preference for efficiency i.e. that resources and opportunities should go to those best able to utilize them, and would have to constrain the operation of specific performance if it were to fulfill the role of the remedy I propose. However, such a restriction is inimical to equity's point of view on such matters. The only question that need be answered from a classical equitable perspective is whether the supplicant has the necessary 'equity' and demonstrated integrity in their dealings; ability is irrelevant. If judges were to factor such a concern into the use of their discretion when granting or withholding the remedy, equity would be effectively precluded from remedying perceived injustice in certain circumstances. This is contrary to the purposes of equity,

²⁰⁴ See Devonshire, *supra* note 200.

given that the amelioration of injustice is at the heart of all equitable intervention.²⁰⁵

Such a change could potentially have the creeping effect of staying the application of the remedy more broadly than just in this particular context, and perhaps equitable intervention overall.

The potential for such creeping paralysis of the law is certainly nothing new, and not unheard of when the law's cognitive dissonance created by reliance on fictions is laid bare in light of facts which do not permit the law to do A while claiming it is in fact doing B. For example, I am reminded of the judgment of Lord Denning in *Gillespie Brothers v Roy Bowles Transport* with respect to the "construction" method of striking down overreaching exclusion clauses, and his Lordship's words in particular when he said:

The time may come when this process of "construing" the contract can be pursued no further. *The words are too clear to permit of it.* Are the courts then powerless? Are they to permit the party to enforce his unreasonable clause, even when it is so unreasonable, or applied so unreasonably, as to be unconscionable? [Emphasis added.]

I fear that a similar position may eventually be reached with respect to specific performance if courts are not open about the change they are affecting in the 'law'. If efficiency is in essence equated with justice, such that it offers sufficient reason to stay equity's hand as referred to above, there must come a time when it will no longer be possible for a court of conscience to intercede when an efficient outcome is manifestly

²⁰⁵ Meagher, Gummow & Lehane, *supra* note 153 at paras 101 – 103; McGhee, *supra* note 66 at para 1-002.

unjust. What other option will there be, other than to admit that they were disingenuous all along?

4.5.1.2.2 Explicit change

Explicitly changing the operation of a remedy in a particular context, or redeploying part thereof is not new. For example, legislative use of concepts such as estoppel or mechanisms such as injunctions, sheared of their equitable trappings, is not uncommon in a western common law context. Going even further, all equitable remedies in respect of contracts, including specific performance, are codified statutorily in India and are no longer equitable at all.²⁰⁶ In most Anglophone legal systems, statutory intervention into the contractual sphere is relatively uncommon, and most of our shared contractual doctrine remains situated in common law. There are a number of explanations for why this might be so, but it would appear to be due to an acknowledgment that the flexibility of the common law is in some ways better suited to deal with the ever-changing and complex nature of the commercial world.²⁰⁷ As such, while modifying a remedy like specific performance statutorily to fit the bill of the remedy proposed in this thesis is possible, it is also unlikely to occur.

Given that improbability, if some version of specific performance were to be developed, without any equitable restrictions to fill the remedial lacuna discussed, it would most likely have to be judge made. To do so though, would require explicit acknowledgment

²⁰⁶ See *The Specific Relief Act* (IND) 1963/47.

²⁰⁷ See Guest, *supra* note 135 (consider for instance how the classification of terms as either conditions or warranties in the *Sale of Goods Act*, 1979 (UK), c 54 has semi-frozen the law of sale out of step with contract generally, since the recognition of “innominate terms” in *Hong Kong Fir v Kawasaki Kaisen Kaisha* [1962] 2 QB 26 (CA) at 10-033).

of change, and ‘there’s the rub’. For if this approach were to be taken, and ‘specific performance’ were to be created differently in this context, free of any of the restrictions referred to above, it could only questionably be described as ‘specific performance’, let alone equitable in nature. It would effectively be a completely new remedy, and it would have to abandon the underpinnings and justification of the older remedy and forge a new path. For instance, it could not rely on the theory that it was attempting to enforce the obligation by requiring damages equivalent to literal performance, because courts of common law do not possess the inherent authority to compel persons to act, apart from requiring the payment of monies in satisfaction of debts, or in actions for the price.²⁰⁸ As such, they would not fall within the ambit of Lord Cairn’s Act or any equivalent thereof, in the sense that the court would be not be granting damages in lieu.

Such complicated theoretical issues could of course be avoided if the change were to be statutory, because the court would be acting under the auspices of the statute, and in a parliamentary democracy (constitutional issues aside) that is generally enough. However, as noted earlier, that is unlikely, and if change is to be made explicit it would appear that such technical issues could not be avoided. That being said, I am of the view that this approach is certainly to be preferred to the ‘de facto’ approach for the reasons outlined above; but this approach is really no different to developing a novel remedy at common law in its own right.

²⁰⁸ Beale, *supra* note 82 at paras 27-001, 27-004.

4.6 The Account of Profits

As previously discussed, the account of profits is an equitable remedy that prior to *Attorney General v Blake* had not been granted in respect of a common law cause of action, and never in respect of breach of contract. The actual reasons for this may be as historic as they are principled; there are, however, compelling reasons why it is inappropriate to interpose in a contractual setting, not least of which is the potential affect on the integrity of the remedy itself. Larger concerns about the integrity of equity will be discussed in the following section, but for now I will explain why the remedy as it is presently cannot properly apply.

Apart from the means of quantification, the most glaring difference between an account of profits and an ordinary award of damages in common law is that an account traditionally imports little restriction on the award in terms of ‘remoteness’.²⁰⁹ Even with respect to intellectual property the quantum of the remedy is relatively uninhibited, with allowances or apportionment being a matter of discretion.²¹⁰

As I explained in an earlier Chapter, the rule of remoteness that emerged from *Hadley v Baxendale* serves an incredibly important function with respect to balancing the interests of the parties and maintaining the equilibrium position – present at the time of transacting – in a post-breach world. The importance of doing so is that otherwise the potential ‘cost’ of transacting would be rendered unpredictable, which would prevent the parties

²⁰⁹ Charles Mitchell, “Causation, Remoteness, and Fiduciary Gains” (2006) 17 KCLJ 325 (direct authority on point appears to be scarce, but a number of authors appear to assume that this is the case at 336-337).

²¹⁰ See e.g. *Boardman v Phipps*, *supra* note 147; *Warman International Ltd v Dwyer* (1995) 182 CLR 544 (HCA).

from pricing their obligations accordingly. Absent such accurate pricing, we cannot be confident of the realization of an overall surplus from the transaction because we cannot be sure that the contract-breaker has not offered too much in exchange for too little. That is, we cannot be sure that they would have ended up with a positive sum at the time of contracting if they had been able to weigh the present value of possible damages against the contract price.

Such a state of affairs must have the consequence of undermining the essential function of contracts in facilitating the realization of surpluses and gains from trade, either by disturbing the economic basis of the parties bargain or significantly chilling commercial freedom. By the latter, I mean that such a potentially overly-broad remedy may forcibly stay the hand of any would-be intentional contract-breaker by transforming common law contractual obligations into something they have never been i.e. an obligation to perform at all costs.²¹¹ This would effectively undo the doctrine of efficient breach, and do what I have been at pains to stress I do not wish to achieve, which is deter genuinely efficient breaches of contract.

If it appears from the picture that I am painting above that the account of profits as applied traditionally is wholly inimical to a purely contractual setting, this is not because the remedy in itself is defective. Instead, it only appears to be inappropriate in the context of orthodox contractual relationships for the reason that the context in which it developed was very different. As such, whether one conceives of it as premised on the

²¹¹ *Blake*, *supra* note 55, Lord Hobhouse, dissenting (contractual obligations are the obligation to perform or pay damages at 296-297).

need to protect the institutions with which it is historically associated, or to deter wrongdoing that compromises said institutions, it has developed to meet very different needs from those of contract.

If, for instance, the account is treated as being necessary for the protection of the institution, the needs of contract as an institution must obviously be regarded as different from fiduciary relationships such as trustee/beneficiary. Contractual relationships in common law are defined by the mutual pursuit of self-interest, whereas fiduciary relationships are defined (classically) by the duty of the fiduciary to prefer the interests of the recipient of said duty above all, and especially in preference to his or her own interests.²¹² How, then, can a remedy that developed in the latter context to enforce a fiduciary's absolute duty of fidelity be applied in the former context where obligations are neither absolute nor immutable?

Even when compared with the application of the account of profits in the context of intellectual property there is an obvious mismatch, given that, like fiduciary relationships, property can be conceived of as an institution that is regarded as inherently valuable; the almost inalienable right to one's private property being one of the obvious cornerstones of Anglophone law. The absence of hard limitations then on the scope of the remedy is fairly explicable, as one is generally thought to not only be entitled to one's property, but the fruits of said property as well. That type of reasoning has little place in contract, however, given that a distinction has long been drawn between the contractual

²¹² Ellis, *supra* note 186 at 1-3.

entitlement to a thing and the entitlement to the thing itself.²¹³ As such, with the exception of contractual entitlements I have described as intrinsically valuable to the holder, which must to some extent be a relatively narrow class, such an absolute sanction for interference with contractual rights appears drastically inappropriate. Thus the account of profits could only affect a partial response to the remedial lacuna my prescription is attempting to address.

4.6.1 What if we revise?

As with specific performance it is possible that we could in effect revise the present operation of the account of profits in order to fit the description of the remedy I have argued that contract law needs. Unfortunately, the options and attendant risks and consequences would appear to be the same as they are for the modification of specific performance. I will offer brief comment though on their relevance for this remedy.

4.6.1.1 De facto change

Unlike specific performance, an odd de facto change to the scope or application of the account of profits remedy actually took place in *Attorney General v Blake*. Prior to *Blake's* case an account had never been granted in respect of a breach of contract and, while groundbreaking, their Lordships' decision to grant the remedy also left a number of questions unanswered. For example, was this still the equitable remedy in its original form and, if so, did other equitable doctrines apply to ameliorate the potential harshness of such an award? If the answer to both was in the affirmative, then there were potential problems with the decision to grant the account.

²¹³ Guest, *supra* note 135 at 1-026.

Equity generally prefers to assist the prompt and not the tardy.²¹⁴ In the circumstances of *Blake's* case the Crown had in fact known of Blake's intentions before the book was published, and yet failed to act even though it could have obtained injunctive relief to restrain publication.²¹⁵ In other circumstances with other plaintiffs, that intentional and potentially cynical delay may have been significant enough to disentitle a plaintiff to relief, but not so in this case. Furthermore, it is clear that even a delinquent fiduciary is entitled to allowances in many circumstances for their time and labour.²¹⁶ Blake, however, was not granted any allowance in respect of the royalties and was not said to be under any obligation enforceable in law or equity other than under his non-disclosure agreement from the 1950s. That begs the question as to why he was held to such an unrelenting standard of account, when the obligation in question appears to have been of lesser weight than a fiduciary obligation, for instance?

Based on these facts, it appears that the concern for 'justice' in the application of the remedy was perhaps somewhat one-sided. This is not necessarily the wrong outcome, as the remedy I propose would reach the same result. It is, however, more typical of a common law remedy than an equitable one. It is trite after all that 'equity does not seek to oppress', and that a litigant being a 'bad sort' generally does not colour the view of a court of conscience with respect to the *lis* of the particular case.²¹⁷ These principles seem to have faded into the background of *Blake's* case, however, which leads me to be concerned that if the account of profits were to be redeployed to fill the role of the

²¹⁴ Meagher, Gummow & Lehane, *supra* note 153 at para 328.

²¹⁵ *Blake*, *supra* note 55 at 294.

²¹⁶ See e.g. *Warman*, *supra* note 211.

²¹⁷ Meagher, Gummow & Lehane, *supra* note 153 at para 322; McGhee, *supra* note 66 at para 5-015.

remedy I propose, concern for justice as between the parties may gradually fade away. 'Justice' in the circumstances of the particular case being not only a question of the vindication of the plaintiff's rights, but the effect of said vindication on the defendant as well.

4.6.1.2 Explicit Change

In light of the difficulties I have referred to above, one suggestion would be to modify an existing equitable remedy to fit the bill, and free it of some of the restrictions I have mentioned. I think that if both aspects of modification were applied, the resulting remedy would be in a strong position to address the problem I have identified and fill the gap in contract's panoply of available remedies. As I have said though, the irony would be that the remedy would actually cease to be equitable in character, and as such, one might question why it should be described as equitable at all. This must be so if we consider that the extraordinary relief provided by equity is jurisdictionally dependent on considerations of good conscience. Thus, in the absence of the need to take account of good conscience in the form of equity's general maxims and principles, any such remedy must simply be common law.

4.7 Verdict on the appropriateness of an equitable response

The perspective I have applied throughout my analysis of the problem at the heart of this thesis has been a largely economic one, and the metric against which I have measured the present law has correspondingly been 'efficiency'. This is an almost unrelentingly unsentimental perspective from which to view the law, and in which to couch one's

analysis, but for the reasons explained in Chapter 1 I am certain that it is appropriate for the matter at hand.

The efficacy of this economic perspective in explaining the law in this area in a positive sense has inexorably pushed me to the conclusion that commercial sensibilities will ultimately prevail over more sentimental ones. Indeed, that appears to be the gist of the historical narrative recounted in Chapter 1 and also appears to be the case with the wider application of the fiduciary principle into the commercial sphere as explained above. As such, a genuinely equitable response to the problem I seek to address does not appear as if it truly can be successful.

Thus, if a remedy is to be finally provided in respect of the types of breach I have focused on, and successfully applied in the ‘cold courts’ in which the law is ultimately practised, it cannot come from a moral perspective. Either that basis will be subverted with potentially serious consequences for its progenitor concept(s) and jurisdiction, or the remedy will fail to operate correctly given that the problem identified is not a moral one. Ultimately it may be more difficult to fashion a novel response in common law without the supposed justification of good conscience, but I do not see how a court of competent jurisdiction could realistically do otherwise for this particular problem.

CHAPTER 5: Conclusion

This thesis has been something of a survey of a number of areas of private law. Its discussion is support for three propositions. First, that there is ample reason to award gain-based damages as an ordinary remedy for breach of contract in circumstances where the function of contract as an economic institution would be undermined otherwise. Second, that there are no persuasive reasons not to. Third, that there are no ready made solutions elsewhere in private law that could fulfil the function of the remedy I propose i.e. that there are no existing alternatives.

Support for the first proposition stems from the early discussion in Chapter 1. The purpose of Chapter 1 was to establish that the perspective of ‘contract’ as an economic institution was not merely *a* germane perspective, but *the most* germane perspective on contract. Having established that, the symmetry between contract law and contract as an economic phenomenon was shown to be not merely serendipitous but the result of intention and design. Accordingly, one could say that the development of the law in line with recognition of this explicit economic underpinning was desirable, and therefore that development that incorporated gain-based damages to protect contract’s economic function was desirable also.

The foundation for the second proposition referred to above was largely developed in Chapter 2. The discussion in Chapter 2 demonstrated that the ordinary limitations on

damages for breach of contract that had made a gain-based remedy apparently impossible were in fact reconcilable with the award of gain-based damages, so long as they too were consistent with contract's underlying economic rationale. On that basis, few convincing objections can be made to awarding a gain-based remedy in response to a breach on a doctrinal basis, which is why I take the view that there is no reason to abstain.

The third proposition required a much broader survey of the law. Indeed, unlike the other aspects of this thesis, which received a Chapter apiece, to substantiate this claim required nearly two chapters, including most of 3 and all of 4. I am convinced, however, that they substantiate the claim made. As explained in Chapter 4, an extraordinary remedy may fail to remedy an ordinary, if potentially infrequent, problem. Thus equity may not, and in my view should not, be the source of the remedy I propose. Furthermore, as explained in Chapter 3, no ordinary remedy at common law presently exists that fits the mould.

What I hope the foregoing demonstrates, when taken in combination, is that there is a clear place for gain-based damages as an 'ordinary' remedy for breach of contract, and that place ought to be filled by the development of a new remedy, or what might be described as a new head of damages at common law. Such a development is unlikely at this stage. However, the renewed interest in restitutionary remedies at common law that began in the 1960s with Goff & Jones, and the fact of gain-based awards having now occurred in contract, give me hope that the type of change I propose may one day come to pass.

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