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Introduction

It has been suggested that disgorgement damages for breach of contract are unorthodox and potentially disastrous for contract law.¹ The aim of this book is to create a workable interpretive theory of the law of disgorgement damages according to which parties to a contract can predict with reasonable accuracy the remedy which a court will award if they breach their obligations. It is preferable if parties are aware of each other's intentions at the outset of a contract, and the threat of disgorgement remedies ensures that contractors do not make idle promises which they do not intend to keep. In some circumstances compensatory damages and specific relief are not adequate to protect the claimant's interest in performance of the contract. The award of a remedy in private law is intended to vindicate the claimant's right, in the sense that the claimant's right is made good. Disgorgement damages fill a gap in the law, as they allow for an appropriate recognition of the claimant's rights in those cases where specific performance would have been available but it is no longer possible, and where compensatory damages are inadequate. They also serve to deter defendants from breaching contracts, particularly as there is no possibility of stipulating liquidated damages to ensure performance.

I use the term 'disgorgement damages' to describe the remedy for stripping profits from a wrongdoer for breach of contract.² Gain-based damages for breach of contract have sometimes been called 'restitutionary damages'³ or an 'account of profit'.⁴ 'Restitutionary damages' is an inapposite label because 'restitution' is an ambiguous term with two mutually exclusive meanings, either a 'giving back' of a benefit unjustly received or a 'giving up' of a benefit made at the expense of the claimant because a wrong has been committed against her.⁵ It was for this reason that Lord Nicholls in *Blake* preferred not to use the term 'restitutionary

¹ *Attorney-General v Blake* [2000] UKHL 45, [2001] 1 AC 268 (HL) 299 (Lord Hobhouse dissenting).

² cf J Edelman, *Gain-Based Damages – Contract, Tort, Equity and Intellectual Property* (Oxford, Hart Publishing, 2002). See also *Stevens v Premium Real Estate Ltd* [2009] 2 NZLR 382 (NZSC) [102] (Tipping J).

³ See, eg D Friedmann, 'Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong' (1980) 80 *Columbia Law Review* 504, 515; G Jones 'The Recovery of Benefits Gained from a Breach of Contract' (1983) 99 *LQR* 443; P Birks, 'Restitutionary Damages for Breach of Contract: *Snepp* and the Fusion of Law and Equity' [1987] *Lloyd's Maritime and Commercial Law Quarterly* 421.

⁴ *Blake* (n 1) 284 (Lord Nicholls); S Doyle and D Wright, 'Restitutionary Damages – The Unnecessary Remedy?' (2001) 25 *Melbourne University Law Review* 1.

⁵ P Birks, *An Introduction to the Law of Restitution*, 2nd edn (Oxford, Oxford University Press, 1989) 12.

damages', calling it an 'unhappy expression'.⁶ 'Account of profits' is also an inappropriate label. It is laden with historical baggage, as it is traditionally awarded for equitable wrongs, and not for common law wrongs.⁷ By contrast, 'disgorgement damages' is a jurisdictionally neutral term which jettisons the historical baggage of the label 'account of profits' and sidesteps the ambiguity of the label 'restitutionary damages'.⁸

My theory of disgorgement damages is intended to be overarching, and to be used in any common law country. Accordingly, I will use cases from England, Australia, New Zealand, Canada and the United States to draw a general overarching doctrine.

I Method

The methodology adopted by this book is interpretive. It attempts to enhance our understanding of the existing law of disgorgement damages for breach of contract.⁹ It also suggests the directions in which the law should develop, as this area of the law is still nascent.

Stephen Smith outlines four useful criteria which must be considered if a particular interpretive theory is to be comprehensive and persuasive:

1. **Fit** (the extent to which the theory 'fits' the data it is trying to explain);
2. **Coherence** (the extent to which the theory is consistent and intelligible);
3. **Morality** (the extent to which the theory justifies the law's claim to be a legitimate or morally justified authority); and
4. **Transparency** (the extent to which the theory explains the legal reasoning of legal actors themselves).

The benefit of this framework is that it can be adapted, and different emphases can be placed on each criterion. Unlike Professors Smith, Beever and Rickett, I do not adopt a corrective justice interpretation of private law, nor do I seek to establish an ordered taxonomy which explains private law generally. My aim is more modest: to

⁶ *Blake* (n 1) 284 (Lord Nicholls).

⁷ J Edelman, 'The Measure of Restitution and the Future of Restitutionary Damages' (2010) 18 *Restitution Law Review* 1, 7. *cf Blake* (n 1) 284; Doyle and Wright (n 4).

⁸ The use of 'damages' could be criticised on the basis that accounts of profits have been expressly held *not* to be awards of damages: see *Watson v Holliday* (1882) 20 Ch D 780 (CA) (affd *Watson v Holliday* (1882) 52 LJ Ch 543 (CA)). However, it has been suggested that damages merely represent a money award for a wrong: P Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *Western Australian Law Review* 1, 29. *cf* H McGregor, 'Restitutionary Damages' in P Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (Oxford, Clarendon Press, 1996) 203, 203.

⁹ S Smith, *Contract Theory* (Oxford, Oxford University Press, 2004) 5; A Beever and CEF Rickett, 'Interpretive Legal Theory and the Academic Lawyer' (2005) *MLR* 320, 324. Against S Hedley, 'The Shock of the Old: Interpretivism in Obligations' in CEF Rickett (ed), *Structure and Justification in Private Law – Essays for Peter Birks* (Oxford, Hart Publishing, 2008) 205 for criticisms of interpretive theory.

establish a workable, coherent set of criteria for awards of disgorgement damages which fits (by and large) with existing law, and which reflects the competing justifications for private law remedies,¹⁰ and for contract law in particular. My view as to the relative importance of each criterion is also different. I place less importance on morality, for example, than would Smith, Beever and Rickett.

I now turn to the way in which my theory of disgorgement damages meets each criterion.

A Fit

Courts acknowledge that disgorgement damages are available for breach of contract in at least some, but not all, common law countries.¹¹ In *Blake*, Lord Nicholls argued that courts would award disgorgement damages according to a two-part test: first, the claimant must have a 'legitimate interest' in performance of the contract, and secondly, compensatory damages must be inadequate.¹² Nonetheless it has been said with some accuracy that, even after a number of cases where judges have applied *Blake*, 'the legitimate interest test remains hopelessly ill-defined and difficult to apply.'¹³

This book seeks to fit the theory of disgorgement damages to the existing law, and to clarify the way in which the 'legitimate interest' test can be applied. An analysis of existing case law discloses two broad categories of cases where disgorgement damages for breach of contract have been awarded:

¹⁰ Hedley (n 9) 212 says interpretive accounts tend 'to treat disorder as a mere appearance, as showing merely that we have not reached the end of the enquiry yet.' Disorder is something which naturally arises in an incremental system like the common law because the law arises from the input of many judges dealing with many different factual situations. Nonetheless, I argue that some kind of pattern can and should be drawn out of the case law.

¹¹ UK: see *Blake* (n 1); *Esso Petroleum Company Limited v Niad Limited* [2001] EWHC Ch 458, [2001] All ER (D) 324 (Ch); *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830 (CA). Canada: see *Bank of America (Canada) v Mutual Trust Co* (2002) 211 DLR (4th) 385 (SCC), [25] (Major J); *Amartek Inc v Canadian Commercial Corp* (2003) 229 DLR (4th) 419 (Ontario SC) 467 (O'Driscoll J) (on appeal held there was no collateral contract: (2005) 5 BLR (4th) 199 (Ontario CA)); *Montreal Trust Co v Williston Wildcatters Corp* (2004) 243 DLR (4th) 317 (SKQB) 122 (Vancise JA). US: see obiter in *Earthinfo Inc v Hydrosphere Resource Consultants*, 900 P (2d) 113 (Colo SC, 1995) 117–21; American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* (2011) § 39 (disgorgement remedy for 'opportunistic' breach of contract). cf Australia, in which disgorgement for breach of contract has generally been rejected, apart from a sole obiter comment of Deane J in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 124–25 (HCA). See against *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157 (FCA) 196 (Hill and Finkelstein JJ); *Town & Country Property Management Services Pty Ltd v Kaltoum* [2002] NSWSC 166 [85] (Campbell J); *Biscayne Partners Pty Ltd v Valance Corp Pty Ltd* [2003] NSWSC 874 [232]–[235] (Einstein J); *Short v Crawley* [2005] NSWSC 928 [24] (White J); PW Young, 'Recent Cases – Account of profits for breach of contract' (2000) 74 *Australian Law Journal* 817; RI Barrett, 'The "Most Wrong" Equity Cases 1990–2003: Attorney General v Blake' (presented at the Supreme Court Judges' Conference, 24 August 2003).

¹² *Blake* (n 1) 285.

¹³ R Cunnington, 'The Measure and Availability of Gain-based Damages for Breach of Contract' in D Saidov and R Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Oxford, Hart Publishing, 2008) 207, 235.

1. **'Second sale' cases.** Alice contracts with Boris for the supply of property, goods or services. Boris sees an opportunity to sell the property, good or service to Conrad for a greater profit. Therefore Boris breaches his contract with Alice and sells to Conrad for a profit. Typically, the contract between Alice and Boris is no longer specifically enforceable but there is a profit for Boris to disgorge.
2. **'Agency problem' cases.**¹⁴ Boris promises Alice he will *not do* a specific thing which relates to Alice's best interests, but Boris breaches the contract and does the very thing which he has contracted not to do, making a profit as a consequence. Breaches of fiduciary duty concurrent with breach of contract form the core of this category, but breach of negative covenant cases on the margin between contract and fiduciary duties also fit into this category in some circumstances.

Chapter four will focus on the 'second sale' cases. The concept of substitutability is the key to determining whether disgorgement damages will be available in these cases, and this produces the best fit with the few existing cases. Substitutability looks to what the claimant hoped to gain from the contract, and therefore what remedy the defendant must give the claimant as a substitute for the performance which was denied as a result of the breach. Ordinarily, damages or specific relief ensure that the claimant receives an adequate substitute for performance, but in a 'second sale' scenario, neither damages nor specific relief are available. Thus some other remedy is needed to vindicate the claimant's performance interest, namely disgorgement damages. It is sometimes suggested that disgorgement damages for breach of contract is precluded by 'efficient breach' theory.¹⁵ This postulates that where a promisor breaches to make a more profitable contract with a third party, the breach should be encouraged because it is economically efficient. The promisee does not lose out because she gets compensatory damages, and the resource is allocated to the person who values it the most. However, while 'efficient breach' seems at first blush to fit better with the preference of contract law for compensatory damages, where the subject matter of the bargain is not substitutable, courts generally *do not* allow promisors to breach, and instead award specific relief. In addition, the theory of efficient breach does not fit with other areas of contract law.

Chapter five will consider the 'agency problem' cases, for which additional considerations must be taken into account besides substitutability. In particular, courts must consider whether the remedies for breach of negative covenants adequately protect the performance interest in certain sorts of contracts in which the claimants are particularly vulnerable. Typically such contracts seek to protect a non-financial interest.

¹⁴ 'Agency' here is *not* intended to connote the legal relationship of agency. It is used in the *economic sense* to talk about relationships where a legal actor undertakes to act in the interests of another and where the undertaking is difficult to supervise. See J Stiglitz, 'Principal and Agent (ii)', entry in S Durlauf and L Blume (eds), *The New Palgrave Dictionary of Economics*, 2nd edn (Basingstoke and New York, Palgrave Macmillan, 2008).

¹⁵ See, eg R Posner, *Economic Analysis of Law*, 8th edn (New York, Aspen Walters Kluwer, 2011) 149–58.

Chapter six will outline the criteria courts use to choose between full and partial disgorgement. Most cases fit with the theory that the choice of remedy depends upon the reason why specific relief is no longer available. If the defendant has put specific relief out of the claimant's hands and it is impossible to procure a substitute performance, then the defendant should be liable for full disgorgement damages. The deterrent considerations are particularly important in such a case. However, if specific relief *could* be granted but the court has chosen not to award it for discretionary reasons, then the court should award a proportion of the profit in the form of a 'reasonable fee' award.

Courts have indicated that an allowance for skill and effort may be awarded to a defendant in some cases of disgorgement damages for breach of contract.¹⁶ This is correct, and I seek to fit these cases into the law with regard to bars to relief and allowances (which basically deal with questions of desert in one form or another). This will be considered in greater detail in chapter seven.

B Coherence

I seek to establish that disgorgement damages are coherent¹⁷ and consistent with both contract law principles and other existing laws. I also seek to ensure that the development of disgorgement damages continues to be intelligible.

The criterion of 'substitutability' (discussed in detail in chapter three) assists in making the law of disgorgement damages coherent. Not every breach of contract gives rise to disgorgement damages. It is important to have regard to the aims of contract law and, specifically, the aims of remedies for breach of contract. The claimant has a 'performance interest', or an interest in gaining what was promised according to the contract.¹⁸ Remedies for breach of contract seek to provide either the means by which to procure a substitute performance, or the performance itself. The primary remedy for breach of contract in common law countries is expectation damages.¹⁹ Expectation damages do not merely compensate for loss, but also seek to recognise the claimant's performance interest in a way which is least intrusive to the defendant.²⁰ When expectation damages do not adequately

¹⁶ *Earthinfo* (n 11); *Experience Hendrix* (n 11) [44] (Mance LJ).

¹⁷ I adopt what Smith calls the 'less-demanding version' of coherence, ie a theory is coherent 'to the extent that it presents contract law as consistent or non-contradictory': see Smith (n 9) 11. I do not seek to identify a single principle which unites all cases. Nor would I take the view that we can only understand law from within, and that coherence necessarily means that one must discount other perspectives on the efficacy of the law (eg empirical work and evaluative work): cf Hedley (n 9) 214–15. Indeed empirical and evaluative work would be very useful in this field.

¹⁸ D Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 *LQR* 628; B Coote, 'Contract Damages, *Ruxley*, and the Performance Interest' (1997) 56 *CLJ* 537, 566; B Coote, 'The Performance Interest, *Panatown*, and the Problem of Loss' (2001) 117 *LQR* 81.

¹⁹ NC Seddon and MP Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 8th Australian edn (NSW, LexisNexis Butterworths, 2002) 1080–83, [23.6]–[23.7].

²⁰ See (n 18); C Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006) 26 *OJLS* 41, 41–42, 45–49; D Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Oxford, Hart Publishing, 2003) 102–04.

recognise the performance interest, courts are likely to award specific relief and compel the defendant to give the claimant exactly what she bargained for. However, if compensatory damages are inadequate and specific relief is no longer available, *and* the defendant has made a profit, the 'next best' remedy to effectively vindicate the claimant's performance interest is disgorgement damages. Courts have already given extensive thought to questions of substitutability when awarding specific relief and these cases provide guidelines as to when it will be appropriate to award disgorgement damages.

Chapters four and five establish that disgorgement damages for breach of contract are coherent with existing law. The 'second sale' cases, which involve a breach of contract in order to sell the subject matter of the contract to a third party more profitably, work along the same principles as awards for specific performance. As with specific performance, the primary criterion is 'substitutability', or whether or not the claimant can procure a substitute performance from elsewhere. The negative covenant cases are extensions of the existing cases on concurrent breaches of contract and fiduciary duty, for which disgorgement damages are incontrovertibly available.

Chapter six seeks to explain the relationship between the 'reasonable fee' cases and the cases involving 'skipped performance' (ie where the defendant saves an expense by not delivering full performance under the contract). There is an overlap between some reasonable fee cases and some cases of skipped performance, because the defendant could be said to have saved himself the expense of paying a fee to the claimant for release from his obligation. The 'reasonable fee' is also the expense saved. However, we should reject the suggestion of the Court of Appeal in *Blake* that 'restitutionary damages' are 'simpler and more open',²¹ and thus represent the remedy of choice in cases of skipped performance. In most cases of skipped performance, it is still possible to put the claimant in a position as if the contract had been performed by an award of damages. Often, the question is whether the measure of damages should be the cost of rectifying the performance (which provides a pecuniary substitute for performance) or simply the decrease in value of the subject matter of the contract (which merely compensates for loss in value). In rare cases it may be necessary to award disgorgement damages for an expense saved when performance is impossible, and damages are inadequate on *any* scale (whether measured by cost of rectification or decrease in value), particularly in a case where the claimant paid upfront for a contract where the purpose was to avoid risk.

In chapter seven, the existing equitable bars to relief which apply to specific performance are used as a basis for those bars to relief which should apply to disgorgement damages. The principles which govern allowances for skill and effort are drawn from fiduciary law. Accordingly, these principles are consistent with the existing law.

²¹ *Attorney-General v Blake* [1998] Ch 439 (CA) 458 (Lord Woolf).

C Morality

The aim of private law remedies is to appropriately recognise and vindicate the claimant's rights in a way which reflects the moral aims behind remedies. There are a number of ways in which a claimant's right can be appropriately vindicated: through compensation, deterrence, punishment or even simply recognition of the right. In chapter two, this book identifies the two moral²² rationales behind disgorgement damages (namely, deterrence and punishment). The primary rationale behind disgorgement damages is deterrence. Simply, there are some situations where the defendant should be deterred from breaching because the claimant's performance interest should be protected. A further rationale for awards of disgorgement damages is punishment or retribution. The basis of the retributive rationale is that the defendant has engaged in wrongful conduct, and thus ought to be punished. It is backward-looking and desert-based rather than forward looking and consequentialist.²³ It follows from this that courts must consider a variety of 'desert-based' considerations, including the advertence of the defendant's breach and the availability of bars to relief and allowances. Compensation for loss is hard to establish as a rationale for full disgorgement damages, despite the attempts of some courts and scholars who argue the contrary. Perhaps a compensatory rationale sits easier with at least some of the *Wrotham Park* damages cases (which I see as 'partial disgorgement'), but for reasons which will be explained in chapters two and three, it cannot explain all such cases.

This book treads the middle line between the polar opposite approaches towards contract theory. On the one hand, the promissory or rights-based analysis emphasises the claimant's right to performance and argues that the primary obligation arising from a contract is the claimant's right to have the contract performed. On the other hand, the utilitarian approaches, typified by those who support 'efficient breach', argue that the primary obligation arising under a contract is to pay compensatory damages for any loss occurring as a result of breach. These would seem to be incompatible theoretical approaches, but as so often occurs, the best explanation lies somewhere between the two extremes.

My theory recognises the claimant's 'performance interest'.²⁴ However, this right is not unqualified, as the claimant is not always entitled to demand actual performance. Sometimes the claimant's performance interest may be satisfied by an award of compensatory damages if an alternative performance can be easily purchased with damages. Thus, sometimes, the defendant is effectively 'free' to breach his contract, subject to the obligation to pay damages.

²² I adopt what Smith calls the 'moderate version' of morality. I seek to establish how the law of disgorgement damages might be thought to be justified, even if it is not: see Smith (n 9) 13, 18–23.

²³ B Chapman and M Trebilcock, 'Punitive Damages: Divergence in Search of a Rationale' (1989) 40 *Alabama Law Review* 741, 780.

²⁴ See (n 20).

Disgorgement damages are intended to vindicate the claimant's performance interest, and to strengthen the performance interest of future claimants by deterring other future defendants from breaching their contracts. Stripping defendants of their profit when they breach a contract in certain circumstances is a 'nudge'²⁵ to encourage parties to either perform their obligations or negotiate a release from the contract. If compensatory damages are inadequate to protect the claimant's performance interest and disgorgement damages are not awarded, a defendant has nothing to stop him from deliberately breaching a contract and leaving the claimant without a substitute performance. However, if profits are stripped from a defendant, there is no longer any incentive on the part of that defendant or other defendants to breach a contract in the future, at least without entering into negotiations with the claimant first. Ultimately, courts use disgorgement damages as 'self-policing' rules.

D Transparency

One of the primary difficulties with the law of disgorgement damages is that there is a distinct lack of transparency²⁶ in the accounts of courts and commentators. My theory does not square with what courts say they are doing in many cases. Courts tend to disguise their actions in three ways. First, they seek to obscure an award of disgorgement damages for second sales of property and shares under a constructive trust analysis, as discussed in chapter four. Secondly, many of the negative covenant cases which result in disgorgement of gains are clothed in a fiduciary analysis, albeit unconvincingly, as discussed in chapter five. Finally, courts tend to obscure disgorgement, particularly 'reasonable fee' awards or partial disgorgement, in the language of compensation, as discussed in chapter six. Partial disgorgement has also been analysed as a form of subtractive unjust enrichment, but I will argue that this analysis cannot be sustained for breach of contract.

Only a few cases explicitly recognise that gains are being disgorged for breach of contract. First, there is *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*²⁷ which, in the words of Lord Nicholls in *Blake*, shone 'rather as a solitary beacon' because of its recognition of the possibility of partial disgorgement of profit for breach of contract.²⁸ Secondly, the Israeli Supreme Court explicitly awarded full disgorgement for breach of contract in *Adras Building Material v Harlow & Jones GmbH*.²⁹

²⁵ See RH Thaler and CR Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (New Haven, Yale University Press, 2008) 6.

²⁶ I adopt what Smith calls the 'moderate version' of transparency. I merely seek to establish how judges could sincerely (even if erroneously) believe that the reasons they give are correct: see Smith (n 9) 24, 28–32.

²⁷ *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch).

²⁸ *Blake* (n 1) 283.

²⁹ *Adras Building Material v Harlow & Jones GmbH* 42(1) PD 221, translated in (1995) 3 *Restitution Law Review* 235 (SC of Israel, 1988).

Finally, *Blake* is the watershed case that explicitly recognised the availability of disgorgement damages for breach of contract in mainstream common law.³⁰

The lack of transparency originates partially from confusion as to what the law is. Following *Blake*, the cases of *World Wide Fund for Nature v World Wrestling Federation Entertainment Inc*³¹ and *Experience Hendrix*³² indicate that there is uncertainty as to when disgorgement damages should be awarded and what their measure should be. My theory seeks to address this.

Lawyers and courts are also conservative. They prefer to clothe new legal developments in existing doctrine, which is why disgorgement damages are disguised under unconvincing fiduciary analyses, categorised as ‘compensatory damages’, or justified as an incident of a constructive trust arising from a specifically enforceable contract of sale. In addition, damages arising from *Lord Cairns’ Act* have tended to be seen as a narrow exceptional category rather than a broader principle which should be incorporated into contract law generally.

The divide between common law and equity also encourages courts to obscure awards of disgorgement.³³ Courts are far more willing to award disgorgement for breaches of equitable obligations than for breaches of common law obligations.³⁴ If disgorgement damages must be pigeonholed as equitable or legal, they should be seen as an operation of equity’s auxiliary jurisdiction, like specific performance for breach of contract. But, as will be discussed in chapter two, courts and commentators often attempt to fit disgorgement damages into a compensatory framework,³⁵ in part, perhaps, because it is considered that only compensatory remedies are appropriate for breach of a legal obligation such as breach of contract.

A compensatory analysis is appealing for commentators and judges because it results in a restoration of what was taken from the claimant rather than the

³⁰ *Blake* (n 1) 283.

³¹ *World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2001] EWHC Ch 482 (Ch); *World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2006] EWHC 184, [2006] FSR 38 (Ch); *World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 WLR 445 (CA) [29] (Chadwick LJ).

³² *Experience Hendrix* (n 11).

³³ A Burrows, ‘We Do This At Common Law But That In Equity’ (2002) 22 *OJLS* 1, 235.

³⁴ S Worthington, ‘Reconsidering Disgorgement for Wrongs’ (1999) 62 *MLR* 218, 235.

³⁵ One method is the ‘lost opportunity to bargain’ theory: RJ Sharpe and SM Waddams, ‘Damages for lost opportunity to bargain’ (1982) 2 *OJLS* 290. Implicitly accepted in *Jaggard v Sawyer* [1995] 1 WLR 268 (CA) 291 (Millett LJ); *Gafford v Graham* (1999) 77 P & CR 73 (CA) 86 (Nourse LJ); *WWF – World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 WLR 445 (CA) [29] (Chadwick LJ). See criticisms of *WWF* in R Cunningham, ‘A Lost Opportunity to Clarify’ (2007) 122 *LQR* 47; R Cunningham, ‘The Measure and Availability of Gain-Based Damages for Breach of Contract’ in D Saidov and R Cunningham (eds), *Contract Damages: Domestic and International Perspectives* (Oxford, Hart Publishing, 2008) 207, 221; C Rotherham, ‘“Wrotham Park Damages” and Accounts of Profits’ [2008] *LMCLQ* 25, 36–55.

Professor McInnes has argued that disgorgement damages are compensating for a lost right: see M McInnes, ‘Account of Profits for Common Law Wrongs’ in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Pyrmont, NSW, Lawbook Co, 2004) 416–18; M McInnes, ‘Gain, Loss and the User Principle’ (2006) 14 *Restitution Law Review* 76, 84–86. However, see criticisms in A Burrows, ‘Are “Damages on the Wrotham Park Basis” Compensatory, Restitutory or Neither?’ in R Cunningham and D Saidov (eds), *Contract Damages: Domestic and International Perspectives* (Oxford, Hart Publishing, 2008) 165, 173; Rotherham, *ibid* 44–45.

redistribution of a 'windfall' benefit to the claimant.³⁶ Distributive justice is seen to be innately suspicious: it involves a moral value judgement on the part of the decision maker, as well as a decision which involves depriving one party of a right to money or property.³⁷ But a compensatory analysis is difficult to fit with the existing law, particularly where full disgorgement is concerned, and it will be argued in chapter two that while some prefer the view that partial disgorgement damages operate to compensate for loss, the better analysis in the context of contract law is that they strip a defendant of gain.

While courts do not like the redistributive implications of disgorgement damages, it is submitted that it is preferable if courts are transparent about their actions rather than attempting to squeeze disgorgement damages into a compensatory scheme, which results in the definition of 'loss' being unduly expanded.

II Conclusion

My aim is to create a comprehensive interpretive theory of the law which provides the best explanation of the case law to date, and which allows lawyers, judges, litigants, academics and contractors to predict more easily when disgorgement damages will be awarded. In addition, I seek to balance the interests of the claimant and the defendant, and to be sensitive to the contractual context of awards of disgorgement damages.

Broadly speaking, disgorgement damages will only be awarded in exceptional circumstances: where there is a second sale, or where there is an agency problem. Nonetheless, it is hoped that they will provide an incentive for contractors to avoid idle promises which they do not intend to keep, or to negotiate a release from their obligations. In this way, disgorgement damages serve to vindicate the claimant's interest in performance of a contract, and to protect the performance interests of future claimants.

³⁶ C Rotherham, 'The Conceptual Structure of Restitution for Wrongs' (2007) 66 *CLJ* 172, 189–90.

³⁷ D Kennedy, 'Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power' (1982) 41 *Maryland Law Review* 563, 587.