Chapter 18
Disgorgement of Profits in Scots Law

Martin A. Hogg

Abstract Scots private law provides what may be called 'gain-based awards' as a response to certain types of (in a broad sense) 'wrongful' conduct, not just delict (perhaps the paradigm the civil wrong) but also breach of contract, breach of fiduciary duty, and other sorts of conduct which are contrary to legal duties undertaken by, or imposed upon, a party. These awards are not, however, classified as damages. In consequence, in Scots law there are strictly no 'disgorgement damages' (or 'restitutionary damages') of the sort commonly encountered in English law and the law of other Common Law systems. The disgorgement response is largely (though not entirely) achieved through remedies granted to reverse the retention of unjustified enrichment, though in some circumstances of delictual wrongdoing a disgorgement remedy may be an alternative to a more commonly sought remedy (usually compensatory damages) of a non-disgorgement nature. In such cases the pursuer usually has the freedom to choose whether to pursue the disgorgement remedy or (compensatory) damages, but the classification of the disgorgement remedy (as delictual or unjustified enrichment in nature) is not a wholly clear matter in Scots law.

Keywords Disgorgement • Restitution • Damages • Restitutionary damages • Disgorgement damages • Profit-stripping • Gain-stripping • Scots law

Structural Underpinnings of Scottish and English Private Law

To understand why Scots law does not possess the disgorgement or restitutionary 'damages' of the Common law, some explanation will first be given (in this section) of structural, doctrinal, and terminological differences between Scots and English private law, before an examination is undertaken (in the sections "The Terminology of Gain-Based Awards and Damages" and "Developing the Terminology of Gain-Based Awards") of the terminology of gain-based awards, and the extent to

M.A. Hogg (✉)
University of Edinburgh, Edinburgh, Scotland, UK
e-mail: Martin.Hogg@ed.ac.uk

E. Hondius, A. Janssen (eds.), *Disgorgement of Profits*, Ius Comparatum - Global Studies in Comparative Law 8, DOI 10.1007/978-3-319-18759-4_18

which such are available in Scots law (in the section "Disgorgement of Gains in Different Areas of Scottish Private Law").

Scots law is a mixed legal system.[1] That simple point needs little further explanation to a scholarly comparative legal readership. The private law of England is not the same as that of Scotland, and in this field of disgorgement remedies (where the ancient common law/equity divide has been so important in English law) that is particularly so. Scots law does not recognise, and has never recognised, any law/equity division: equitable principles and ideas are generally accepted as being infused throughout the law of Scotland, albeit that some sorts of remedy (e.g. of recompense for unjustified enrichment) are said particularly to disclose an 'equitable' character (in a general, and not an English law sense). As Scots law recognises no division between 'common law' and 'equitable' remedies in the English sense, there is, for instance, no question of a barrier to the award of disgorgement remedies in contract and delict merely because these fields of private law are not fundamentally equitable in nature – the fact that disgorgement of gain is not generally available as a remedy in those two fields has more to do with the existence of other parts of Scots law (especially unjustified enrichment) which have the stripping of improperly held gains at their heart, and the functions which these parts of the law serve in Scotland. The functions of these well-established parts of the law often perform the role played by aspects of the Common law which are absent from Scots law, for instance the proprietary torts of the Common law.

The territory of the Scots law of obligations is different to that of England, and there is a much stricter divide between obligations and property law than exists in England (so there are no 'proprietary torts' of the sort just mentioned). In Scotland there are five major obligations recognised in the law: the two voluntary obligations of contract and unilateral promise; and three involuntary obligations of delict, unjustified enrichment, and *negotiorum gestio* (benevolent intervention). Unjustified enrichment has a great deal to do with disgorgement in Scots law. Indeed it is perhaps the pre-eminent field of private law dealing with disgorgement, allowing recovery both in cases of transfer (restitution narrowly so called) and in cases of enrichment 'by other means' (disgorgement narrowly so called). In this latter category fall such cases as (i) gains made by an enriched party (E) through his debts being paid by a consequently impoverished party (I), (ii) profit made through E's land or buildings being improved by I in the belief mistakenly held by I that the land/buildings belonged to I, and (iii) gains made by E through interference with certain rights possessed by I (e.g. through unauthorised use by E of I's moveable property). Notably in the field of unjustified enrichment, Scots law had a developed action of recompense (for enrichment unjustifiably retained at the expense of another) at an early stage, in contrast to England's late development of a comparable enrichment-based action – this early Scots development somewhat obviated the need to develop other sorts of remedy which were used in English law to strip gains held by another wrongfully or without justification.

[1] On mixed legal systems in general, see, for instance, du Plessis (2006).

The Terminology of Gain-Based Awards and Damages

The terminology employed in Scotland in the field of gain-based remedies and damages is different in a number of respects to that employed in the Common Law, and this reflects the different structure of our private law explained above.

In the case of the former – gain-based awards – the case law discloses a variety of different terminology which has been employed in gain-based award cases scattered across Scots private law: 'ordinary profits',[2] 'violent profits',[3] a 'reasonable sum',[4] a 'royalty',[5] a 'notional licence fee',[6] '*quantum lucratus*'[7] (the amount by which a party is enriched), '*quantum meruit*'[8] (the 'amount merited'), and an 'award of profits' in an action of accounting and payment of profits.[9] These are all regarded by some as varieties of 'gain-based award', though – given the precise measure of recovery applicable in each – not all of them appear to strip gains or profits from a defender. The various nomenclatures and class are award are discussed further in the section "Disgorgement of Gains in Different Areas of Scottish Private Law" below.

As to the latter – damages – the absence of 'disgorgement damages' or 'restitutionary damages' from the gain-based terminology list is noteworthy. Damages (in all fields of Scots private law, including contract and delict) are restricted to the idea of monetary compensation for loss suffered by the party bringing the claim. By contrast, the idea of damages in English law encompasses not only compensatory damages, but also aggravated, exemplary, disgorgement, restitutionary, punitive, and nominal damages.[10] As one respected commentator has put it, damages in English law "means nothing more specific than a monetary award for a wrong",[11] a definition of sufficient breadth to allow compensation, gain-stripping, punishing, and other aims to be met in Common law systems through a damages award.

What all of the foregoing means is that, while 'gain based awards' are available in Scots law in the cases discussed below, these awards ought *not* to be termed damages. That being so, comparative judicial recourse to English cases awarding so-

[2]See discussion in main text at section "Enrichment by the Taking of a Thing from Another, or by Interference with Another's Rights of Corporeal Property".

[3]Nothing to do with physical violence, but a remedy used in cases of tenants staying on leased property without authority beyond the termination of their lease: see later discussion below.

[4]See discussion in contract section below.

[5]See discussion in IP law section below.

[6]This is the term used in Experience Hendrix LLC v PPX Enterprises Inc [2003] EWCA Civ 323; [2003] 1 All ER (Comm) 830. The case is commented on, from a Scottish perspective, in Black (2005), 31.

[7]See discussion below on recompense for unjustified enrichment.

[8]See discussion below on contract.

[9]See discussion below in relation to passing-off, breach of confidence, and IP rights.

[10]In theory, nominal damages can be awarded by a Scottish court too, though this rarely happens (one area where it does, is in defamation cases).

[11]Edelman (2002), 5.

called ‘gain based damages’, ‘restitutionary damages’, or ‘disgorgement damages’ can only be undertaken with caution: a disgorgement result may be mirrored in both Scots and English law in certain types of factual circumstance, but the classification, terminology, and often underlying doctrine, properly to be deployed in order to reach the same result will often differ. As for ‘punitive damages’, these have no place in Scots law,[12] nor have ‘aggravated damages’.

Developing the Terminology of Gain-Based Awards

No agreement yet exists on the preferable terminology for use in Scotland in relation to disgorgement awards: should all such awards be classed as ‘disgorgement’ in nature? Or as an ‘accounting of profits(s)’? Or as ‘restitutionary’? And would any common terminology assert a common measure of recovery, and/or a common theory as to the purpose underlying the award? Do we even need a single term to describe all such awards? Scots law is only in the infancy of exploring such questions systematically, though it seems relatively clear (to this observer at least) that ‘restitutionary’ is unlikely to do as an umbrella term: whilst the late Peter Birks asserted[13] that the idea of ‘restitution’ includes not just giving back, but also giving up, the intuitive sense of ‘restitution’ is of restoring/returning some value or thing to a party; a stripping of a gain which was never transferred is not about restitution, but concerns ‘disgorgement’, and if it is that which is at the heart of a claim it would seem appropriate to use that term as an umbrella term (if such an umbrella term is indeed desirable). That said, disgorging itself may also have intuitive limitations: it suggests a stripping of something from a party and a giving it to another, whereas in some cases of stripping of gains what is awarded is the equivalent value of what was gained, rather than the exact thing gained. Account(ing) of profit seems a better term for such cases, but this may simply show that no one term is entirely apt for capturing the essence of the multitude of awards made by the Scottish courts.

One taxonomic solution to the terminological debate may be to group the entirety of the various remedies available in this field (and discussed further below) under a single general heading of remedies for ‘disgorgement of profits and redress of unjustified enrichment’, which would encompass both restitution and disgorgement. That is the approach currently proposed for the forthcoming reissue of the ‘Obligations’ title in volume 15 of *The Stair Memorial Encyclopaedia of the Laws of Scotland*,[14] the principal scholarly encyclopaedia of Scots law (and a publication which has had a very pronounced effect upon court practice and judgments).

[12]Though see the discussion below on ‘violent profits’ which have been argued by some to be damages awards.

[13]Birks (2002), 21–22.

[14]Draft of para. 9.17 of volume 15, current as at December 2013 (the text and numbering of the paragraph are both likely to change before publication).

The vastly larger Common Law world enjoys a more developed debate on terminological issues, the debate having benefitted from a particularly scholarly and impressive effort by James Edelman to achieve terminological order.[15] On Edelman's approach, there are two species of non-compensatory, gain-based damages: (1) "restitutionary damages" and (2) "disgorgement damages". Edelman explains the terminology as

> a vocabulary in which the word 'restitution' whether in the law of unjust enrichment ('restitution for unjust enrichment') or the law of wrongdoing ('restitutionary damages') is used to refer to an award which reverses a transfer of value from a claimant to a defendant, and therefore focuses on the immediate benefit received by the defendant. In contrast, the word disgorgement should be used where, in the law of wrongdoing, a personal award is made to disgorge actual profits made by a defendant.[16]

Ignoring for the moment the usage of 'damages' in these two terms (a borrowing of which would not, given the point made earlier about the Scots idea of 'damages', be appropriate for Scots law), the distinction made by Edelman between 'restitution' (the reversal of a transfer of value) and 'disgorgement' (a disgorging of profits made by a party) mirrors the distinction suggested above in these ideas. It is a usage which merits some consideration in Scots law, albeit without the addition of the term damages (the simple term 'award' would suffice as a replacement).

Disgorgement of Gains in Different Areas of Scottish Private Law

The general position on the availability of gained-based awards in Scots private law can be succinctly stated: there is no general 'disgorgement award' available in all cases of 'wrongful' conduct, i.e. of breach of duty owed by a defender, or in all cases of delictual conduct, or even in all cases of intentional harm (e.g. the delict of assault gives rise to an entitlement only to damages for loss caused). There are merely pockets of law where gain-based awards may be available to pursuers: these pockets are now considered.

Contract

In Scots law, the primary remedy for breach of contract (i.e. contractual non-performance) is specific implement (the equivalent of the Common law's specific performance):[17] by 'primary remedy' is meant that, except in certain exceptional

[15] Edelman (2002, 2010).

[16] See further Edelman (2010), at 3; Edelman (2002), Chap. 3.

[17] On the history of the development of this approach, see Smith (2000).

cases, a party which has suffered a breach of contract is entitled to a court order that the party in breach perform the duty in question. This primary remedial entitlement in theory takes pressure off the need to develop damages awards in contract which might strip a contract-breaker of profits made through breach; instead, the victim of the breach is entitled to the actual performance promised, enforcing such entitlement by a request for specific implement. The extent to which, in practice however, specific contractual duties are enforced in Scotland which would not be enforced in Common law countries is debateable. One divergent field, however, is that of 'keep open' and trade clauses in commercial leases (i.e. clauses requiring tenants of commercial premises to keep them open and trade from them): these have been enforced, via specific implement, in Scotland when similar clauses have not been so in England.[18] The Scottish landlord thus gets to enforce occupation by a trading tenant, when the English landlord will likely have to rely on damages assessed merely by reference to likely losses (often very hard to assess, and usually worth a lot less to the landlord than occupation by a trading tenant) and not to any profit made through breach.

As for the most commonly sought contractual remedy – damages – the basic principle for assessing such damages is clear: damages are assessed by reference to the loss suffered by the victim. Such loss is measured primarily by reference to the so-called performance interest (i.e. by considering the position in which the innocent party would have been had the other party's duty been performed),[19] though there are cases where the so-called restoration, or *status quo ante*, interest (assessed by reference primarily to the victim's wasted expenditure) has been awarded instead. The general approach to compensatory damages expressed for English law by Haldane LC in *British Westinghouse Electric* is thus accepted as a formulation of the general totality of loss which can be claimed in damages for breach of contract in Scots law: "[t]he fundamental basis [of damages] is thus compensation for pecuniary loss naturally flowing from the breach".[20] This measure encompasses both *damnum emergens* (losses rendering a party worse off) and *lucrum cessans* (lost opportunities/profit of the *victim*).

Because damages for breach are not fault-based, it matters not to their assessment by a Scottish court whether the breach was intentional or inadvertent (i.e. there are no greater damages available for intentional breach). Furthermore, and crucially for the present discussion, damages based upon any profit made by the contract-breaker

[18]Compare Retail Park Investments v Royal Bank of Scotland plc (No 2) 1996 SC 227 with Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1.

[19]"[T]he damages should be what the party would have received had his contract been fairly fulfilled": Watt v Mitchell (1839) 1 D 1157 at 1168, per Lord Justice-Clerk Boyle.

[20]British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673, 689.

are not permitted (even if they were a foreseeable result of the breach):[21] this rule is clearly set out in the leading case of *Teacher v Calder*.[22] This common law rule cannot be evaded by the use of an agreed damages clause in the contract entitling the party in breach to an amount equalling any profit made upon breach by the defaulting party, as a Scottish court will only enforce an agreed damages clause to the extent that it embodies a reasonable assessment of the likely losses to the victim which will flow from the breach in question.[23]

Are any exceptions made to this rule? It has been said that the availability of so-called 'violent profits' in lease cases is one such exception. Violent profits are a financial award which may be ordered by a court to be paid by a tenant who remains in occupation beyond the agreed end date of the lease without the permission of the landlord. Such an award is designed to act as a deterrent against tenants refusing to quit the leased premises at the agreed date, and – in some cases at least – to strip the tenant who refuses to quit of profits made through continued unlawful possession. In urban leases, a somewhat arbitrary amount of double the agreed rent for the period of unlawful possession has become established as the measure of such violent profits: this arbitrary level of the award matches neither the likely losses of the landlord nor (except by chance) any profit made by the tenant through a refusal to quit the premises. However, in other leases, the courts have assessed violent profits according to the measure of the greatest profit that the landlord could have made either by possessing the leased subjects himself or by letting them to others, together with the measure of all losses which the landlord may have suffered at the hands of the wrongful possessor.[24] Is this gain stripping? Indirectly perhaps, though note that the measure is of the *landlord's* likely lost profits, not the actual gain of the tenant. Given the varying ways in which violent profits may be assessed, it is too simplistic (and inaccurate given the idea of damages discussed earlier) to call the remedy 'damages' or even 'penal damages', though such usage exists;[25] it may perhaps be arguable that (indirect) gain-stripping forms part of the award in *some* cases (only for non-urban leases), but strictly such cases are focused on compensating the landlord's losses, both *damnum emergens* and *lucrum cessans*.

A related question concerning the occupation of land or buildings is how to deal with cases where there is never any express entitlement to occupy to begin with. The Scottish courts' approach to such cases has often been to say, in vague terms,

[21] In other words, the rule in Hadley v Baxendale that losses which were a foreseeable result of the breach are claimable is trumped by the rule that loss is not to be measured by profit made by the party in breach.

[22] (1898) 25 R 661.

[23] For a summary of the approach taken to agreed damages clauses in general, see MacQueen and Thomson (2012), paras 6.47–6.52.

[24] Rankine (1916), 585; Paton and Cameron (1967), 280; Scottish Law Commission (1989), para. 10.9.

[25] See, for instance, McAllister (2013), para. 10–37, who calls violent profits "a form of penal damages", citing the same view in Scottish Law Commission (1989), para. 10.9.

that such occupation gives rise to a 'presumption to pay', the occupier being able to counter such presumption by demonstrating a clear agreement that the occupier was entitled to occupy without charge. Speaking of a 'presumption to pay' is not however sufficient to determine whether the basis of the requirement to pay lies in contract (under an implied lease)[26] or in unjustified enrichment, or to identify the appropriate measure of recovery. The answer to the first question is not necessarily provided by the answer to the second. As to the second question – the measure of recovery – the courts have variously required occupiers to pay a 'reasonable sum',[27] a 'fair value',[28] or a 'market rent'.[29] Some such awards (especially market rent) smack of a *quantum meruit* approach to valuation, which is itself more suggestive of a deemed contractual analysis; however, in some cases where the courts have explicitly made an award in recompense for unjustified enrichment, the measure of the award has also been assessed by reference to the market rent.[30] Looking at the body of such cases, it must be admitted that there has often been a judicial vagueness in specifying the basis of recovery, and also that, while some cases have justified awards as compensation for the rent lost to the landlord, others have used language more indicative of a desire to prevent the occupier from unjustifiably gaining from the occupation. Gain-based awards have therefore played some part in this area of the law (albeit that whether they are based in contract or unjustified enrichment is not always clear).

Leaving aside cases of the occupation of property, there is the further contractual issue of what status decisions such as *Wrotham Park*[31] (and *Experience Hendrix*)[32] have in Scots law, i.e. do cases of 'breach of covenant' (that is, breach of a specific contractual undertaking not to do a specific act) give rise to an entitlement to an award which goes beyond any loss made by the victim of the breach (which may be nothing)? The short answer is that it is unclear: neither *Wrotham Park* nor *Experience Hendrix* have been directly applied in Scotland. In any event, are such cases actually about stripping gains from defendants? When such cases have arisen in England, the courts have permitted recovery in damages in a fictional measure (without the need to demonstrate any loss), such measure being the amount which the court considers the victim of the breach might reasonably be imagined to have charged for a relaxation or waiver of the covenant. Many consider such awards to be 'gained-based' or as designed to 'disgorge profits' from the party in breach: such

[26]This analysis seems to have been employed in Glen v Roy (1882) 10 R 239, where the Lord Justice-Clerk characterised matters (at 240) as being that "the presumption of law is that he occupied as tenant".

[27]Earl of Fife v Wilson (1864) 3 M 323; H.M.V. Fields Properties Ltd v Skirt 'N' Slack Centre of London Ltd 1986 SC 114; GTW Holdings Ltd v Toet 1994 SLT (Sh Ct) 16.

[28]Glen v Roy (1882) 10 R 239.

[29]Secretary of State for Defence v Johnstone 1997 SLT (Sh Ct) 37.

[30]Secretary of State for Defence v Johnstone 1997 SLT (Sh Ct) 37.

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

[32]Experience Hendrix LLC v PPX Enterprises Inc [2003] EMLR 25 (CA).

an argument seems to proceed from the basis that, by having evaded a possible payment for a waiver/relaxation, the defendant has 'gained' because it is better off than it would have been had it paid for such a waiver/relaxation. However, the courts have accepted that such awards are appropriate even in cases where it is clear that the claimant would *not* have agreed to any such waiver. As the court is assessing damages according to a deemed (albeit fictional) performance interest loss by the claimant (the claimant gets what *it* has theoretically lost from not being able to bargain for the relaxation or waiver, i.e. there is compensation for imagined *lucrum cessans*), there seems to be a stronger case for *not* classifying this sort of recovery as genuinely 'disgorgement' in nature.

Moving away from damages, there is also the question of whether an 'account of profits' (not classed as a damages award, but as a separate species of remedy) of the sort seen in *Attorney General v Blake*[33] is ever available in Scots law for breach of contract. Such a remedy was said to be justified in *Blake* on account of the quasi-fiduciary position in which the defendant stood towards H.M. Government, for whom he had worked in the British Secret Intelligence Service, his conduct being in breach of a contractual duty of confidence which he owed. However, when the *ratio* of *Blake* was later applied in *Esso Petroleum v Niad*,[34] no such quasi-fiduciary relationship was present. It is very difficult to narrate a justification of the award of an account of profits in either case (the justification that a normal award of damages would be inadequate is too broad) which would be sufficiently tightly drawn to prevent inroads being made into the general rule that breach should not give rise to a remedy based upon the profit made by the breaching party. Neither case has been applied in Scotland, so, as with the breach of covenant cases, the status of awards for an accounting of profits in similar circumstances is doubtful. Breach of a clear fiduciary duty (discussed below in the section "Breach of Fiduciary Duties") is of course a quite different matter, in which an accounting of profits is an available remedy (as it is in infringement of intellectual property cases, also discussed below, in the section "Conclusions").

Delict

In delict (and note, Scots law has not just a number of nominate delicts, but also a general action for the reparation of wrongly inflicted harm), the principal remedy is that of damages, with interdict (the equivalent of the Common law injunction) also being available to prevent anticipated harm. Where interdict is granted, it may of course have the effect of preventing a defender from making a gain through delictual conduct in the first place.

[33] [2001] 1 AC 268.

[34] [2001] EWHC 6 (Ch).

As in contract, the purpose of damages in delict is compensation for loss suffered by the pursuer. Damages are thus intended to restore, so far as possible in monetary equivalent terms, the pursuer to its *status quo ante* position. This measure of recovery means that, in general terms, the stripping of a profit made by a defender through delictual conduct is irrelevant so far as the pursuer's remedial entitlement is concerned. There are no exemplary or punitive damages.[35]

So, are gain based-remedies ever available in the event of a delict in Scotland? In the case of two nominate delicts, it appears that they are, though there is uncertainty as to whether the gain-stripping response should be seen as a delictual or unjustified enrichment in nature. Both of these delicts have a connection to the idea of intellectual property. The first of these nominate delicts is passing off. In the first instance decision of *Treadwell's Drifters Inc v RCL Ltd*,[36] the judge held that, in a claim for passing off, the pursuer might choose *either* to have an inquiry made as to damages in respect of his loss *or* an inquiry as to profits made by the defender through the passing-off, but not both, and must therefore choose whether he wishes to pursue the remedy of damages or the remedy of accounting and payment of profits. What is unclear however is whether the availability of the latter remedy should be seen as triggered by the commission of the delict or else as a remedy for the unjustified enrichment of the defender (albeit without mirror loss to the pursuer).

The same taxonomic issue affects the second area of delict having some relevance to gain-based awards, namely breach of confidence. The tort of breach of confidence was absorbed into Scots law as a nominate delict.[37] By analogy with the English law, in Scotland a remedy of an accounting and payment of profits may be available to a pursuer in a breach of confidence case. There are no Scots cases awarding an accounting of profits as a delictual remedy; however, in *Levin v Caledonian Produce (Holdings) Ltd*,[38] the court overcame doubts as to the relevancy of a claim for the enrichment-based remedy of recompense (and allowed the litigation to proceed to a proof before answer). This one scant authority shows a preference for treating any gain-based remedy for breach of confidence in enrichment-based terms and not in delictual terms. In English law, a new emerging tort of 'misuse of private information'[39] (an offshoot of breach of confidence) may also be remedied, in appropriate cases, by an account of profits; how this tort will fare in Scotland (as a new nominate delict?), is yet to be seen.

With both passing-off and breach of confidence, the same factual circumstances may constitute both a delict (giving rise to a remedy of damages) and an unjustified enrichment resulting from the unwarranted interference in the pursuer's rights (giving rise to a remedy of accounting and payment of profits). The treatment of the

[35]Hyslop v Miller (1816) 1 Mur 43 at 54; Black v North British Railway Co 1908 SC 444.

[36]Treadwell's Drifters Inc v RCL Ltd 1996 SLT 1048 (OH).

[37]Lord Advocate v Scotsman Publications Ltd 1989 SLT 705.

[38]Levin v Caledonian Produce Holdings Ltd 1975 SLT (Notes) 69.

[39]Campbell v MGN Ltd [2004] UKHL 22; Mosley v News Group Newspapers Ltd [2008] EMLR 679; Vidal-Hall v Google Inc [2014] EWHC 13 (QB).

gain-based remedy in breach of confidence as enrichment in nature has academic support.[40] It is suggested that the correct answer is that the classification of the remedial response is determined by the cause of action: if the cause of action lies in unjustified enrichment, then the disgorgement response is properly treated as a remedy in unjustified enrichment; if the cause of action lies in delict, then the remedial response is delictual. This analysis, if it is to be applied, will require clearer judicial statements as to the cause of action when disgorgement is ordered by courts.

Unjustified Enrichment

A full recitation of the recent semi-transformation of the law of unjustified enrichment in Scots law is not possible here: reference is made to other sources for this.[41] Briefly, however, the old actions of repetition, restitution and recompense, have been swept aside; these so-called '3 Rs' are no longer to be seen as separate actions,[42] but instead merely examples of remedies which may be available in unjustified enrichment cases: (i) repetition where reversal of the transfer of a monetary sum is sought, (ii) restitution where reversal of the transfer of some thing other than money is sought, and (iii) recompense where what is sought is a sum of money representing the monetary gain made by a defender (often at the expense of the pursuer, but in some cases without any mirror loss having been suffered by the pursuer). The first two are simply variations of a restitutionary response;[43] the focus of the third is on disgorging, rather than restitution, and is the response applied in cases where the defender made a gain (or had a liability reduced, or avoided an expense, or was protected from a loss) by the conduct of the pursuer, for instance through the provision of a service.

In place of the three old actions, there is now a general principle against unjustified enrichment: no one should be unjustifiably enriched at the expense of another. Further development has yet to be solidified (e.g. it remains unclear whether a general action will develop or not), but there is a growing consensus that analysis of different cases according to the Germanic Wilburg/von Caemerrer typology helps to make sense of the Scottish cases.[44]

More detail is now provided on the precise nature and measure of recovery in different sorts of unjustified enrichment case.

[40] See Whitty (2009), at 241–2.

[41] See, for instance, Hogg (2006), 1.

[42] See the judgment of Lord Rodger in Shilliday v Smith 1998 SC 725.

[43] Though, of course, in reversing a transfer one could describe this as also stripping the recipient of a gain.

[44] See Hogg (2006), 1.

Enrichment by Transfer

In cases of enrichment by transfer (either of money or some other thing), the entitlement of the impoverished party is to the return of (i) the sum of money (plus interest) or (ii) the thing in question (or its monetary equivalent if the thing has been consumed or disposed),[45] plus any fruits not the result of the recipient's own efforts:[46] so, e.g. calves born to a cow may be reclaimed, but products made through the application of the industry of the recipient to the thing received (e.g. machinery) are not claimable. Because in such transfer cases the focus is not on profits made by the defender, but on restitution of the thing transferred (or its monetary equivalent), such cases are focused essentially on restitution rather than disgorgement (to adopt the distinction drawn earlier). The right to restitution is subject to any available defences, the application of which may mean that the pursuer receives only the value remaining in the defender's hands at the time of recovery.

Enrichment by 'Other Means'

It is in cases of unjustified enrichment by means other than transfer that the focus lies on disgorgement of the defender's gain. Such cases may be distinguished into two broad sorts: (i) enrichment by means of imposition of a gain upon the defender, and (ii) enrichment by taking from another, or by means of interference with certain rights of another.

'Other Means' 1: Imposition

In the first category fall *inter alia* two important types of case: payment of another's debt; and the improvement of another's property in the *bona fide* but mistaken belief that it is the improver's. Both of these entitle the impoverished party to the remedy of recompense in Scots law, enabling such party to recover the amount by which the defender has been enriched by the pursuer's conduct (*quantum lucratus*), e.g. in payment of another's debt to the amount by which the payment has reduced the defender's liability to a third party.[47]

[45] Subject to a defence of 'bona fide consumption and perception', which limits liability to the value of what remains in the defender's hands.

[46] Stair, Institutions of the Laws of Scotland, I.vii.10.

[47] See for the detail of the law in this area, Whitty and Macgregor (2011), 57.

'Other Means' 2: Taking/Interference

In the second category fall a number of circumstances where the defender has taken something from the pursuer or has interfered, without authority, in certain rights of the pursuer's. Included in this category are cases of: (a) enrichment by the taking of a thing from another, or by interference with another's rights of corporeal property or money; (b) enrichment by interference with another's intellectual property rights; and (c) gain-based remedies for the commission of certain sorts of wrongful behaviour. The precise remedy/measure in such cases varies (see the following paragraphs for the detail).

Enrichment by the Taking of a Thing from Another, or by Interference with Another's Rights of Corporeal Property

The cases in this area can be broken down into the following sub-categories: (a) enrichment by interference with another's exclusive right to the use and occupation of corporeal property (*ius utendi*); (b) enrichment by taking fruits to which another is entitled (*ius fruendi*); (c) enrichment by interference with another's right of disposal of property (*ius disponendi*); (d) enrichment by interference with another's right to consume moveable property (*ius abutendi*); (e) enrichment by original mode of acquisition (accession or specification) depriving another of title to property; (f) enrichment by unauthorised appropriation of another's money; (g) enrichment by unauthorised abstraction of minerals from strata unworkable by owner and third party; and (h) some miscellaneous cases.[48]

The remedies in such cases are various, for instance (and by reference to the foregoing list) in category (a), for authorised occupation of property, a "reasonable sum",[49] or, for unauthorised occupation of property, "ordinary profits", i.e. the actual income of the occupier during the period of unauthorised possession,[50] violent profits[51] (see earlier discussion of contract), or a reasonable sum for the use and occupation itself; for cases where an owner of property has been deprived of the fruits of the property, an accounting for the income or other fruits produced during

[48] See the treatment of such cases by reference to this categorisation in the forthcoming reissue of the Obligations title of volume 15 of the The Laws of Scotland: Stair Memorial Encyclopaedia (hereinafter "SME").

[49] Rochester Poster Services Ltd v A G Barr plc 1994 SLT (Sh Ct) 2. The alternative approach of seeing such occupation as based upon an implied lease was discussed earlier in the contract section of this text.

[50] Reid (1991), para. 168 states: "Familiar examples of ordinary profits include crops grown on land, the young of animals, honey from bees, and, where the possession enjoyed is civil rather than natural, rent ... Industrial growing crops may be claimed despite the fact that they may have involved the possessor in both money and skill".

[51] Reid (1991), para. 169.

the period of wrongful deprivation ("ordinary profits");[52] in category (g), cases of unauthorised (i.e. bad faith) extraction of minerals, the entirety of any net profits made by the extractor[53] (though whether this is properly seen as a delictual award of damages, or an unjustified enrichment remedy, is unclear), but, in cases of good faith extraction, a "royalty" or "lordship" measured by reference to the amount which might have been obtained by the owner of the minerals under a hypothetical bargain[54] for the right to mine them (this being reminiscent of the "negotiating damages" encountered in the English law of trespass), together with compensatory damages for any surface damage caused by the extraction.

Enrichment by Interference with Another's Intellectual Property Rights

As for enrichment by interference with intellectual property rights, gain-based awards are available for the infringement of such rights, including patent, copyright and related rights (e.g. design right), and trade marks (both registered and unregistered).[55] In respect of patent, the Patents Act 1977 provides that in patent infringement proceedings a claim may be brought for, *inter alia*, "an account of the profits derived by [the infringer] from the infringement",[56] with the important caveat that a court "shall not, in respect of the same infringement, both award the proprietor of a patent damages and order that he shall be given an account of the profits".[57] In relation to copyright, the Copyright Patents and Design Act 1988, s 96(2) provides that "in an action by the copyright holder all such relief by way of damages, interdict, count, reckoning and payment or otherwise is available to the pursuer as is available in respect of the infringement of any other property right".[58] Similar provision is made for infringement of registered trade marks in section 14 of the Trade Marks Act 1994. It seems that, apart from these statutory entitlements to an accounting of profits, common law recovery in recompense (for unjustified enrichment) is alternatively available to the right holder.[59]

An intellectual property right holder will wish to consider whether he may get more by way of (i) damages for his loss resulting from the infringement (which

[52] Reid (1991), paras 167 and 168.

[53] Davidson's Trs v Caledonian Railway Co (1895) 23 R 45.

[54] Livingstone v Rawyards Coal Co (1879) 6 R 922. See at 926, per Lord President Inglis: "a fair bargain without any advantage on either side", and at 928, per Lord Deas: "I think the price which would probably have been fixed by an arbiter, if the one party had been willing to purchase and the other to sell, would afford a fair criterion for estimating the value, . . . ".

[55] The latter are protected through the delictual action of passing-off, discussed earlier.

[56] Section 61(1).

[57] Section 61(2).

[58] Copyright Patents and Design Act 1988 (c 48), s 96, read with s 177 (which contains adaptations of expressions for application of the Act in Scotland).

[59] See the (draft) text of para. 9.56 of the reissue of the "Obligations" title in volume 15 of the SME.

damages may include lost profits), (ii) an accounting of profits in respect of the infringer's gain (here the measure is the net profit of the infringer attributable to his infringement,[60] and there is no inclusion of expenses saved, as there is in *quantum lucratus*); (iii) a reasonable royalty or the market price of a (notional) licence fee;[61] (iv) *quantum lucratus* (the extent of the enrichment of the infringer), which is the standard measure appropriate to an obligation of recompense reversing unjustified enrichment,[62] and is likely to be measure, in intellectual property infringement cases, by reference to the market value of the use of the relevant intellectual property (referred to as a "reasonable royalty").[63]

Three Party Enrichment Cases

By way of a final remark on unjustified enrichment, a little should be said on three party, indirect enrichment cases. Scots law is generally antagonistic to enrichment claims by a party suffering loss (I) against an enriched party (E) whose enrichment has been acquired indirectly, through the medium of a third party (T). Such antagonism stems from a number of factors, including a desire to avoid the possibility of double recovery by I or double liability of E, a desire not to undermine contractual arrangements (and thus contractual risk) which may exist in the relationships I-T and T-E, and the absence of a direct causal relationship in the transfer of the enrichment from I to E.[64] However, one clear instance where Scottish courts are willing to allow enrichment claims by I against E despite the transmission of the enrichment through intermediary T is in cases where T obtained the enrichment fraudulently and E is aware of this.[65] Recovery in such cases is in recompense, and is by reference to the legal maxim that "no one should be allowed to profit from another's fraud".

[60] United Horse Shoe and Nail Co v Stewart & Co (1886) 15 R (HL) 45 at 48 per Lord Watson.

[61] This was recognised as a possible alternative measure for the right holder by Lord President Clyde in British Thomson-Houston Co v Charlesworth Peebles & Co 1923 SC 599 and by Lord Wilberforce in General Tire and Rubber Co v Firestone Tire and Rubber Co Ltd [1975] 1 WLR 819 (HL).

[62] See, for recompense in an intellectual property infringement setting, Mellor v William Beardmore & Co 1927 SC 597.

[63] See remarks of Lord Justice-Clerk Alness in Mellor v Beardmore 1927 SC 596 at 609.

[64] See generally on indirect unjustified enrichment claims, Whitty (1994).

[65] See M & I Instrument Engineers v Varsada 1991 SLT 106.

Negotiorum Gestio/Benevolent Intervention

In general, *negotiorum gestio* claims (increasingly referred to by the English language term 'benevolent intervention') are not relevant to the issue of disgorgement of gains, as the entitlement of the *gestor* (the intervener) is not to any gain made by the *dominus* (the party whose affairs are administered) as a result of the benevolent intervention (even if such have arisen) but to the reasonable expenses of the intervention. However, there may be cases where the expenses of the intervener directly match a gain made by the party whose affairs are administered, and in such cases it would be accurate to say that the satisfaction of the intervener's claim coincidentally has the effect of disgorging a gain of the other party. One example is the payment of the debt of a party who is absent or otherwise unable to consent to the payment: a claim in benevolent intervention would be possible in such a case (as an alternative to a recompense claim), and the amount of the claim (the debt discharged) would equal the gain made by the benefited party.

Breach of Fiduciary Duties

In Scotland, breach of duty by a fiduciary is remediable in two ways which have the effect of stripping gains made by the fiduciary as a result of such breach:

(a) through the proprietary route of a 'constructive trust',[66] such a trust enforcing a fiduciary's obligation to account for unauthorised gains and to make them available to the beneficiary under the trust (in a so-called "action of forthcoming"[67]) – the alternative English remedy of an "equitable charge" or "equitable lien" is not available in Scots law;[68] or
(b) through the personal route of an action of accounting ("count, reckoning and payment") sometimes referred to by the English name "account of profits".

The beneficiary of the fiduciary obligation may choose which of these routes to pursue, though a limit on the availability of the first route is that constructive trust claims may only be mounted in relation to pre-existing assets of the beneficiary.[69]

[66] Great care must be taken when comparing the English law of constructive trusts. In Scots law, the constructive trust is almost entirely confined to the role it plays in relation to breach of fiduciary duty.

[67] See the remarks of Lord Wood in Cochrane v Black (1857) 19 D 1019 at 1029: "The rule of law … is, that the defenders are not entitled to make profit for their own benefit of trust-money belonging to the pursuers … but are bound to render such profit forthcoming to the pursuers".

[68] See Hood (2000), 314–315.

[69] A limitation expressed in the recent English case of Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd [2011] EWCA Civ 347 (see judgment of Lord Neuberger at para [88]). Such

The first option – the constructive trust route – provides two main benefits to the beneficiary under the trust: (1) constructive trust property is not available to the fiduciary's personal creditors in the event of the fiduciary's bankruptcy or liquidation, nor may such property be attached by the fiduciary's creditors by means of diligence; (2) the beneficiary is entitled to "trace" the property of the constructive trust to (or through) mixed or substituted property.[70]

So far as the second option is concerned – the personal action of accounting – the measure of recovery is the fiduciary's gain[71] (no limit is placed on this by the loss to the beneficiary – indeed in many cases there may be no such loss), thus the same measure as that in an action of recompense (*quantum lucratus*).

It has been argued that the fiduciary's duty to account in cases of breach of duty resulting in personal gain to the fiduciary should be classified separately from obligations deriving from unjustified enrichment. In part this is because the gain of the fiduciary may not be mirrored by any loss of the principal, though additional reasons have also been advanced for separate classification.[72]

Procedural Issues

Procedural issues are not of obvious relevance to the substantive question of whether gain-based remedies are, or ought to be, available in the law. However, one procedural issue is worth commenting on: class actions.

Class actions are not possible in Scots law, though they were broadly supported by the Scottish Law Commission in its 1996 Report on Multi-Party Actions.[73] The lack of class actions means that there is no procedural means for lots of small-value claims against wrongdoers to be joined together, and therefore that there is the likelihood that some wrongdoers will be able to avoid having gains made through their wrongdoing stripped from them given the economic disincentive to the small claimholders to bringing a claim.

Change is imminent in one area, however. The Government's Department for Business, Innovation and Skills (BIS) consulted in April 2012 on the possibility of allowing class actions in UK competition law litigation. Following this consultation, competition litigation reforms were effected in the Consumer Rights Act 2015. These reforms have conferred much wider powers on the Competition Appeal Tribunal to hear both 'stand alone' and 'follow-on' competition cases. The most

limitation is likely to be accepted as applicable in Scotland too, given the limited appetite for the use of constructive trusts in Scots law.

[70] See further draft text of the reissue of the Obligations title, volume 15 of the SME, para. 20.1.2.

[71] Laird v Laird (1858) 20 D 972, 983.

[72] Draft text of reissue of Obligations title, volume 15 of the SME, para. 20.2.2.

[73] Scottish Law Commission Report No. 154 of 1996.

significant change has been the permissibility of collective actions.[74] The changes were effected through amendment of the Competition Act 1998, a UK-wide statute. The one difference concerning the introduction of the changes in Scotland is that the Court of Session has retained jurisdiction in relation to any interdicts sought in respect of competition law causes of action. The changes mean that, for instance, in cases of price-fixing, businesses and consumers are able to raise actions claiming losses suffered through any anti-competitive overcharging from the offending parties. While the focus in such collective claims is on compensating loss, such loss can be conceptualised as being taken from assets of the offending parties gained at the expense of the consumer (and hence as an indirect form of gain-stripping).

Conclusions

Those contributing to this project were asked to consider whether, in our opinion, our legal systems were efficient when it comes to disgorgement of unlawful profits by private law mechanisms, and, if not, what suggestions we had for enhancing the overall situation regarding the combatting of 'illegal' profits. The answer must be that, for Scots law, while there is clarity in the view of the nature of damages (these are *never* disgorgement in nature), there is a lack of clarity in most issues concerning disgorgement awards: the cause of action triggering the award is not always clear (e.g. whether a disgorgement award is being ordered because of the commission of a delict or because of an unjustified enrichment); the terminology of the remedy varies (there is no clearly agreed term to describe disgorgement awards, rather a plethora of different names), and not all awards which are considered disgorging in nature by some in fact appear to be so (e.g. hypothetical release awards, and some instances of 'violent profits'); there is no uniform measure of recovery; and there appears to be no single justification for the making of disgorgement awards (sometimes there are overtones of a penalty, sometimes the focus is on deterrence, sometimes the reason is simply 'equity' in general). Much of the law is found in nineteenth century cases; other portions have been borrowed unthinkingly from English law, thereby applying language, structure and analysis which is not always appropriate.

Some greater clarity and consistency is likely to follow the publication of the "Obligations" title in the forthcoming reissue of volume 15 of the *Stair Memorial Encyclopaedia*, but in this field, like so many others in Scots private law, the real problem is caused by the lack of a civil code which could provide a coherent structure and language. Whilst further judicial development of the field is awaited, some preliminary suggestions have been made in this chapter:

[74] Modeled on the Netherland's Mass Settlement Act 2005, which was specifically cited in the UK Government's proposals.

(i) the concepts of restitution and disgorgement should be distinguished, albeit that both involve (in a broad sense) taking something from a defender and giving it to a pursuer;
(ii) whether a remedy is labelled 'delictual', 'contractual', 'enrichment-based', etc., should depend on the cause of action triggering the remedy; the courts must be clearer when they are stating the obligational source of a remedy (this is important because, for instance, of available defences in specific obligational fields);
(iii) if a remedy is to be considered disgorgement in nature it must, in fact, have as its focus the stripping of gains made by a defender; if remedial entitlement is assessed by reference to the loss of the pursuer (including hypothetical lost profits/gains *of the pursuer*), then it is *not* a remedy directed at disgorgement/gain-stripping of the *defender*;
(iv) greater uniformity in the language used to describe remedial entitlement would be welcome, and vague terms such as 'fair price' and 'ordinary profits' would be best avoided;
(v) any opportunity should be taken by the courts to settle uncertain legal developments, such as the status of the *Wrotham Park* and *Blake* cases in Scots law;
(vi) caution must be shown in borrowing from England: the historical development of English gain-based remedies, as well as their present taxonomy, is quite different in many cases to that of Scotland.

Bibliography

Birks, P. 2002. *The foundations of unjust enrichment: Six centennial lectures*. Wellington: Victoria University Press.
Black, G. 2005. A New Experience in Contract Damages? Reflections on Experience Hendrix v PPX Enterprises Ltd. *Juridical Review*: 31 et seq.
du Plessis, J.D. 2006. Comparative law and the study of mixed legal systems. In *The Oxford handbook of comparative law*, ed. M. Reimann and R. Zimmermann. Oxford: Oxford University Press. pp. 477 et seq.
Edelman, J. 2002. *Gain-based damages – contract, tort, equity and intellectual property*. Oxford: Hart.
Edelman, J. 2010. The measure of restitution and the future of restitutionary damages. *Restitution Law Review* 18: 1 et seq.
Hood, P. 2000. What is so special about being a fiduciary? *Edinburgh Law Review* 4: 308 et seq.
Hogg, M. 2006. Unjustified enrichment in Scots law twenty years on: Where now? *Restitution Law Review* 14: 1 et seq.
MacQueen, H.L., and J. Thomson. 2012. *Contract law in Scotland*, 3rd ed. Haywards Heath: Bloomsbury.
McAllister, A. 2013. *Scottish law of leases*, 4th ed. Haywards Heath: Bloomsbury.
Paton, G.C.H., and J.G.S. Cameron. 1967. *Landlord and tenant*. Edinburgh: W. Green & Son Ltd.
Rankine, J. 1916. *The law of leases in Scotland*, 3rd ed. Edinburgh: W. Green & Son Ltd.
Reid, K.G.C. 1991. Property. In *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol. 18, ed. R. Black, J.M. Thomson, and K. Miller. Edinburgh: Butterworths Law.

Scottish Law Commission. 1989. *Report on recovery of possession of heritable property* (Scot Law Com No 118, 1989). Edinburgh: Her Majesty's Stationery Office.
Smith, A. 2000. Specific implement. In *A History of Private Law in Scotland*, vol. 2, ed. K. Reid and R. Zimmermann. Oxford: Oxford University Press.
Whitty, N. 1994. Indirect enrichment in Scots law. *Juridical Review*: 200 et seq. (Part 1) and 239 et seq. (Part 2).
Whitty, N. 2009. Overview of rights in personality. In *Rights of Personality in Scots law*, ed. N. Whitty and R. Zimmermann. Dundee: Dundee University Press.
Whitty, N., and L. Macgregor. 2011. Payment of another's debt, unjustified enrichment and ad hoc agency. *Edinburgh Law Review* 15: 57 et seq.

List of Cases

Attorney General v Blake [2001] 1 AC 268
Black v North British Railway Co 1908 SC 444
British Thomson-Houston Co v Charlesworth Peebles & Co 1923 SC 599
British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673
Campbell v MGN Ltd [2004] UKHL 22
Cochrane v Black (1857) 19 D 1019
Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1
Davidson's Trs v Caledonian Railway Co (1895) 23 R 45
Earl of Fife v Wilson (1864) 3 M 323
Esso Petroleum v Niad [2001] EWHC 6 (Ch)
Experience Hendrix LLC v PPX Enterprises Inc [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830
General Tire and Rubber Co v Firestone Tire and Rubber Co Ltd [1975] 1 WLR 819 (HL)
Glen v Roy (1882) 10 R 239
GTW Holdings Ltd v Toet 1994 SLT (Sh Ct) 16
H.M.V. Fields Properties Ltd v Skirt 'N' Slack Centre of London Ltd 1986 SC 114
Hyslop v Miller (1816) 1 Mur 43 at 54
Laird v Laird (1858) 20 D 972
Levin v Caledonian Produce Holdings Ltd 1975 SLT (Notes) 69
Livingstone v Rawyards Coal Co (1879) 6 R 922
Lord Advocate v Scotsman Publications Ltd 1989 SLT 705
M & I Instrument Engineers v Varsada 1991 SLT 106
Mellor v William Beardmore & Co 1927 SC 597
Mosley v News Group Newspapers Ltd [2008] EMLR 679
Retail Park Investments v Royal Bank of Scotland plc (No 2) 1996 SC 227
Rochester Poster Services Ltd v A G Barr plc 1994 SLT (Sh Ct) 2
Secretary of State for Defence v Johnstone 1997 SLT (Sh Ct) 37
Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd [2011] EWCA Civ 347
Shilliday v Smith 1998 SC 725
Teacher v Calder (1898) 25 R 661
Treadwell's Drifters Inc v RCL Ltd 1996 SLT 1048 (OH)
United Horse Shoe and Nail Co v Stewart & Co (1886) 15 R (HL) 45
Vidal-Hall v Google Inc [2014] EWHC 13 (QB)
Watt v Mitchell (1839) 1 D 1157
Wrotham Park Estate Co Ltd v Parkside Homes Ltd 1974 1 WLR 798 (Ch)

Martin A. Hogg is Professor of the Law of Obligations at the University of Edinburgh, having previously held the posts of lecturer and senior lecturer there.