Chapter 3
Gain-Based Remedies for Civil Wrongs in England and Wales

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Abstract English law undoubtedly recognises that gain-based remedies may be awarded as a response to civil wrongdoing. It is also now widely accepted that such remedies must be distinguished from restitutionary remedies based on the law of unjust enrichment, which may be concurrently available in certain settings. Less clear, and more controversial, is when such gain-based remedies can be awarded. It is impossible to account for the law on the basis that it straightforwardly implements a prescription that 'no man should profit from his wrong' – not every wrong currently appears to yield a gain-based remedy, let alone in the same circumstances, and in the same form.

Keywords Restitutionary awards • Profit-stripping awards • Account of profits

Introduction

English law undoubtedly recognises that gain-based remedies may be awarded as a response to civil wrongdoing. Less clear, and more controversial, is when such gain-based remedies can be awarded. It is impossible to account for the law on the basis that it straightforwardly implements a prescription that 'no man should profit from his wrong' – not every wrong currently appears to yield a gain-based remedy, let alone in the same circumstances, and in the same form.

For comparative purposes, several features of the English law's development and shape immediately stand out. First, as in other common law jurisdictions, the availability of gain-based remedies cannot be attributed to a single, code-like source. Instead, modern English law is the product of separate strands of judicially-developed doctrine, common law and equitable, and a patchwork of statutory interventions. This disparate development has inhibited the appreciation or development of common principles. Some notable recent efforts have been made to

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rectify this – drawing together and bringing order to the legal materials. However, the veracity of these accounts is contested, and the authorities remain resistant to easy rationalisation.

Secondly, English law does not exhibit any rigid jurisdictional divide between equity and common law when it comes to the availability of gain-based remedies for wrongs. In particular, the equitable remedy known as the 'account of profits', English law's primary and most transparently profit-stripping remedy, is not confined to equitable wrongs.

Thirdly, there is a general consensus today that gain-based remedies for civil wrongdoing are not part of the 'law of unjust enrichment': so-called 'restitution *for wrongs*' must be distinguished from 'restitution *for unjust enrichment*'. In the former case, the cause of action is the wrong; whether, in what circumstances, and in what measure the wrong yields a gain-based remedy is a matter for the law of wrongs. In the latter case, the cause of action that triggers the restitutionary remedy is the defendant's unjust enrichment at the claimant's expense.[1] Reflecting this division, leading works on the English law of unjust enrichment now exclude 'restitution for wrongs' from their ambit.[2]

Fourthly, although the normal gain-based remedy for a wrong is a personal, monetary remedy, there are important variations in the form that this remedy takes. Gain-based monetary remedies have been given for different wrongs by differently-labelled remedial forms, in a variety of measures, and arguably for different remedial aims.[3] More exceptionally, a wrongdoer may be compelled to give up his wrongful gains *in specie* via a proprietary remedy – commonly through the imposition of a trust over a specific asset in the wrongdoer's hands that represents his wrongful gains.

The following sections survey the current state of English law. Monetary remedies inevitably deserve most attention. They are considered first, in the section titled "Monetary Remedies", which begins by distinguishing three possible measures of gain-related award, before examining their underlying rationales, and then their availability for particular wrongs. Proprietary remedies are considered more briefly in the section titled "Proprietary Remedies".

[1]E.g. Mitchell et al. (2011), 1.01–1.05; Burrows (2011), 9–12.

[2]E.g. the recent re-naming and re-orientation of the landmark work first authored by Robert Goff and Gareth Jones, and titled Goff and Jones – The Law of Restitution, as Mitchell C, Mitchell P, Watterson S, Goff and Jones – The Law of Unjust Enrichment, 8th edn., Sweet and Maxwell, London 2011. See too Birks P, Unjust Enrichment, 2nd edn., Oxford University Press, Oxford 2005 (cf Birks P, An Introduction to the Law of Restitution, rvd edn., Clarendon Press, Oxford 1989); Burrows A, A Restatement of the English Law of Unjust Enrichment, Hart Publishing, Oxford 2012 (cf Burrows A, The Law of Restitution, 3rd edn., Oxford University Press, Oxford 2011).

[3]The fullest attempt to systematise the disparate remedial forms remains Edelman (2002).

Monetary Remedies

The ordinary monetary remedy for a civil wrong is undoubtedly a compensatory measure of damages. Nevertheless, a hard look at the case law reveals that English courts have also sometimes made available three measures of monetary award that can, at least arguably, be characterised as gain-based/-related. In rough order of severity, one can find support for the view that the courts make:

(a) overtly punitive awards;
(b) awards that strip a wrongdoer's actual profits, whatever their source;
(c) awards that require a wrongdoer to make restitution in money of the benefit that he immediately obtained from the claimant/at the claimant's expense.

The division between (b) and (c), in particular, is contested. Some scholars have insisted that this division is fundamental, and corresponds to a fundamental difference in aim.[4] Others, whilst conceding that there may be different measures of gain-based award, deny that there is such a clear cleavage in principle and/or as a matter of authority.[5]

Three Measures of Award

'Category Two' Exemplary Damages

English courts can undoubtedly award a punitive/quasi-punitive remedy directly and openly via an award of 'exemplary damages' – a form of non-compensatory damages specifically designed to punish, deter and express disapproval of the most outrageous examples of civil wrongdoing. Such awards have long been, and remain, highly controversial. In the modern landmark in their development, *Rookes v Barnard*,[6] the House of Lords regarded exemplary damages as an anomaly – an attempt to pursue, within civil proceedings, an aim that was primarily and most appropriately the preserve of the criminal law. Despite this, their Lordships felt unable to abolish exemplary damages altogether, and opted instead to confine their availability to two limited categories of cases, where it was considered that such awards might retain a useful role: (i) unconstitutional, arbitrary or oppressive action by servants of government ('category 1'); and (ii) wrongdoing calculated to make a profit which might well exceed any compensatory damages payable to the victim

[4] In particular, Edelman (2002), Chap. 3. See further section "Underlying Rationales".

[5] E.g. Rotherham (2007); Burrows (2011), 633–635. See further section "Underlying Rationales".

[6] [1964] AC 1129, esp 1220–1233 (per Lord Devlin). See too Cassell & Co v Broome [1972] AC 1027.

('category 2').[7] For some time, it was also thought that exemplary damages were further confined to the forms of wrong for which they had been awarded before the 1964 decision in *Rookes v Barnard*.[8] This arbitrary restriction was finally rejected in *Kuddus v Chief Constable of Leicestershire*.[9] Nevertheless, exemplary damages remain an exceptional, last resort remedy.[10] Thus, even if facts falling within 'category 1' or 'category 2' are shown, the remedy is limited to the most outrageous and punishment-worthy examples of this sort of conduct,[11] which cannot be adequately remedied by other means.

'Category 2' exemplary damages have obvious relevance for any account of gain-based remedies in English law. As Lord Devlin put it in *Rookes v Barnard*, "[w]here a defendant with a cynical disregard for a [claimant's] rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity" – "to teach a wrongdoer that tort does not pay".[12] Some opponents of exemplary damages have argued that 'category 2' exemplary damages are redundant and should be abolished, in light of modern developments in the availability of gain-based remedies.[13] However, this may be an error. 'Category 2' exemplary damages are not strictly gain-based awards. They are a different, larger remedy, which aims to punish a defendant for his outrageous, profit-motivated wrongdoing, and to deter other, similarly-motivated parties. This different motive explains why such exemplary damages may be available whether or not any gain is actually made;[14] why their quantum is not necessarily limited to the amount of the gain actually made;[15] and why, more generally, the factors that bear on their assessment are different from those appropriate for 'pure' disgorgement.[16]

[7] [1964] AC 1129, 1226–1227 (per Lord Devlin). Lord Devlin also recognised a third possible basis for these awards – statute.

[8] Cassell & Co Ltd v Broome [1972] AC 1027, as interpreted in AB v South West Water Services Ltd [1993] QB 507 (CA).

[9] [2001] UKHL 29, [2002] 2 AC 122.

[10] See generally the analysis in Law Com No 247 (1997), Part IV (pre-Kuddus).

[11] Kuddus v Chief Constable of Leicestershire [2001] UKHL 29, [2002] 2 AC 122, [63], [68] (per Lord Nicholls), articulating an 'outrageousness' threshold strongly emphasised in later cases, including R (on the application of Lumba) v Secretary of State for the Home Department [2011] UKSC 12, [2012] 1 AC 245 [150], [166] (per Lord Dyson JSC) (a 'category 1' case) and Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion [2012] EWHC 3354 (Ch), [2012] CP Rep 35, [76], [77] (a 'category 2' case).

[12] [1964] AC 1129, 1226–1227 (per Lord Devlin).

[13] Esp Kuddus v Chief Constable of Leicestershire [2001] UKHL 29, [2002] 2 AC 122, [109] (per Lord Scott).

[14] E.g. Archer v Brown [1985] QB 401, 423; Design Progression Ltd v Thurloe Properties Ltd [2004] EWHC 324 (Ch), [2005] 1 WLR 1, [145]-[146].

[15] Cassell & Co Ltd v Broome [1972] AC 1027, 1130 (per Lord Diplock).

[16] See generally Law Com No 247 (1997), 4.16–4.19.

Whilst these 'category 2' exemplary damages are not therefore gain-based, their recognition may have wider relevance. In past cases, such awards have been made for some wrongs for which there is no authority for gain-based awards, in any form. Some scholars have contended that the availability of these exemplary damages provides good grounds for thinking that in circumstances falling within 'category 2' – i.e. where a defendant has committed a wrong deliberately and cynically with a view to profit – the courts should be willing to award a lesser, gain-based remedy which strips a wrongdoer's actual profits as a mechanism for deterrence.[17]

Awards Stripping a Wrongdoer's Actual Profits, Whatever Their Source ('Profit-Stripping Awards')

For a number of civil wrongs, English law also makes available monetary awards that are transparently profit-stripping – being measured by the positive gains that actually accrue to a wrongdoer, *whatever their source*. The additional words – "whatever their source" – are important in signifying that these profit-stripping awards can in principle require a wrongdoer to give up gains that are not acquired *from* the claimant. Thus conceived, these awards can effect 'disgorgement', rather than a more limited form of 'restitution' to the claimant.

Historically, such profit-stripping awards have been made via various remedial forms – equity's account of profits, the common law's action for money had and received, damages, and interest awards.[18] This continuing diversity makes little sense. Looking forwards, the account of profits may prove to be the focus for future development of English law's profit-stripping awards. It is the primary and most transparently profits-based remedy, and, despite its equitable origins, it is not limited to merely equitable wrongs. There is a long history of the remedy being given for some common law torts;[19] in 2001, the House of Lords decided that the remedy could exceptionally be awarded for breaches of contract;[20] and this has, in turn, reinforced an assumption in at least some recent cases that if a profit-stripping remedy is available for a wrong, of whatever quality, it is in this form.[21]

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[17] See esp Edelman (2002). Cf too Law Com No 247 (1997), 3.48–3.51. See further section "Underlying Rationales".

[18] For a full survey of what are labelled "disgorgement damages", see Edelman (2002). These profit-stripping forms are not mutually exclusive. E.g. in wrongful mining cases, involving the trespassory mining of another's coal, the stripping of unrealised or realised gains was effected, at differing times, via common law damages awards (e.g. Martin v Porter (1839) 5 M & W 351, 151 ER 149), the common law's action for money had and received (e.g. Powell v Rees (1837) 7 Ad & El 426, 112 ER 530) or a claim in equity for an account of profits (e.g. Powell v Aiken (1857) 4 K & J 343, 70 ER 144).

[19] E.g. copyright infringement, patent infringement, and trademark infringement/passing off.

[20] Attorney-General v Blake [2001] 1 AC 268. See further section "Breach of Contract".

[21] E.g. post-Blake discussion of accounts of profits in Forsyth-Grant v Allen [2008] EWCA Civ 505, [2008] Env LR 41 (nuisance); Douglas v Hello! Ltd (No 3) [2005] EWCA Civ 595, [2006]

As the authorities now stand, a profit-stripping measure of this sort is potentially available for, inter alia, (a) breaches of trust/fiduciary duty,[22] as well as the associated ancillary liabilities that may be incurred by third parties who are dishonest accessories to such breaches,[23] or by knowing recipients of assets that have been applied in an unauthorised manner by trustees, or without authority by other types of custodian;[24] (b) major intellectual property wrongs, in particular patent infringement,[25] copyright infringement,[26] trademark infringement,[27] and passing off,[28] (c) misuse of confidential information;[29] (d) the wrongful appropriation of/lesser interferences with rights to possess chattels or land;[30] and (e) breaches of contract.[31] As explained below, this is probably not an exhaustive list.[32] Indeed, the recent extension of this remedy to breaches of contract, long assumed to be a wrong that could not attract such an award, raises a question whether the courts might award a profit-stripping remedy for any type of wrong in an appropriate case.[33]

Taking the account of profits as the paradigm and primary profit-stripping remedy, several general principles of quantification appear from the cases. First, the remedy has so far been limited to positive gains, and does not extend to merely negative gains – where the wrongdoer merely saves himself from expense without

QB 125, [249] (misuse of private information); Devenish Nutrition Ltd v Sanofi-Aventis SA [2008] EWCA Civ 1086, [2009] Ch 390 (breach of competition law).

[22]E.g. Boardman v Phipps [1967] 2 AC 46; Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134. Although it is widely assumed that a fiduciary's liability is an instance of profit-stripping/disgorgement triggered by a wrong committed by the fiduciary – a breach of fiduciary duty – this analysis is not universally accepted: see Smith (2013) and Smith (2014), discussed in the text at notes 52–53 and section "Breach of Fiduciary Duty/Trust and Related Wrongdoing".

[23]Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908, [66]-[93]. See further section "Breach of Fiduciary Duty/Trust and Related Wrongdoing".

[24]E.g. as assumed in Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch), [2007] WTLR 835, [1577], and now Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908, [82]. See further section "Breach of Fiduciary Duty/Trust and Related Wrongdoing".

[25]E.g. Celanese International Corp v BP Chemicals Ltd [1999] RPC 203; Patents Act 1977, s 61(1)(d). See further section "Intellectual Property Wrongs".

[26]E.g. Potton Ltd v Yorkclose Ltd [1990] FSR 11; Copyright, Designs and Patents Act 1988, s 96(2). See further section "Intellectual Property Wrongs".

[27]E.g. Hollister Inc v Medik Ostomy Supplies Ltd [2012] EWCA Civ 1419, [2013] Bus LR 428; Trade Marks Act 1994, s 14(2); Community Trade Mark Regulations 2006/1027, reg 5(2). See further section "Intellectual Property Wrongs".

[28]E.g. My Kinda Town Ltd v Soll & Grunts Investments [1982] FSR 147; Woolley v UP Global Sourcing UK Ltd [2014] EWHC 493 (Ch). See further section "Intellectual Property Wrongs".

[29]E.g. Attorney-General v Times Newspapers Ltd [1990] 1 AC 109. See further section "Breach of Confidence".

[30]See further section "Wrongful Interferences with Rights to Land or Chattels".

[31]Attorney-General v Blake [2001] 1 AC 268. See further section "Breach of Contract".

[32]See further section "Other Wrongs and Possible Future Developments".

[33]See further section "Other Wrongs and Possible Future Developments".

making any actual profit.[34] Secondly, the remedy is not limited to monetary gains, but can also extend to non-monetary gains not yet realised in money – as, for example, where a house, not yet sold, was built without permission to a copyrighted design.[35] Thirdly, a wrongdoer is generally only accountable for the amount of his wrongful profits net of the costs that he can prove are properly attributable to earning them.[36] Fourthly, the wrong must ordinarily be at least a 'but for' cause of the wrongdoer's profits.[37] Fifthly, a wrongdoer is not necessarily liable for 100 % of his net profits. The courts may well apportion his profits between multiple causes,[38] make 'just' allowances for the wrongdoer's skill and effort,[39] and disregard certain gains as 'too remote'.[40]

Despite what has just been said, it is important to recognise that the account of profits – as a profit-stripping mechanism – is far from uniform across all contexts in which it is potentially available. This is for several reasons.

First, in some settings, the quantification principles just outlined are applied, or perhaps disregarded, in a manner that may yield a larger award. This is certainly true of cases involving fiduciaries' profits.[41] For example, the courts show particular caution before apportioning profits or otherwise making allowances for a fiduciary's skill and effort;[42] and they have refused to allow a fiduciary to avoid or reduce his liability on the basis that he would have profited in any event, even if he had acted properly.[43] The best explanation for this greater rigour is debatable. A very plausible

[34]Esp Celanese International Corp v BP Chemicals Ltd [1999] RPC 203, [127]; for an attempt to justify this, see Edelman (2002), 74.

[35]E.g. Potton Ltd v Yorkclose Ltd [1990] FSR 11, 14–16.

[36]E.g. Hollister Inc v Medik Ostomy Suppliers Ltd [2012] EWCA Civ 1419, [2013] Bus LR 428.

[37]E.g. Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908, [94]-[115]; Celanese International Corp v BP Chemicals Ltd [1999] RPC 203, [37].

[38]Routine in intellectual property cases: e.g. Potton Ltd v Yorkclose Ltd [1990] FSR 11; Celanese International Corp v BP Chemicals Ltd [1999] RPC 203; Hotel Cipriani SRL v Cipriani (Grosvenor Street) Ltd [2010] EWHC 628 (Ch).

[39]E.g. Boardman v Phipps [1967] 2 AC 446; Redwood Music Ltd v Chappell & Co Ltd [1982] RPC 109, 132.

[40]Cf e.g. Bayer Cropscience KK v Charles River Laboratories [2010] CSOH 158, 2011 SLT 145, [5]-[9]; Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch), [2007] WTLR 835, [1588]; CMS Dolphin Ltd v Simonet [2002] BCC 600, [3].

[41]Cf too intellectual property cases, where the courts have refused to allow an infringer to argue that his liability should be limited to the difference between the profits actually earned from his infringing conduct, and the profits that he could have earned, had he taken an alternative, non-infringing course of action available to him: Potton Ltd v Yorkclose Ltd [1990] FSR 11, 16–18 (copyright infringement); Celanese International Corp v BP Chemicals Ltd [1999] RPC 203, [39]-[43] (patent infringement); Hotel Cipriani SRL v Cipriani (Grosvenor Street) Ltd [2010] EWHC 628 (Ch), [8] (trademark infringement/passing off).

[42]E.g. Imageview Management Ltd v Jack [2009] EWCA Civ 63, [2009] 2 All ER 666, [54]-[60].

[43]Murad v Al-Saraj [2005] EWCA Civ 959, [2005] WTLR 1573. Cf now Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908, [94]-[115], which appears to reject the assumption adopted

narrow view is that it reflects the peculiar juristic nature and basis of a fiduciary's accountability.[44] An alternative view is that the courts might make such 'enhanced' profit-stripping awards in wider circumstances, to achieve a stronger measure of deterrence and/or for quasi-punitive motives.[45]

Secondly, although it is often said that the account of profits – reflecting the remedy's equitable origins – is a '*discretionary*' remedy,[46] the court's jurisdiction to award the remedy is neither radically, nor uniformly, discretionary. As one recent decision put it, the remedy is "not discretionary in the true sense" – it is "granted or withheld on the basis of equitable principles".[47] Consistently with this, there is inherent flexibility when interpreting and applying the quantification principles just highlighted, and an account of profits can be refused or limited by a court on a limited number of recognised equitable grounds.[48] Beyond this, in the absence of such disqualifying circumstances, not all species of wrongdoing are treated identically. A fiduciary is liable to account for unauthorised profits resulting from his position without further qualification – the account of profits is uncontroversially an automatic response in such cases. For other, non-fiduciary wrongdoing, the picture looks more varied. For example, the account of profits is a long-established, standard remedy for the major intellectual property wrongs, which is available more or less as a matter of course where the claimant elects for it.[49] In contrast, the courts seem inclined to more tightly confine the availability of such profit-stripping for other wrongs, whether by explicitly setting additional threshold conditions (e.g. the "inadequacy" of other remedies and/or the presence of "exceptional circumstances"), or by claiming the liberty to grant or withhold the remedy according to whether it is the "appropriate" response in all the circumstances[50] (e.g. whether it would be a 'disproportionate' response to the wrong).[51]

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in a line of earlier first instance decisions, that persons liable for dishonestly assisting another's breach of fiduciary duty should be similarly treated.

[44] See further section "Breach of Fiduciary Duty/Trust and Related Wrongdoing".

[45] E.g. Edelman (2002), 104–105.

[46] As assumed in Attorney-General v Blake [2001] 1 AC 268, 279, 284–285; Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch), [2007] WTLR 835, [1579]; Hollister Inc v Medik Ostomy Supplies Ltd [2012] EWCA Civ 1419, [2013] Bus LR 428, [55]; Walsh v Shanahan [2013] EWCA Civ 411, [64]-[66]; Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908, [116]-[120].

[47] Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch), [2007] WTLR 835, [1579].

[48] E.g. the claimant's unreasonable delay in bringing proceedings after becoming aware of the defendant's wrongful conduct – widely acknowledged in the context of certain intellectual property wrongs, at least. See esp Hollister Inc v Medik Ostomy Supplies Ltd [2012] EWCA Civ 1419, [2013] Bus LR 428, [55]; Electrolux Ltd v Electrix Ltd (1953) 70 RPC 158; Lever Bros v Sunniwite Products (1949) 66 RPC 84; Young & Co Ltd v Holt (1947) 65 RPC 25.

[49] See section "Intellectual Property Wrongs".

[50] E.g. breach of contract and breach of confidence: see sections "Breach of Contract" and "Breach of Confidence".

[51] There is an under-examined idea emphasised in some recent cases that an account of profits should be refused if it would be a 'disproportionate' response to the wrong: Satnam Investments

Finally, some variations just highlighted arguably reflect a deeper feature of English law: that an order for an account of profits may not have a uniform juristic basis. In general, such awards are readily analysed as a profit-stripping/disgorgement remedy triggered by the defendant's wrong. However, it is more controversial whether a *fiduciary's* accountability for profits resulting from his position is properly analysed in this way. Although it is widely assumed that it is triggered by a wrong – a "*breach* of fiduciary duty" – a plausible alternative analysis is that the fiduciary's accountability actually reflects what has been labelled a "rule of primary attribution".[52] On this view, a fiduciary relationship inherently entails a primary duty for a fiduciary to render profits arising from his position to the relationship's beneficiary, and a corresponding primary right of the beneficiary to such profits.[53] As such, the account of profits is not strictly a remedy for any *wrong* committed by the fiduciary; it enforces performance of the fiduciary's primary duty. This alternative analysis is consistent with some unusual features of a fiduciary's accountability; and if correct, might mean that fiduciary cases are unsafe material from which to derive any general principles regarding the availability of a profit-stripping response to civil wrongs in English law.

Awards Requiring a Wrongdoer to Make Restitution of the Benefit Immediately Obtained from the Claimant/at the Claimant's Expense ('Restitutionary Awards')

The profit-stripping awards just described effect 'disgorgement' – they are measured by the profits that have actually accrued to the wrongdoer from his wrongful conduct, whatever their source. Another possible measure of gain-based award is different and more limited. It achieves 'restitution' to a claimant in a narrower sense – restoring to the claimant the value of the benefit immediately obtained by the wrongdoer from the claimant/at the claimant's expense. This category of awards is referred to here as 'restitutionary awards'.

Although one might expect these restitutionary awards to be more widely granted, it is surprisingly difficult to find unequivocal support for their availability. This could be attributed – to a large extent – to an inevitable overlap with other remedies, which means that even where such awards are theoretically available, they are not routinely resorted to, and/or that some awards that could be analysed as restitutionary awards for a wrong can also be explained in other terms. So, in particular: (a) in many cases of 'subtractive', wrongful enrichment, a claimant is likely to be able to obtain a similar sum from the defendant as compensatory damages for

Ltd v Dunlop Heywood & Co Ltd [1999] 3 All ER 652; Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch), [2007] WTLR 835, [1579]-[1580]; Walsh v Shanahan [2013] EWCA Civ 411, [55]-[80]; Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908, [116]-[120].

[52] See Smith (2013); Smith (2014).

[53] See further section "Breach of Fiduciary Duty/Trust and Related Wrongdoing".

the wrong (potentially more, if consequential losses are also compensated); (b) on the same facts, the claimant may also be entitled to another remedy with similar restitutionary effects, most likely: (i) a personal restitutionary remedy for unjust enrichment;[54] or (ii) a proprietary restitutionary remedy, in the form of rescission of a transaction under which property has been transferred to the defendant, together with ancillary monetary orders; or the imposition of a trust over property transferred to the defendant which restores beneficial title to the claimant.[55]

Consider, for example, a case where the defendant obtains property from the claimant by fraudulent misrepresentations. The defendant commits the tort of deceit, for which he will be liable to pay compensatory damages, extending to all direct consequential losses – a measure that should exceed and subsume any award assessed on a restitutionary basis. Alongside this claim, the claimant may be entitled to a personal restitutionary remedy in unjust enrichment; he may be able to seek rescission of the transaction, bringing about a revesting of title to the property transferred in his favour; and in the absence of a transactional barrier, the law might achieve a similar effect by imposing an immediate constructive trust over the property transferred, in favour of the claimant, as a response to the defendant's fraud.[56] All of this means that it may be unusual to find a monetary award being claimed and made that is only explicable as a restitutionary award made specifically for the tort of deceit. Nevertheless, one way or another, restitution is what can be and is often being achieved, at least by functional equivalents.

The fact that a 'restitutionary award' may not often be required does not, of course, prove that English courts cannot make such awards in response to a civil wrong – requiring the defendant to repay money, the value of property, or the value of some other benefit obtained from the claimant by wrongdoing. Indeed, there is a reasonable amount of material to suggest that they can do so,[57] causing one leading scholar to suggest that the law should in principle respond to any wrong by a restitutionary award.[58]

In practice, the largest collection of cases that could be rationalised as restitutionary awards are those cases where the defendant commits a wrong against the claimant, and the courts order the defendant to pay a sum reflecting the reasonable value of the liberty to do as the defendant did (or in some cases, to do as he proposes to do in future).[59] These awards – referred to here as 'reasonable fee awards' –

[54] See further the text at note 211 and following.

[55] See further section "Proprietary restitution".

[56] See further the discussion of proprietary restitutionary remedies in section "Proprietary restitution".

[57] For a full exploration of the circumstances in which what are called "restitutionary damages" may be awarded, see Edelman (2002).

[58] Edelman (2002). See further the text at notes 73–74.

[59] The latter encompasses those cases where the court is asked to award damages on the assumption that it will not award specific relief to prevent a future/continuing wrongful interference with the claimant's rights: e.g. the cases cited in notes 158–160.

have several historic roots, and English courts have yet to develop consistent terminology for them. Depending upon the context and judicial preferences, such awards are made under a variety of labels – in particular, user damages, damages assessed by reference to a reasonable or notional royalty, mesne profits awards, wayleave awards, *Wrotham Park* damages, negotiation damages, and Lord Cairns's Act damages.

What these reasonable fee awards have in common is that they see the courts requiring a wrongdoer to pay a sum which represents the reasonable (objectively-determined) value of the liberty/right to do as he did (or in some cases, the value of the liberty/right to do as he proposes to do in future). The necessary valuation exercise can occur in various ways. Sometimes, a reasonable sum is simply plucked from the air. More often, the courts (a) identify an appropriate market rate, or (b) as a fall-back, adopt a 'hypothetical negotiations' approach, which is directed at identifying the price that might reasonably be agreed to legitimate the defendant's wrongful conduct. This last approach is inevitably more complex. The courts do not attempt to re-construct any actual bargaining process that might have occurred – in truth, the claimant might not have been prepared to bargain away his rights to the defendant at any price, or at least at a price that the defendant could or would pay. Instead, the courts imagine a bargain struck between two willing parties, acting reasonably, generally before the defendant's wrongful course of conduct begins, and without the benefit of hindsight. These parties are not assumed to share the personal characteristics of the claimant and defendant, but they are assumed to be situated as the claimant and defendant were. Accordingly, when determining the outcome of the hypothetical bargain, a court can factor in a wide range of circumstances that would strengthen or weaken either party's hands, or reasonably influence their preparedness to strike a deal.[60]

Such reasonable fee awards are widely available, and certainly, more readily awarded than profit-stripping awards. Thus, the cases support their availability for: (a) the major intellectual property wrongs (reflecting a reasonable/notional royalty for the relevant infringing act);[61] (b) breaches of confidence (reflecting the sum that could reasonably be demanded for relaxation of any confidentiality obligation);[62] (c) wrongful interferences with rights to possess chattels (typically in the form

[60]E.g. the profits that could have been expected to accrue to the defendant; the likelihood of the claimant being able to obtain a court order to prevent the defendant's conduct; and the availability and cost of alternative means to achieve the defendant's desired object.

[61]E.g. Catnic Components Ltd v Hill & Smith Ltd [1983] FSR 512 (patent infringement); Blayney (t/a Aardvark Jewelry) v Clogau St David's Gold Mines Ltd [2002] EWCA Civ 1007, [2003] FSR 19 (copyright infringement); Irvine v Talksport Ltd [2003] EWCA Civ 423, [2003] 2 All ER 881 (trademark infringement/passing off). See further the text at notes 126–129.

[62]E.g. Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd [2009] UKPC 45, [2011] 1 WLR 2370; Vercoe v Rutland Fund Management Ltd [2010] EWHC 424 (Ch). See further the text at notes 142–144.

of a reasonable user fee for a period of temporary wrongful user);[63] (d) wrongful interferences with rights to possess land,[64] or lesser rights of use and/or control (in the form of a reasonable user fee for a period of temporary wrongful user or the sum that could reasonably be negotiated for permission to do as the defendant did);[65] and (e) breach of contract (reflecting the sum that could reasonably be demanded for relaxation of the relevant contractual obligation).[66]

An important obstacle to understanding exactly when these reasonable fee awards should be made, and on what assumptions, is a continuing controversy as to their nature. The cases and the literature divide on whether these awards are properly characterised as gain-based/restitutionary at all – many judges and scholars insist that they should be classified as 'compensatory' awards. On one analysis, they are compensatory in a conventional sense, being designed to compensate a real financial loss which consists of the claimant's genuinely lost opportunity to bargain with the defendant for the relaxation/exploitation of his rights.[67] According to another, now more popular analysis, they are compensatory in a different sense – a form of 'substitutive' compensation, reflective of the value of the infringed right, which does not depend on the presence or proof of consequential financial/material losses.[68]

If these awards are properly characterised as gain-based/restitutionary, as a number of cases assume,[69] they are nevertheless clearly distinguishable from the

[63]E.g. Blue Sky One Ltd v Mahan Air [2010] EWHC 631 (Comm), [133]-[134]. See further the text at notes 148–151.

[64]Typically, in the form of temporary occupation or user (e.g. Ministry of Defence v Ashman (1993) 66 P&CR 195 (CA); Inverugie Investments Ltd v Hackett [1995] 1 WLR 713 (PC); Stadium Capital Holdings (No 2) Ltd v St Marylebone Property Co [2011] EWHC 2856 (Ch), [2012] 1 P&CR 7). See further the text at notes 148–151.

[65]E.g. interferences with easements (e.g. Carr-Saunders v Dick McNeil Associates Ltd [1986] 1 WLR 922 (right to light)) and breaches of restrictive freehold covenants (e.g. Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 WLR 798). See further the text at notes 158–160.

[66]Experience Hendrix LLC v PPX Enterprises Inc [2003] EWCA Civ 323, [2003] EMLR 25; Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd [2009] UKPC 45, [2011] 1 WLR 2370; Giedo van der Garde BV v Force India Formula One Team Ltd [2010] EWHC 2373 (QB), [499]-[560]. See further the text at notes 170–171.

[67]See classically, Sharpe and Waddams (1982); persuasively criticised by, inter alia, Burrows (2011), 635–638; Rotherham (2008); Edelman (2002), 99–102.

[68]The most extreme version of this thesis is Stevens (2007), Chap. 4. Cf the more limited explanation offered by others, including McBride (2013), 272–275 (arguing that such damages may be justified to compensate a claimant for the non-material, "normative loss" that occurs when "liberty oriented rights" are infringed). For a variation on this approach, stressing the 'vindicatory' role of such damages, in relation to certain wrongs, see Varuhas (2014).

[69]E.g. Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd [1952] 2 QB 246 (CA), 255 (per Denning LJ); Attorney-General v Blake [2001] 1 AC 268, 278 (per Lord Nicholls); Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5) [2002] UKHL 19, [2002] 2 AC 883, [87] (per Lord Nicholls); Ministry of Defence v Ashman (1993) 66 P&CR 195, 201 (per Hoffmann LJ); Inverugie Investments Ltd v Hackett [1995] 1 WLR 713 (PC), 718 (per Lord Lloyd); Blue Sky One Ltd v Mahan Air [2010] EWHC 631 (Comm), [133]-[134]; Stadium Capital Holdings (No 2) Ltd v St Marylebone Property Co [2011] EWHC 2856 (Ch), [2012] 1 P&CR 7, [69]; Enfield LBC v

profit-stripping awards exemplified by the account of profits. For some wrongs, where a wrongdoer has profited and an account of profits is an available remedy, the courts often opt to make a reasonable fee award instead.[70] It might then appear tempting to view this measure as a lesser form of partial profit-stripping/disgorgement. However, that would risk missing the distinctive nature of reasonable fee awards, if properly understood as gain-based awards. As an objective measure of the benefit that immediately accrues to the wrongdoer from the unlicensed appropriation or infringement of the claimant's rights, these reasonable fee awards are available whether or not the wrongdoer actually makes any profits consequent on his wrong, and regardless of the extent of the profits which he does actually make.

For example, where courts quantify a reasonable fee award by adopting a market basis for valuation (e.g. requiring a defendant who has wrongfully possessed the claimant's land to pay a reasonable rental) the wrongdoer can be liable to pay a substantial sum, reflecting the market value of this benefit, whether or not this reflects any actual profitable use during the period of wrongful possession.[71] So too, when the courts quantify a reasonable fee award by assessing damages on a 'hypothetical negotiation' basis, an important factor bearing on the readiness of a person in the defendant's position to strike a deal, and on the price that could reasonably be agreed, is the extent of the profits which the defendant could reasonably have anticipated. For this purpose, however, it is the anticipated profits that are crucial. Any award assessed on this basis might therefore exceed the profits that, with hindsight, can be seen actually to have accrued to the defendant, if the defendant's conduct is less profitable than expected or, in fact, unprofitable.[72]

Outdoor Plus Ltd [2012] EWCA Civ 609, [2012] CP Rep 35, [47]; Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA [2013] EWCA Civ 1308, [2014] HLR 4, [20]-[25].

[70] See esp breach of contract and many instances of breach of confidence.

[71] E.g. Inverugie Investments Ltd v Hackett [1995] 1 WLR 713 (PC), where the defendant was in wrongful possession for 15 years of 30 apartments within a hotel complex, of which the claimant was lessee; the defendant used the apartments as part of its hotel, with average occupancy rates of 35–40 %, but had to pay as 'mesne profits' for its trespass, a reasonable rent for each apartment for every day of the year.

[72] E.g. Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd [2009] UKPC 45, [2011] 1 WLR 2370, involving breach of a confidentiality and exclusivity agreement entered between two parties in connection with an oilfield development project. The project, ultimately proceeded with by the defendant alone, proved much less profitable than the defendant anticipated. Only US$1 m-$1.8 m profit was ultimately made, but $2.5 m was awarded to the claimant using the hypothetical negotiations approach, in view of what would have contemporaneously been viewed as the likely profitability.

Underlying Rationales

What sense might made of this range of remedial measures? It seems plausible that the different measures of award may implement different remedial aims, and that identifying these aims is a necessary first step to understanding when they should be available.

This was indeed the key premise of Edelman's important and influential book, *Gain-Based Damages*. Writing in 2002, Edelman argued that, properly interpreted, English law recognises two different measures of gain-based award, each with different remedial aims. The first, which Edelman termed "*disgorgement damages*", strip a wrongdoer's actual profits, whatever their source, as a mechanism for deterrence. The second, "*restitutionary damages*", have the different and more limited aim, of effecting restitution of a benefit wrongfully obtained by the defendant "at the claimant's expense". As such, they effect "restitution" in a similar sense to restitutionary awards designed to reverse unjust enrichment – reversing a (wrongful) "transfer of value" between claimant and defendant.[73] This distinction necessarily brings implications for the availability of the two measures of "gain-based damages". According to Edelman, so-called "disgorgement damages" should in principle be available when compensatory damages would be inadequate to deter wrongdoing. Edelman identified two situations where this was the case: (i) fiduciary wrongdoing, where there is a heightened need to deter even inadvertent breaches of duty; and (ii) where any other wrong was committed deliberately or recklessly, with a view to profit. In contrast, Edelman argued that the law should in theory respond to any wrong, without more, by an award of "restitutionary damages": "[i]f conduct is deemed a wrong, the law should always be prepared to reverse a transfer of value that is the result of that conduct. To do otherwise would be to legitimate the wrong".[74]

At least at first sight, this account looks like a promising basis for rationalising English law. In particular, Edelman's two-fold division seems to correspond closely to the distinction, observable in the cases, between: (i) 'profit-stripping awards', which strip a wrongdoer's actual profits, whatever their source (= Edelman's "disgorgement damages"?); (ii) 'restitutionary awards', best exemplified by 'reasonable fee awards', which reflect the reasonable value of the liberty to do as the defendant did (= Edelman's "restitutionary damages"?).[75] Nevertheless, the veracity of Edelman's account, which purports to offer an interpretative theory of English law, has been contested.[76]

[73] Edelman (2002), esp Chap. 3.

[74] Edelman (2002), 81.

[75] See sections "Awards Stripping a Wrongdoer's Actual Profits, Whatever Their Source ('Profit-Stripping Awards')" and "Awards Requiring a Wrongdoer to Make Restitution of the Benefit Immediately Obtained from the Claimant/at the Claimant's expense ('Restitutionary Awards')".

[76] Cf also, inter alia, Burrows (2011), 633–635; Rotherham (2007); Barnett (2012), Chap. 6.

Profit-Stripping Awards

Deterrence is undoubtedly a popular explanation for profit-stripping awards,[77] and might provide a plausible explanation for some important features of English law. In particular, (a) strongly prophylactic concerns are widely assumed to underlie the core duties and strict accountability of fiduciaries;[78] (b) outside of the fiduciary sphere, some level of deliberate wrongdoing may often be required before a profit-stripping remedy is awarded;[79] and (c) the presence of 'category 2' exemplary damages supports the view that deliberate and cynical wrongdoing, committed with a view to profit, is conduct that can and should be deterred.[80]

Nevertheless, English law does not yet precisely match Edelman's vision of when so-called "disgorgement damages" should be awarded. On the one hand, despite the existence of 'category 2' exemplary damages, English courts have not yet clearly accepted that deliberate or reckless wrongdoing with a view to profit is a sufficient, general basis for a profit-stripping award. There are many examples of such wrongdoing that have not yet attracted a profit-stripping award, or are remedied only by a reasonable fee award, at least in the absence of further "exceptional circumstances".[81] On the other hand, deliberate or reckless wrongdoing with a view to profit is not invariably required for a profit-stripping award. For example, there are several intellectual property wrongs for which profit-stripping awards can be made against defendants who are not conscious/deliberate infringers.[82]

It may be tempting to dismiss this unevenness as the accidental product of English law's ad hoc development. However, there are other inferences that might be drawn. They include:

(a) that deterrence is not a sufficient or necessary explanation for all profit-stripping awards – *purely* deterrence-focused accounts may be too reductionist, and ignore other bases for profit-stripping in certain contexts;[83]

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[77] Besides Edelman (2002), see also the notable recent contributions by Barnett (2012) and Rotherham (2012).

[78] See section "Breach of Fiduciary Duty/Trust and Related Wrongdoing".

[79] See generally section "Particular Forms of Wrongdoing".

[80] But note the further limits on these awards mean that, today, these damages are very far from automatic, even against cynical profit-seekers: see section "'Category Two' Exemplary Damages".

[81] See generally section "Particular Forms of Wrongdoing".

[82] See section "Intellectual Property Wrongs".

[83] As argued by McBride (2013). For example, (a) what may seem to be a profit-stripping remedy awarded for wrongdoing may sometimes reflect a primary duty owed by the defendant, to render up certain benefits to the claimant (see the explanation for fiduciary accountability developed by Smith (2013) and Smith (2014), and discussed in section "Breach of Fiduciary Duty/Trust and Related Wrongdoing"); or (b) the law might take the position that, as a concomitant of a particular right held by the claimant, certain benefits accruing to a wrongdoer should be attributed to the claimant as a matter of right – a position which, if taken, would of course require some deeper justification (an explanation sometimes offered to explain the basis on which an owner of an asset which is misappropriated might trace into, and recover, its proceeds).

(b) that even if deterrence can provide a legitimate justifying goal for profit-stripping awards, its implications are more complex than Edelman's account assumes;[84]
(c) that some English judges may be uncomfortable about the instrumentality of deterrence-focused reasoning, and at least outside the clearest of cases, its dictates may not be sufficiently apparent to provide workable, explicit reference-points for judicial decision-making;[85]
(d) that English judges are strongly influenced by various countervailing concerns, which incline them to more tightly limit the availability of profit-stripping even when a prima facie argument, based on individual or general deterrence, might be made out – most obviously, the perception that a profit-stripping award might produce an unwarranted windfall for a *particular* claimant,[86] and/or represent a disproportionate sanction for a *particular* defendant's conduct.[87]

Restitutionary Awards

Different issues arise in relation to what have been labelled as 'restitutionary awards' – best exemplified by 'reasonable fee awards'. This is a fragile category of gain-based award because of the continuing controversy regarding whether they should be understood, exclusively, in different terms – as compensatory awards.[88] If they *are* gain-based, then they are manifestly different in quantum from profit-stripping awards. However, there is no clear consensus as to the implications of this. Two broad lines of opinion are identifiable.

One view, reflecting Edelman's analysis,[89] is that the reasonable fee awards are one manifestation of a wider species of gain-based award that is different in nature and underlying rationale from awards that effect disgorgement of a wrongdoer's actual profits, whatever their source, in order to deter. These 'restitutionary' awards effect restitution of a benefit wrongfully obtained by the defendant from the claimant/at the claimant's expense, in the same sense as restitutionary remedies

[84] A sophisticated analysis would need to factor in, inter alia, the availability and adequacy of alternative sanctions, and countervailing concerns, including the high risk, in particular settings, of costly over-deterrence. See e.g. the recent, highly-nuanced discussion of when deterrence might justify a profit-stripping award offered by Rotherham (2012), which reaches the interesting conclusion that deterrence may not justify profit-stripping awards very much more widely than is presently accepted. See also Barnett (2012), examining the circumstances in which deterrence might justify a profit-stripping remedy for breaches of contract.

[85] See, in particular, the complexity of analysis offered by Rotherham (2012).

[86] E.g. Devenish Nutrition Ltd v Sanofi-Aventis SA [2008] EWCA Civ 1086, [2009] Ch 390, [147], [158].

[87] E.g. Walsh v Shanahan [2013] EWCA Civ 411, [55]-[80]; Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908, [116]-[120].

[88] See the text at notes 67–68 above.

[89] See section "Underlying Rationales".

awarded to reverse an unjust enrichment. They should in principle be available for any wrong, without more.[90]

A different view is that the reasonable fee/restitutionary awards are not susceptible to such simple, separate rationalisation: they merely represent a lower point on a single spectrum of possible gain-based awards. On this view, the availability of a reasonable fee/restitutionary award, and the choice between such an award and an award that removes all or part of a wrongdoer's actual profits, turns on the interplay of a more complex set of considerations – including the importance and vulnerability of the claimant's protected interest, the extent and culpability of the defendant's wrongful conduct, the extent to which any profit accruing to the defendant is causally attributable to the defendant's wrong, the adequacy of alternative remedies/sanctions, and the strength of concerns to deter.[91]

Particular Forms of Wrongdoing

Turning now to the detail of English law, it is immediately clear that not all wrongs are alike from the point of view of the availability of gain-based remedies.

Breach of Fiduciary Duty/Trust and Related Wrongdoing

Profit-stripping, via an account of profits,[92] is the/a *primary* response where a fiduciary contravenes the 'no conflict' and 'no profit' rules that underpin the core requirement for undivided loyalty to the beneficiary of the fiduciary relationship – the closely-related rules that demand that a fiduciary must not find himself in a position of unauthorised conflict of interest and duty, and that he must not make any unauthorised profit from his position. The stringency of these proscriptions is such that it is no defence that the fiduciary acted in good faith, in the best interests of the beneficiary, without breaching any other duty owed to the beneficiary, and without causing him any loss.[93] These rules are widely justified as strictly prophylactic in aim – designed to prevent a fiduciary from finding himself in a position where he might be tempted by the prospect of personal gain to act inconsistently with his

[90] Edelman (2002), Chap. 3, esp 66–68, 80–81.

[91] Cf e.g. Burrows (2011), 633–635; Rotherham (2007); Rotherham (2010).

[92] Profit-stripping can also be achieved in this context via the imposition of a trust; see section "Proprietary disgorgement".

[93] E.g. Boardman v Phipps [1967] 2 AC 46; see too Regal (Hastings) Ltd v Gullifer [1967] 2 AC 134, 144–145 (per Lord Russell of Killowen).

duty.[94] The ready availability of profit-stripping mechanisms, in robust form, is the obvious remedial counterpart of these stringent rules. As recently put in *Murad v Al-Saraj*,[95] "the law imposes exacting standards on fiduciaries and an extensive liability to account" "in the interests of efficiency and to provide an incentive to fiduciaries to resist the temptation to misconduct themselves".

Closely related is the ancillary wrong committed by a person who dishonestly assists or otherwise participates in another's breach of trust or fiduciary duty.[96] Recent authority confirms that where a 'dishonest assistant' profits by such wrongdoing, an account of profits may also be awarded, whether or not the beneficiary suffered loss, and even though the trustee's/fiduciary's wrong may not have involved any misapplication of assets held for the beneficiary.[97] Given the high level of conscious wrongdoing required, and the high degree of protection generally afforded to trust/fiduciary relations, this liability might be readily explained as a deterrent/prophylactic measure.[98]

There are, however, some important differences between the position of a dishonest assistant and that of a defaulting fiduciary – a fiduciary's accountability is stricter and more extensive.[99] In particular, (a) unlike a fiduciary's liability, the liability of a dishonest assistant is necessarily limited to circumstances demonstrating a high degree of conscious fault; (b) the courts have refused/limited accounts of profits against dishonest assistants using causal reasoning that does not appear to constrain

[94]For a leading recent account, see Conaglen (2010). Cf the alternative account recently developed in Smith (2013) and Smith (2014), which involves an important re-conceptualisation of the nature and operation of the 'no conflict' and 'no profit' rules.

[95][2005] EWCA Civ 959, [2005] WTLR 1573, [74].

[96]Royal Brunei Airlines v Tan [1995] 2 AC 378 (PC).

[97]See Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908, [66]-[93], recently endorsing the position assumed in a line of earlier first instance decisions: Fyffes Group Ltd v Templeman [2000] 2 Lloyd's Rep 643, 668–672; Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch), [2007] WTLR 835, [1589]-[1601]; Tajik Aluminium Plant v Ermatov [2006] EWHC 7 (Ch), [23]; OJSC Oil Company Yugraneft v Abramovich [2008] EWHC 2613 (Comm), [377] and [392]; Fiona Trust & Holding Corp v Privalov [2010] EWHC 3199 (Comm), [66]; Otkritie International Investment Management Ltd v Urumov [2014] EWHC 191 (Comm), [79].

[98]Explicitly rationalised in these terms in Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908, [76]. See too Fiona Trust & Holding Corp v Privalov [2010] EWHC 3199 (Comm), [66], and the earlier discussions in Fyffes Group Ltd v Templeman [2000] 2 Lloyd's Rep 643, 668–672, and Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch), [2007] WTLR 835, [1589]-[1601]. Cf Royal Brunei Airlines v Tan [1995] 2 AC 378 (PC), 387, where Lord Nicholls explicitly justified the existence of the wrong itself in terms of the "dual purpose" of "making good the beneficiary's loss should the trustee lack financial means and imposing a liability which will discourage others from behaving in a similar fashion". Cf the alternative rationalisation, featuring in the same judicial discussions, that it would simply be inequitable or unconscionable for a third party to retain the fruits of his dishonest assistance.

[99]This is particularly evident from Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908.

a fiduciary's accountability;[100] (c) as with other non-fiduciary wrongdoers, the availability of an account of profits against a dishonest assistant is said to be subject to the court's "discretion", whereas a fiduciary's accountability is peremptory and follows automatically where a relevant profit is made;[101] and (d) a fiduciary is accountable for any relevant profit *in specie*, whereas the dishonest assistant's liability seems to be a merely personal, monetary liability.[102]

These differences almost certainly reflect the distinctive juristic nature and basis of a fiduciary's accountability. Although often said to be liable in the same manner as a trustee,[103] a dishonest assistant is not, without more, a *fiduciary*. This means that dishonest assistants are not subject to the proscriptive rules, and associated disabilities and liabilities, that are fundamental incidents of a fiduciary relationship – including the so-called "inflexible" rule that requires a fiduciary to account for any unauthorised profit resulting from his position. If an account of profits is ordered against a dishonest assistant, this is naturally viewed as a profit-stripping/disgorgement remedy, triggered by the wrong committed by the dishonest assistant. In contrast, the fiduciary's accountability may be more satisfactorily understood in different terms: not as a profit-stripping remedy for any wrong committed by the fiduciary, but the result of a distinctive *primary* duty, which is peculiar to the fiduciary relationship and a concomitant of the core requirement of loyalty, *to render any relevant profit to the relationship's beneficiary*.[104] On this view, a fiduciary cannot make any unauthorised profit from his position because of a "primary rule of attribution", which means that anything that the fiduciary tries to extract from the relationship is attributed to the relationship's beneficiary, *as a matter of primary right/duty*.

In practice, in situations involving unauthorised dealings with trust assets by trustees, and unauthorised dealings with assets managed by other forms of custodian for another's benefit, equity often achieves the functional equivalent of a gain-based remedy more widely, without this needing to be characterised as a gain-based liability for wrongdoing. For example, where assets held on trust are disposed of without authority, English law is generous in affording the trust's beneficiaries an ability (i) to assert equitable proprietary rights to any unauthorised traceable substitute asset in the trustee's hands; and (ii) corresponding rights to the original asset or traceable substitute in the hands of a third party recipient.[105] Such a third

[100] Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908, [94]-[115]. Cf Murad v Al-Saraj [2005] EWCA Civ 959, [2005] WTLR 1573.

[101] Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908, [116]-[120].

[102] See further section "Proprietary disgorgement".

[103] E.g. Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908, [82].

[104] For a fuller elaboration of this argument see, in particular, Smith (2013) and Smith (2014). Cf the slightly different reasoning (such as reliance on 'good man theories') used by others to support a similar conclusion – in particular, Millett (1993) and Millett (2012).

[105] Esp Foskett v McKeown [2001] 1 AC 102. The legal basis for these rights is a matter of ongoing debate: e.g. Mitchell et al. (2011), 8.17–8.19, 8.83–8.93.

party recipient, once he acquires sufficient knowledge of the misapplication as to make it unconscionable for him to retain the benefit of his receipt,[106] may also incur an equitable personal liability for "knowing receipt", which ordinarily involves an immediate liability to restore the misapplied assets or their value to the trust,[107] but might also generate a further liability to account for his profits.[108]

Intellectual Property Wrongs

English law has also long made available the remedy of an account of profits for major intellectual property ('IP') wrongs, originally via proceedings in courts of equity as an adjunct to a claim for injunctive relief. This practice pre-dates modern IP statutes, which now expressly confirm the remedy's availability for patent,[109] copyright,[110] and trademark[111] infringements, as well as for the infringement of a number of other rights.[112] Passing off remains a common law wrong, for which an account of profits is undoubtedly available.[113] Three features of these profit-stripping awards, when awarded in IP cases, stand out.

First, it is widely assumed that an account of profits is readily available for these wrongs, as an alternative to ordinary compensatory damages, at the election of the claimant. In practice, claimants rarely make this election. Nevertheless, where it is made, the courts apparently exercise only a very limited discretion to refuse the remedy and leave the claimant with ordinary compensatory damages in lieu.[114]

Secondly, there is unevenness in relation to the degree of fault needed to justify an account of profits. Conscious/deliberate wrongdoing is certainly not universally required. For trademark infringement or passing off, the courts may refuse an account of profits against an infringer who did not knowingly infringe the claimant's

[106] BCCI (Overseas) Ltd v Akindele [2001] Ch 437 (CA).

[107] There is an ongoing debate about the proper characterisation of this liability: see Mitchell and Watterson (2009); Mitchell et al. (2011), 8.123–8.130. There is also an ongoing debate about whether the law might impose a strict personal liability in unjust enrichment in these circumstances: see Mitchell et al. (2011), 8.50–8.68. See now Mitchell (2014).

[108] E.g. Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch), [2007] WTLR 835, [1577]; Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908, [82].

[109] Patents Act 1977, s 61(1)(d).

[110] Copyright, Designs and Patents Act 1988, s 96(2).

[111] Trade Marks Act 1994, s 14(2); Community Trade Mark Regulations 2006, reg 5(2).

[112] In particular: performers' property rights (Copyright, Designs and Patents Act 1988, s 191I(2)); (unregistered) design right (Copyright, Designs and Patents Act 1988, s 229(2)); registered design right (Registered Designs Act 1949, s 24A(2)).

[113] E.g. My Kinda Town Ltd v Soll & Grunts Investments [1982] FSR 147; Woolley v UP Global Sourcing UK Ltd [2014] EWHC 493 (Ch).

[114] Cf the position today for breaches of confidence, discussed in the text at notes 137–144.

rights.[115] In contrast, an account of profits seems to be available for merely negligent patent infringement: a statutory "innocent infringement" defence protects an infringer from liability for damages or an account of profits if he proves that "at the date of the infringement he was not aware, and had no reasonable grounds for supposing, that the patent existed".[116] For copyright,[117] performers' property rights,[118] (unregistered) design right,[119] and in future, registered design right,[120] an infringer who neither knew nor had reason to believe that the rights existed is only protected from liability for "damages"; other remedies, including an account of profits, are expressly preserved.[121]

Thirdly, whilst many commentators emphasise deterrence as the primary basis for profit-stripping awards, this has not been an explicit feature of judicial reasoning in modern IP cases. Where a substantial explanation is articulated, it is typically the prevention of the infringer's "unjust enrichment"[122] – perhaps implying that in the IP context, a profit-stripping award is thought warranted without any need to refer to the aim of deterrence. The absence of any general requirement for conscious/deliberate wrongdoing may also reinforce the view that deterrence is not a necessary premise on which these awards are made; or it may suggest that some commentators[123] are wrong to assume that conscious/deliberate wrongdoing is always a necessary condition for profit-stripping to be warranted on deterrent-grounds. Either way, English courts may well make more explicit reference to the requirements of deterrence in future, in light of EU law requirements embodied in the recent EU Enforcement Directive.[124] These require Member

[115] See Hollister Inc v Medik Ostomy Supplies Ltd [2012] EWCA Civ 1419, [2013] Bus LR 428, [55]; Gillette (UK) Ltd v Edenwest [1994] RPC 279, 290; Conran v Mean Fiddler Holdings Ltd [1997] FSR 856, 861; AG Spalding & Bros v AW Gamage Ltd (1915) 32 RPC 273, 283.

[116] Patents Act 1977, s 62(1).

[117] Copyright, Designs and Patents Act 1988, s 97(1); Wienerworld Ltd v Vision Video Ltd [1998] FSR 832; see too Microsoft Corp v Plato Technology [1999] FSR 834 (account of profits from innocent sale of copied software conceded).

[118] Copyright, Designs and Patents Act 1988, s 191J.

[119] Copyright, Designs and Patents Act 1988, s 233(1) (innocent primary infringement).

[120] Registered Designs Act 1949, s 24B (as amended by the Intellectual Property Act 2014, s 10(1)) (now in force); the pre-amendment provision expressly excluded both damages and an account of profits.

[121] As decided in Wienerworld Ltd v Vision Video Ltd [1998] FSR 832 (copyright infringement).

[122] E.g. Spring Form Inc v Toy Brokers Ltd [2002] FSR 17, [7] (patent infringement); Potton Ltd v Yorkclose Ltd [1990] FSR 11, 15–16 (copyright infringement); My Kinda Town v Soll & Grunts Investments [1982] FSR 147, 156 (passing off).

[123] See esp Edelman (2002), Chap. 7, arguing that for non-fiduciary wrongdoing – including IP wrongs – deliberate/reckless wrongdoing, committed for profit, is required before a deterrent-based award can be made. He criticises the uneven fault requirements for an account of profits for IP wrongs as inconsistent with this.

[124] EU Enforcement Directive, 2004/48/EC.

States to provide remedies to enforce IP rights that are, inter alia, "effective", "proportionate" and, crucially, "*dissuasive*".[125]

Where a claimant elects to recover damages rather than an account of an infringer's profits, the basic premise on which these damages are assessed and awarded is that they are intended to compensate the claimant's losses – e.g. lost sale or licensing profits. However, in patent cases, it has long been assumed that every infringement is a wrongful act for which substantial damages should be payable by reference to a reasonable or notional royalty, in the absence of other proven losses, and apparently even though the claimant would not have licensed the defendant's acts.[126] This is an example of the 'reasonable fee' measure. Similar awards have been accepted for copyright infringement;[127] as well as more recently, with more equivocation, for trademark infringement and passing off.[128] As in other contexts, the cases remain ambivalent as to whether this measure is properly classified as 'compensatory' or 'restitutionary'.[129]

It is worth noting, finally, that this general picture is complicated by the fact that Parliament has expressly provided for a sui generis measure of award, known as "additional damages", for copyright infringement[130] and a number of other

[125] Art 3(2). Art 13 provides for a "damages" remedy against an infringer who engaged in infringing activity, knowingly or with reasonable grounds for knowing, which is implemented into English law by the Intellectual Property (Enforcement etc.) Regulations 2006/1028, reg 3. It is not clear that reg 3 dictates any major change to English law's remedial regime; but in the wake of these developments, concerns for deterrence do seem to be filtering into judicial discourse. E.g. Hollister Inc v Medik Ostomy Supplies Ltd [2012] EWCA Civ 319, [69]. See too counsel's argument in Pendle Metalwares Ltd v Page [2014] EWHC 1140 (Ch), [18].

[126] See the classic statement of Lord Shaw in Watson Laidlaw & Co Ltd v Pott Cassels & Williamson (1914) 31 RPC 104, 118–120, echoing earlier suggestions of Fletcher-Moulton LJ in Meters Ltd v Metropolitan Gas Maters Ltd (1911) 28 RPC 157. On this basis, the courts have been prepared to award damages calculated by reference to the lost profits from infringing sales that would otherwise have accrued to the patent owner, and a notional royalty for every other infringing sale: Catnic Components Ltd v Hill & Smith Ltd [1983] FSR 512; Gerber Garment Technology Inc v Lectra Systems Ltd [1995] RPC 383.

[127] Esp Blayney (t/a Aardvark Jewellery) v Clogau St David's Gold Mines Ltd [2002] EWCA Civ 1007, [2003] FSR 19, where the court rejected the suggestion that the different nature of the monopoly conferred by copyright dictated a difference in approach to damages in this respect.

[128] Cf the differing views expressed as to whether the notional royalty measure is automatically available for trademark infringement/passing off, at least when the 'mark' is not the sort of mark available for hire, or whether these cases should be treated in the same way as patent cases: Roadtech Computer Systems Ltd v Mandata Ltd [2000] ETMR 970, 974; Irvine v Talksport Ltd [2003] EWCA Civ 323, [2003] 2 All ER 881; Reed Executive Plc v Reed Business Information Ltd [2004] EWCA Civ 159, [2004] ETMR 56, [165]; National Guild of Removers & Storers Ltd v Silveria [2010] EWPCC 15, [2011] FSR 9, esp [17]; National Guild of Removers & Storers Ltd v Jones [2011] EWPCC 4, [10]-[16]. Cf earlier, Dormeuil Frères SA v Feraglow Ltd [1990] RPC 449.

[129] E.g. Attorney-General v Blake [2001] 1 AC 268, 278–279 (per Lord Nicholls).

[130] Copyright, Designs and Patents Act 1988, s 97(2). It was first introduced for copyright infringement by the Copyright Act 1956, s 17(3).

wrongs.[131] These damages can be awarded in addition to ordinary compensatory damages[132] in an appropriate case, "as the justice of the case may require", "having regard to all the circumstances, and in particular to – (a) the flagrancy of the infringement, and (b) any benefit accruing to the defendant by reason of the infringement". This is an unusual, hybrid remedy, which occupies an uncertain status as between (a) aggravated compensatory damages, (b) a gain-based measure, and (more doubtfully) (c) exemplary damages.[133] It remains a live question whether, post-*Kuddus*, 'category 2' exemplary damages could be awarded for an IP wrong.[134]

Breach of Confidence

Liability for breach of confidence has a wide reach in English law, encompassing actions for misuse of information in breach of an obligation of confidentiality assumed by contract or imposed by law, without formal distinction between types of information – e.g. technological, commercial, political, or personal. Courts of equity have had long-running involvement in these cases, both in restraining breaches by injunctions, and in imposing confidentiality obligations in the absence of any contract. There is a long-running debate about the proper classification of the action available in the latter cases – if not a common law claim in contract or in tort, then it looks like an equitable wrong, prompting some arid debates about the jurisdictional basis for courts to make compensatory awards.[135] More immediately important, however, is the long-standing assumption that a profit-stripping remedy, via the equitable remedy of an account of profits, may be awarded for breach of confidence.[136]

It has sometimes been argued that the victim of a breach of confidence, much like the victim of an IP wrong, has a free election between damages and an account of profits, subject only to the court's discretion to refuse the remedy on general

[131] Performers' property rights (Copyright, Designs and Patents Act 1988, s 191J(2)); (unregistered) design right (Copyright, Designs and Patents Act 1988, s 229(3)).

[132] Redrow Homes Ltd v Bett Brothers plc [1999] 1 AC 197, holding that such additional damages could not be claimed in addition to an account of profits, and overruling the earlier decision in Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd (No 2) [1996] FSR 36.

[133] E.g. Pendle Metalwares Ltd v Page [2014] EWHC 1140 (Ch); Peninsular Business Services Ltd v Citation plc [2004] FSR 17; Nottinghamshire Healthcare NHS Trust v News Group Newspapers Ltd [2002] EWHC 409 (Ch), [2002] RPC 49.

[134] Cf Catnic Components Ltd v Hill & Smith Ltd [1983] FSR 512, 541 (patent infringement).

[135] For a very good recent discussion, see Force India Formula One Team Ltd v 1 Malaysia Racing Team [2012] EWHC 616 (Ch), [2012] RPC 29, [374]-[424], where the conclusion is reached that compensation is available either under Lord Cairns's Act or as equitable compensation, and that in either case, it should be not be assessed differently from common law damages for breach of a contractual confidentiality obligation.

[136] E.g. Attorney-General v Times Newspapers Ltd [1990] 1 AC 109.

equitable grounds.[137] However, recent cases suggest that this is mistaken, and that the courts are taking a more discriminating approach to the availability of this remedy – refusing it altogether where it is not regarded as the "appropriate" response to the breach.[138] It would seem that the line is not simply a line between conscious/deliberate and non-deliberate wrongdoing, although conscious/deliberate wrongdoing may be a necessary condition for an award.[139] Instead, and consistently with the wide range of circumstances embraced within actions for breach of confidence, the courts appear to be assuming a spectrum of cases, with the extent of the law's remedial response graded, inter alia, according to importance of the interest in confidentiality, the extent to which any profit accruing to the defendant is causally attributable to the defendant's wrong, and the strength of the need for deterrence. [140] For example, confidential information obtained within a fiduciary relationship, or state secrets,[141] may be given the highest level of protection in the form of an account of profits. In contrast, for breaches of confidence between parties to a purely commercial relationship, the courts appear likely, at least in the absence of (as yet undefined) "exceptional circumstances", to regard the more appropriate remedy as a lesser 'reasonable fee' award – i.e. damages assessed on a hypothetical negotiation basis, reflecting the price that the claimant could reasonably have demanded as the price for agreeing to relax the confidentiality obligation.[142] As in other contexts, the cases remain equivocal as to the true characterisation of this latter remedy, as 'compensatory' or 'restitutionary';[143] and as in the IP cases, there may be a tendency to treat the measure as a residual measure, awarded if the claimant cannot prove that he has suffered financial loss in the form of lost profits from exploiting the information, by sale or licensing, or a genuinely lost opportunity to bargain with the defendant.[144]

[137] An argument advanced and rejected in both Vercoe v Rutland Fund Management Ltd [2010] EWHC 424 (Ch) and Walsh v Shanahan [2013] EWCA Civ 411.

[138] Vercoe v Rutland Fund Management Ltd [2010] EWHC 424 (Ch), esp [334]-[345], endorsed by the Court of Appeal in Walsh v Shanahan [2013] EWCA Civ 411, esp [55]-[73].

[139] Cf Edelman (2002), 213–215.

[140] Esp Vercoe v Rutland Fund Management Ltd [2010] EWHC 424 (Ch), esp [334]-[345]; Walsh v Shanahan [2013] EWCA Civ 411, esp [55]-[73].

[141] Cf Attorney-General v Blake [2001] 1 AC 268.

[142] See Vercoe v Rutland Fund Management Ltd [2010] EWHC 424 (Ch); Jones v Ricoh Ltd [2012] EWHC 348 (Ch); Walsh v Shanahan [2013] EWCA Civ 411.

[143] E.g. Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd [2009] UKPC 45, [2011] 1 WLR 2370 (where the language of 'compensation' dominates). Cf Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd [2013] EWCA Civ 780, [2013] RPC 36, [97]-[104] (where a similar award is clearly treated as benefit-based).

[144] See recently Force India Formula One Team Ltd v 1 Malaysia Racing Team [2012] EWHC 616 (Ch), [2012] RPC 29, [424], after a comprehensive review of the authorities.

Wrongful Interferences with Rights to Land or Chattels

English law is robustly protective of rights to possess chattels or land. An unauthorised, wrongful appropriation of another's chattel is likely to result in strict liability for a common law tort – most likely, the tort of conversion. Such wrongdoing readily yields a liability to pay damages measured by the market value of the chattel (if the chattel is not returned),[145] or if it has been sold, a liability for the proceeds of sale.[146] In principle, a similar position applies to land, where it is permanently expropriated.[147]

Where another's chattel or land is merely wrongfully used – most likely, amounting to the tort of trespass to goods or land – the courts have also routinely held the defendant liable to pay a reasonable sum for the wrongful use. This is another example of the reasonable fee measure, variously described as 'user damages',[148] 'mesne profits',[149] a 'wayleave' award,[150] or 'hypothetical negotiation damages'.[151] It is harder to find cases where the courts have gone further, and made a profit-stripping award that captures part or all of the profits actually earned by

[145]Depending on the circumstances, this is obviously susceptible to explanation as compensatory and/or restitutionary in nature. See further the Torts (Interference with Goods) Act 1977, s 3 (forms of judgment against a defendant in possession of goods).

[146]Historically achieved via a variety of routes; in particular, the old common law action for money had and received (e.g. Oughton v Seppings (1830) 1 B & Ad 241, 109 ER 776) or in some cases, an accounting in equity (e.g. Powell v Aiken (1858) 4 K & J 343, 70 ER 144).

[147]Cf the damages award made in Horsford v Bird [2006] UKPC 3, [2006] 1 EGLR 75 (the price that could reasonably be agreed, to acquire the expropriated area), where the court refused to order a mandatory injunction to restore an area of land expropriated from a neighbour; similarly, Ramzan v Brookwide Ltd [2010] EWHC 2453 (Ch), [2011] 2 All ER 38. See too early wrongful mining cases, where nineteenth century courts were prepared to award, as a remedy for the trespassory extraction of coal from the claimant's land, (i) the market value of the coal, as if purchased in the ground (e.g. Wood v Morewood (1842) 3 QB 440, 114 ER 575; Jegon v Vivian (1871) LR 6 Ch App 742), or (ii) the market value of the coal at the surface, less the costs of raising but not the costs of severing (e.g. Llynvi Co v Brogden (1870) LR 11 Eq 188; Phillips v Homfray (1871) LR 6 Ch App 770, 780–781). The choice between these two measures seems to have depended on whether the defendant acted in good faith, or was a wilful wrongdoer.

[148]E.g. Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5) [2002] UKHL 19, [2002] 2 AC 883, [87]-[90].

[149]E.g. Ministry of Defence v Ashman (1993) 66 P&CR 195 (wrongful occupation by former tenant); Inverugie Investments Ltd v Hackett [1995] 1 WLR 713 (PC) (wrongful deprivation of possession of lessee by reversioner).

[150]E.g. Whitwham v Westminster Brymbo Coal and Coke Co [1896] 1 Ch 894, [1896] 2 Ch 538 (CA) (value of use of land for tipping colliery waste); Phillips v Homfray (1871) LR 6 Ch App 770, 780–781 (value of use of underground passages for transporting coal).

[151]E.g. Stadium Capital Holdings (No 2) Ltd v St Marylebone Co [2011] EWHC 2856 (Ch), [2012] 1 P&CR 7 (value of use of airspace above land for placement of advertising hoarding).

wrongful use.[152] The most recent cases imply that such a remedy may be available against a conscious wrongdoer in (as yet undefined) "exceptional circumstances".[153]

There is no doubt that the most outrageous examples of this variety of wrongdoing can attract 'category 2' exemplary damages.[154] Mention must also be made of the special statutory tort of unlawful eviction of a "residential occupier", created by the Housing Act 1988.[155] The "landlord" is liable for a statutory measure of gain-based damages, reflecting the increase in the market value of the landlord's interest in the property as a result of the eviction.[156] This was specifically designed, in part, to provide a powerful deterrent for landlords tempted to evict their tenants with a view to gain.[157]

Interferences with lesser rights to land, short of rights to possession, have also attracted what look like reasonable fee awards. In particular, breach of a restrictive freehold covenant will readily yield an award of damages assessed on a hypothetical negotiation basis where injunctive relief is not awarded to undo a past breach and/or to prevent future breaches.[158] Interference with an easement, such as a right to light[159] or right of way[160] – actionable via the tort of nuisance – has attracted a similar measure of award. As yet, there are no cases in which an account of profits has been awarded in these situations. Indeed, it remains unclear whether a nuisance

[152]Cf where the relevant property was in fact held as trustee for the claimant: as in Ramzan v Brookwide Ltd [2010] EWHC 2453 (Ch), [2011] 2 All ER 38; [2011] EWCA Civ 985, [2012] 1 All ER 903.

[153]Esp Stadium Capital Holdings (No 2) Ltd v St Marylebone Property Co [2010] EWCA Civ 952, [13], [17]; Enfield LBC v Outdoor Plus Ltd [2012] EWCA Civ 608, [53]. For a possible example of sufficient facts, see Ramzan v Brookwide Ltd [2010] EWHC 2453 (Ch), [2011] 2 All ER 38. Cf previously, Re Simms [1934] Ch 1 (CA); Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd [1952] 2 QB 246 (CA), 255 (per Denning LJ).

[154]E.g. Ramzan v Brookwide Ltd [2011] EWCA Civ 985, [2012] 1 All ER 903 (expropriation of land from freehold owner); Drane v Evangelou [1978] 1 WLR 455 (unlawful eviction of tenant); Guppys (Bridport) Ltd v Brookling (1984) 14 HLR 1, 27 (harassment of tenant); Borders (UK) Ltd v Commissioner of Police of the Metropolis [2005] EWCA Civ 197, [2005] Pol LR 1 (large-scale trading in stolen chattels).

[155]Housing Act 1988, s 27.

[156]Housing Act 1988, s 28.

[157]E.g. Mehta v Royal Bank of Scotland (2000) 32 HLR 45, 60.

[158]E.g. Wrotham Park Estate Co v Parkside Homes Ltd [1974] 1 WLR 798; Gafford v Graham (1999) 77 P&CR 73; AMEC Developments Ltd v Jury's Hotel Management (UK) Ltd (2001) 82 P&CR 22.

[159]E.g. Carr-Saunders v Dick McNeil Associates Ltd [1986] 1 WLR 922; Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd [2007] EWHC 212 (Ch), [2007] 1 WLR 2167. But cf Lawrence v Fen Tigers Ltd [2014] UKSC 13, [2014] 2 WLR 433, [128]-[131], [172]-[173], [248].

[160]E.g. Kettel v Bloomfold Ltd [2012] EWHC 1422 (Ch).

can ever attract a profit-stripping award, via an account of profits or otherwise.[161] It seems to be assumed again that (as yet undefined) "exceptional circumstances" will at least be required.[162]

Breach of Contract

Until remarkably recently, it was a long-standing assumption that damages for breach of contract were compensatory only; neither exemplary damages[163] nor gain-based damages[164] could be awarded for a 'pure' breach of contract. However, in 2001, in the landmark decision in *Attorney-General v Blake*,[165] a majority of the House of Lords held that an account of profits could be awarded against a contract-breaker, albeit only in "exceptional circumstances". Lord Nicholls, giving the leading judgment, said that the remedy would not be awarded unless normal contractual remedies (compensatory damages and specific remedies) would be an "inadequate" response to a breach. Beyond that, no "fixed rules" could be prescribed for identifying what would qualify as "exceptional circumstances", although a "useful" but "not exhaustive" guide was "whether the [claimant] had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit".[166]

Blake was an extreme case,[167] and much ink has been spilt in an attempt to give further content to Lord Nicholls's words. It is certainly clear that an account of profits was expected to be highly unusual; that it was viewed primarily as a mechanism for deterrence; and that it is not sufficient to warrant the remedy that

[161] Cf Stoke-on-Trent City Council v W&J Wass Ltd [1988] 1 WLR 1406 (CA); Forsyth-Grant v Allen [2008] EWCA Civ 505, [2008] Env LR 41; Lawrence v Fen Tigers Ltd [2014] UKSC 13, [2014] 2 WLR 433, [128]-[131], [172]-[173], [248]. For discussion, see Rotherham (2009).

[162] Cf Forsyth-Grant v Allen [2008] EWCA Civ 505, [2008] Env LR 41.

[163] Addis v Gramophone Co Ltd [1909] AC 488; Law Com No 247, 4.28. Also assumed in e.g. Crawfordsburn Inn Ltd v Graham [2013] NIQB 79; WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc [2006] EWHC 184 (Ch), [2006] FSR 38, [114]. For the suggestion that this line cannot hold, see e.g. McKendrick (2003), 119–122.

[164] Esp Surrey County Council v Bredero Homes Ltd [1993] 1 WLR 1361 (CA).

[165] [2001] 1 AC 268.

[166] [2001] 1 AC 268, 284–285.

[167] Blake was a former member of the UK's intelligence services and a notorious Russian spy, who was imprisoned, but escaped; during years of exile in Russia, he wrote an autobiography, substantially based on information acquired during his time working for the UK's intelligence services. The proceedings were brought with a view to preventing Blake from profiting pursuant to a publishing contract. Since any fiduciary relationship had long since ended, and the information disclosed was no longer confidential, the claim rested on Blake's breach of a contractual obligation, assumed to the Crown when he signed an Official Secrets Act declaration prior to commencing his employment, not to divulge any official information gained by him as a result of his employment, during or after his employment.

the breach of contract was deliberate and cynical, with a view to profit.[168] Precisely what more is required remains unsettled. Some commentators plausibly suggest that a key to identifying when such awards may legitimately be available as a mechanism to deter breaches of contract is whether the obligation which the defendant breached is one for which courts might be prepared to order specific performance.[169] Post-*Blake* decisions are not straightforwardly explained in these terms; nevertheless, two things, at least, are clear. First, an account of profits is very rarely awarded.[170] Secondly, where the necessary "exceptional circumstances" cannot be identified, the courts often make a more limited reasonable fee award instead – assessing damages on a hypothetical negotiations basis, reflecting the price that could reasonably be agreed for the relaxation of the defendant's contractual obligation – at least if ordinary compensatory damages would be an inadequate remedy.[171]

Other Wrongs and Possible Future Developments

What about other wrongs? English courts clearly do not regard profit-stripping awards/disgorgement as an automatic, or even common, response to every wrong. Nevertheless, the recognition in *Attorney-General v Blake*[172] that an account of profits may be awarded for breach of contract suggests that the list of wrongs that may yield a profit-stripping award is not closed.[173] *Blake* even seems to pave the way for allowing a similar remedy, in an appropriate case, for other wrongs for which

[168] See Attorney-General v Blake [2001] 1 AC 268, 286, where Lord Nicholls expressly acknowledged that it was not sufficient, to justify an award, that, inter alia, a breach was deliberate and cynical; that the defendant did the very thing he contracted not to do; or that the breach enabled the defendant to enter into a more profitable contract elsewhere.

[169] E.g. Cunnington (2008); Barnett (2012).

[170] A lone decision is Esso Petroleum Co Ltd v Niad [2001] EWHC 458 (Ch); cf too Luxe Holding Ltd v Midland Resources Holding Ltd [2010] EWHC 1908 (Ch). Cases in which an account of profits has been sought but rejected include: AB Corp v CD Co (The Sine Nomine) [2002] 1 Lloyd's Rep 805; Experience Hendrix LLC v PPX Enterprises Inc [2003] EWCA Civ 323, [2003] EMLR 25; WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc [2006] EWHC 184 (Ch), [2006] FSR 38; Vercoe v Rutland Fund Management Ltd [2010] EWHC 424 (Ch).

[171] Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 WLR 798; Experience Hendrix LLC v PPX Enterprises Inc [2003] EWCA Civ 323, [2003] EMLR 25; WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc [2007] EWCA Civ 286, [2008] 1 WLR 445; Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd [2009] UKPC 45, [2011] 1 WLR 2370; Giedo van der Garde BV v Force India Formula One Team Ltd [2010] EWHC 2373 (QB), [499]-[560].

[172] [2001] 1 AC 268.

[173] E.g. the obiter suggestion that an account of profits might be available for the newly-recognised wrong of invasion of privacy/misuse of private information, in Douglas v Hello! Ltd (No 3) [2005] EWCA Civ 595, [2006] QB 125, [249].

there is no present authority for profit-stripping awards[174] – mostly, a significant number of common law torts[175] – at least where "exceptional circumstances" are shown.[176]

It is currently far from clear whether, in developing the law in future, the English courts will adopt Edelman's simple criterion, that a profit-stripping award should be available to deter non-fiduciary wrongdoing which is committed deliberately or recklessly, with a view to profit.[177] An analogy can obviously be drawn from the availability of 'category 2' exemplary damages, which have been awarded for various wrongs for which there is no authority for profit-stripping awards, such as the tort of defamation.[178] Nevertheless, this may not be a completely safe analogy. Exemplary damages continue to divide English judges, who generally show little appetite – despite *Kuddus*[179] – to extend their ambit;[180] indeed, a future Supreme Court might well opt to abolish them altogether. Even whilst they remain part of English law, there are further thresholds that dramatically restrict their availability even where 'category 2' facts are prima facie made out.[181] As such, 'category 2' exemplary damages may not be safe material from which to extract any general principle that deliberate, profit-seeking wrongdoing, without more, merits a profit-stripping award as a means to deter. Perhaps the most that can be said at this stage is that in developing the law in a principled way, the courts are likely to have regard to the importance and vulnerability of the claimant's protected interest, the extent and culpability of the defendant's wrongful conduct, the extent to which the defendant's profits were causally attributable to his wrongdoing, and the adequacy of other remedies/sanctions, to overcome any qualms they might have about the

[174] But cf Devenish Nutrition Ltd v Sanofi-Aventis SA [2008] EWCA Civ 1086, [2009] Ch 390 (breach of competition law); Forsyth-Grant v Allen [2008] EWCA Civ 505, [2008] Env LR 41 (nuisance). For critical discussion of these decisions, see Rotherham (2010).

[175] Even after Blake, some judges still sometimes assume – implausibly, once the law is viewed as a whole – that a firm line can be drawn between "proprietary" and "non-proprietary" torts/wrongs, when it comes to the availability of gain-based awards, in principle and/or as a matter of authority. See e.g. the discussion in Devenish Nutrition Ltd v Sanofi-Aventis SA [2008] EWCA Civ 1086, [2009] Ch 390; and in Sinclair Investment Holdings SA v Versailles Trade Finance Ltd (in administrative receivership) [2007] EWHC 915 (Ch), [2007] 2 All ER (Comm) 993, [128]. For critical discussion of this exercise in line-drawing, see esp Rotherham (2009).

[176] Cf Rotherham (2010), who is critical of the assumption that the "exceptional circumstances" threshold articulated in Blake should be straightforwardly transferred from breach of contract cases, to tort cases.

[177] See section "Underlying Rationales".

[178] E.g. Cassell & Co Ltd v Broome [1972] AC 1027; Riches v News Group Newspapers Ltd [1986] QB 256 (CA); John v MGN Ltd [1997] QB 586 (CA).

[179] Kuddus v Chief Constable of Leicestershire [2001] UKHL 29, [2002] 2 AC 122. See further the text at notes 8–11.

[180] E.g. Mosley v News Group Newspapers Ltd [2008] EWHC 1777 (QB), [2008] EMLR 20 (not available for newly-recognised wrong of invasion of privacy).

[181] See section "'Category Two' Exemplary Damages".

redistributive nature of a profit-stripping award, and justify a profit-stripping award as a proportionate deterrent sanction.[182]

Restitutionary awards require different treatment. It is quite possible that these awards should be more often awarded than profit-stripping awards, for several reasons: (a) this narrowly restitutionary measure is less easily characterisable as a windfall to the claimant than a profit-stripping/disgorgement measure, which strips a wrongdoer's profits, whatever their source; (b) deterrence may not be a necessary foundation for these awards, with the result that lesser culpability may be required from the defendant; (c) a restitutionary measure, exemplified by a 'reasonable fee' award, is available even where the defendant's conduct was not profitable; and (d) where the defendant's conduct is profitable, a restitutionary measure may be the better measure, in some circumstances, of the limited extent to which the defendant's profits are attributable to his wrongdoing, and therefore the appropriate gain-based measure in the absence of a compelling argument for a stronger measure of deterrence.

Edelman's thesis is more expansive – what he calls 'restitutionary damages' should in theory be available for any wrong, without more; otherwise, the law would "legitimate" the wrong.[183] However, English law currently seems some way from this point. One obstacle may be an enduring assumption that the 'normal' remedy for a civil wrong is compensation for loss, and that other monetary remedies must have a more residual role.[184] Another obstacle is the continuing equivocation about whether many arguable examples of restitutionary awards are truly explicable as compensatory.[185] Expansive visions of when "substitutive" compensatory awards can be made rob advocates of gain-based damages of some of the most promising material from which to construct any general theory about the availability of restitutionary awards. The better answer may well be that these approaches are not mutually exclusive – that dual rationalisation is legitimate.[186] Nevertheless, whilst that remains in doubt, the status of these restitutionary awards, and their extension to other wrongs in English law, will be insecure.

Even if the 'restitutionary' analysis does ultimately prevail, it has inherent limits. In particular, it is implausible to suggest that *every* wrongful infringement of a claimant's rights warrants a restitutionary award on a reasonable fee basis. Such

[182]Cf the sophisticated discussion of Rotherham (2012), who concludes that if deterrence is the justification for profit-stripping awards, this may not justify the remedy's availability in very much wider circumstances than is presently accepted. As Rotherham's account makes clear, an all-encompassing inquiry would have regard, inter alia, to the costs that might result from the use of such remedies (e.g. the risk of over-deterrence).

[183]See section "Restitutionary Awards", esp the text at notes 73, 89–90.

[184]Cf e.g. the assumptions reflected in the controversial anti-restitution decision in Stoke-on-Trent City Council v W&J Wass Ltd [1988] 1 WLR 1406 (CA).

[185]See section "Awards Stripping a Wrongdoer's Actual Profits, Whatever Their Source ('Profit-Stripping Awards')", esp the text at notes 67–68.

[186]Cf e.g. the dual rationalisation reflected in the analysis in Inverugie Investments Ltd v Hackett [1995] 1 WLR 713 (PC), 718 (per Lord Lloyd).

awards seem possible only if the claimant's interest is one which it is possible to regard as the object of bargaining. Only then does it seem possible to imagine a court identifying an objective 'benefit' to the defendant, consisting of the unlicensed appropriation or infringement of the claimant's rights, which can be quantified in money by reference to a market valuation or hypothetical negotiation. All awards classifiable as reasonable fee awards so far involve interests that one might not have qualms about monetising in this way, and where it is therefore feasible to identify an objective benefit to the defendant, quantifiable in money, that might be the subject of a 'restitutionary' award. There are, however, clearly other interests which it would be surprising to find courts treating similarly – e.g. a claimant's interest in his bodily integrity. In such cases, any concern that a defendant should not be permitted the 'benefit' or 'advantage' of unlicensed, wrongful interference, without incurring any substantial liability, must be met in other ways.

Proprietary Remedies

The previous section surveyed the circumstances in which monetary gain-based remedies might be awarded for a civil wrong. A missing dimension is whether English law ever affords what might be called 'proprietary restitution for wrongs' – affording the victim some form of entitlement to an asset in the wrongdoer's hands that represents the proceeds of his wrongful conduct. Some important benefits may follow for a claimant, depending upon the basis and form of the right – in particular: (a) improved status in the wrongdoer's insolvency; (b) an ability to trace into and assert title to substitute assets; (c) an ability to seek relief against third party recipients; (d) an increased measure of recovery that can capture additional, post-receipt gains accruing to the wrongdoer (typically, from profitable investment of the original wrongful gains).

This area is fraught with difficulty. One clear point of departure is that, unlike some other common law jurisdictions, English courts have not yet adopted any form of remedial constructive trust.[187] As such, it is not yet open to English courts, exercising a broad remedial discretion in proceedings before them, to impose a trust or lien over an asset in the wrongdoer's hands, either retrospectively or prospectively from the date of the court's order. If English law ever achieves 'proprietary restitution for wrongs', it only does so by so-called 'institutional' mechanisms –

[187]Esp Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669, 714–716 (per Lord Browne-Wilkinson); Polly Peck International plc (in administration) (No 5) [1998] 3 All ER 812 (CA); Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administrative receivership) [2011] EWCA Civ 347, [2012] Ch 453, [37]; FHR European Ventures LLP v Mankarious [2013] EWCA Civ 17, [2014] Ch 1, [76]; and recently, FHR European Ventures LLP v Cedar Capital Holdings [2014] UKSC 45, [2014] 3 WLR 535, [47].

proprietary entitlements that are generated by operation of law, in accordance with legal rules, as the right-justifying facts occur.[188]

Beyond this starting-point, clear generalisations become difficult. Three points nevertheless stand out. First, on any view, proprietary gain-based remedies are far more restricted than personal gain-based remedies. Secondly, there are undoubtedly mechanisms in English law by which such proprietary restitution might be achieved – most obviously, by the imposition of a trust or an equitable lien. Nevertheless, there is currently no simple alignment between proprietary responses and either (i) conduct that would qualify as a wrong under the general law (e.g. a tort, equitable wrong, or breach of contract), or (ii) circumstances that would establish a cause of action in unjust enrichment. Thirdly, in the realm of proprietary restitution, a robust look across the authorities suggests a stark distinction between: (i) the availability of proprietary restitutionary mechanisms in the 'narrow' sense, which reverse essentially 'subtractive' gains accruing to the defendant at the claimant's expense; and (ii) the availability of proprietary disgorgement mechanisms, which can go further and strip a wrongdoer of the proceeds of his wrongdoing, whatever their source.

Proprietary Restitution

Proprietary restitutionary mechanisms, in the 'narrow' sense just described, seem widespread in English law. That is, where a defendant gains by receiving an asset directly from the claimant, or otherwise at the claimant's expense, the law routinely 'reverses' this transfer via a proprietary response. Sometimes this is via an immediate trust for the claimant. In other circumstances, it is via a 'power in rem' that once exercised, operates to vest in the claimant either legal title, or more often, a merely equitable title under some form of trust. For example:

(a) a wholly unauthorised taking of another's asset ordinarily has no effect on the original owner's title, and if there are further unauthorised substitutions by the recipient, English law is generous in affording the original owner an interest in any newly acquired asset that represents the traceable substitute for the previous asset.[189]
(b) a transfer of title to property under a contract or by way of gift can be rescinded on various grounds including duress, undue influence, and misrepresentation (fraudulent or non-fraudulent); depending on the origin of rescission, the effect

[188] For this distinction, see esp Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669, 714–716 (per Lord Browne-Wilkinson).

[189] E.g. Foskett v McKeown [2001] 1 AC 102.

is to revest legal title, or alternatively, a merely equitable title under what is variously regarded as a resulting[190] or a constructive trust[191] in favour of the transferor.

(c) property obtained by simple theft or by fraud may be held on constructive trust for the victim which arises immediately in the absence of any transactional barrier.[192]

(d) property transferred by mistake, or arguably, in other circumstances that generate a restitutionary liability in unjust enrichment (e.g. some failure of consideration), may be held on constructive trust at least once the recipient has acquired knowledge of the restitution-justifying facts, so as to render his subsequent retention of the property 'unconscionable'.[193]

Beyond this, there are other, miscellaneous examples of constructive trusts imposed by equity in response to a wider range of unconscionable conduct that in some manifestations may have some form of restitutionary effect.[194]

There is scope for debate about the basis of these proprietary restitutionary mechanisms. Some might certainly be characterised as responses to wrongdoing; however, a number of English unjust enrichment scholars contend that many could be better analysed as restitutionary responses to the defendant's subtractive unjust enrichment at the claimant's expense.[195] This is some appeal in this analysis. It is consistent with the limited 'restitutionary' remedial orientation of these mechanisms; the right-generating facts often disclose circumstances that could found a cause of action in unjust enrichment (e.g. non-consensual/unauthorised acquisition, mistake, duress, undue influence etc.);[196] many of the right-generating facts do not disclose conduct of the defendant that would be regarded as 'wrongful' under the general law; and even where there may be a concurrent cause of action

[190] E.g. El Ajou v Dollar Land Holdings plc [1993] BCC 689, 712–713 (per Millett J).

[191] E.g. Lonrho plc v Fayed (No 2) [1992] 1 WLR 1, 11–12 (per Millett J).

[192] Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669, 716 (per Lord Browne-Wilkinson). See subsequently e.g. Niru Battery Manufacturing Co v Milestone Trading [2002] EWHC 1425 (Comm), [55]-[56]; Papamichael v National Westminster Bank plc (No 2) [2003] EWHC 164 (Comm), [2003] 1 Lloyd's Rep 341, [231]-[243]; Armstrong DLW GmbH v Winnington Networks Ltd [2012] EWHC 10 (Ch), [2013] Ch 156, [127]-[129], [276]. Cf Shalson v Russo [2003] EWHC 1637 (Ch), [2005] Ch 281, [110].

[193] Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669, 714–715 (per Lord Browne-Wilkinson), explaining Chase Manhatten Bank NA v Israel-British Bank (London) Ltd [1981] Ch 105; followed in e.g. Papamichael v National Westminster Bank plc (No 2) [2003] EWHC 164 (Comm), [2003] 1 Lloyd's Rep 341, [221]-[231]; Commerzbank AG v IMG Morgan plc [2004] EWHC 2771 (Ch), [2005] 2 All ER (Comm) 564, [36]. And see too Nesté Oy v Lloyds Bank plc [1983] 2 Lloyd's Rep 658; Re Farepak Food & Gifts Ltd (in administration) [2006] EWHC 3272 (Ch), [2008] BCC 22; [2009] EWHC 2580 (Ch), [2010] BCC 735.

[194] For general discussion, see e.g. Hayton et al. (2010), Chap. 9.

[195] E.g. Chambers (2007); Birks (2005), Chap. 8; Burrows (2011), Chap. 8. Cf the very different vision offered in Virgo (2006).

[196] E.g. Mitchell et al. (2011), Chaps. 8, 9, 10, and 11.

for such a wrong (e.g. the tort of deceit or conversion), the wrong is not obviously a necessary basis for the right. This analysis nevertheless remains highly contested, and as things stand, it can only by adopted by glossing or ignoring what some judges have said.[197]

Proprietary Disgorgement

Proprietary disgorgement is, at best, a very unusual phenomenon in English law. For a long time, the only firm support for proprietary disgorgement has been in the area of fiduciary accountability: it is widely accepted that a fiduciary, who is liable to account for unauthorised benefits resulting from his position, will ordinarily be a trustee for the fiduciary relationship's beneficiary, if those profits are represented by an asset identifiable in the fiduciary's hands. For some years, the high-water-mark was *Attorney-General for Hong Kong v Reid*,[198] where the Privy Council controversially held that a bribed public prosecutor held the bribes received on an immediate constructive trust for his employer, the Crown, and reasoned in terms that suggested that any unauthorised benefit accruing to a fiduciary by virtue of his position would potentially be held on trust for his beneficiary. In 2011, the English Court of Appeal signalled a retreat from this position,[199] deciding that a fiduciary would only be a trustee if the asset in his hands represented the beneficiary's property, the proceeds of exploiting the beneficiary's property, or the proceeds of an opportunity that properly belonged to the beneficiary. However, the Supreme Court has since held, in *FHR European Ventures LLP v Cedar Capital Holdings Ltd*,[200] that the availability of a proprietary remedy is not limited in this way. Authority, policy and practicality are said to require the conclusion that a fiduciary holds *any* unauthorised benefits resulting from his position on trust for his beneficiary.

It is doubtful that any wider principles can be extracted from this important body of decisions. The extensive availability of proprietary disgorgement in the fiduciary context is best attributed to the peculiar nature of a fiduciary's position, and to a robust working-out of the fiduciary relationship's core requirement of loyalty. On this view, a fiduciary is altogether disabled from profiting from his position, without due authorisation, because the fiduciary relationship entails a duty immediately to

[197] E.g. in Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669 (re: the relationship between unjust enrichment and the imposition of resulting or constructive trusts); and in Foskett v McKeown [2001] 1 AC 102 (re: the extent to which unjust enrichment provides an explanation for rights to substitute assets).

[198] [1994] 1 AC 324 (PC).

[199] Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administrative receivership) [2011] EWCA Civ 347, [2012] Ch 453; followed, with some reservations, in FHR European Ventures LLP v Mankarious [2013] EWCA Civ 17.

[200] [2014] UKSC 45, [2014] 3 WLR 535.

account *in specie* to his beneficiary for any unauthorised benefits that he receives. There is, in contrast, no significant evidence that English law will supplement the personal liability of a *non-fiduciary* wrongdoer to disgorge their wrongful profits by imposing a constructive trust, whether 'remedial' or 'institutional'. The authorities suggest, for example: (a) that an IP infringer is only personally liable to account for his profits, and is not a constructive trustee of the proceeds of any infringement;[201] (b) that a non-fiduciary, who misuses confidential information in breach of an obligation of confidentiality, may only be personally liable to account for his profits;[202] (c) that a third party who dishonestly assists a breach of trust or fiduciary duty, and may be liable to account for his profits, is not a constructive trustee of his profits without more;[203] and (d) that a trespasser who profitably uses another's land, and who might exceptionally be held liable to account for his profits from doing so, is nevertheless not a constructive trustee.[204] The very restricted availability of proprietary disgorgement should help to allay the concerns of some commercial lawyers, at least, who have often argued that there is no justification for the special priority on insolvency (or other advantages) that may accrue as a result of proprietary disgorgement.[205]

The Wider Legal Landscape

The law on gain-based remedies for civil wrongdoing does not exist in isolation: there are other routes by which, in English law, some or all of their purposes might be achieved. This is true of profit-stripping awards, and a fortiori, restitutionary awards.

Where permitted, profit-stripping/disgorgement is primarily achieved in ordinary civil proceedings via an order for an account of profits in favour of the victim of the wrong, or more exceptionally, the imposition of a trust. 'Category 2' exemplary damages offer an alternative means to similar ends. Beyond this, where the wrongdoing also amounts to *criminal* activity, English law provides various routes to *state* confiscation of the proceeds in both criminal and civil proceedings.

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[201] Twentieth Century Fox Film Corp v Harris [2013] EWHC 159 (Ch), [2014] ETMR 46; Sinclair Investment Holdings SA v Versailles Trade Finance Ltd (in administrative receivership) [2007] EWHC 915 (Ch), [2007] 2 All ER (Comm) 993, [128].

[202] Cf dicta in e.g. Attorney-General v Observer Ltd [1990] 1 AC 109. For discussion, see Tang (2003); Conaglen (2008).

[203] Sinclair Investment Holdings SA v Versailles Trade Finance Ltd (in administrative receivership) [2007] EWHC 915 (Ch), [2007] 2 All ER (Comm) 993. See too Tajik Aluminium Plant v Ermatov [2006] EWHC 7 (Ch), [23]; OJSC Oil Co v Yugraneft v Abramovich [2008] EWHC 2613, [377], [392]. Cf if he actually received the misapplied assets/traceable proceeds.

[204] Re Polly Peck International plc (in administration) (No 2) [1998] 3 All ER 812 (CA); Twentieth Century Fox Film Corp v Harris [2013] EWHC 159 (Ch), [2014] ETMR 46, [18].

[205] E.g. Goode (1998); and more recently, Goode (2011).

Criminal courts have a wide-ranging jurisdiction under the Proceeds of Crime Act 2002[206] to make a "confiscation order" after a criminal conviction on the application of the prosecutor or on the court's own initiative, which can extend to the "available amount" of the defendant's "benefit" from particular criminal conduct or a "general criminal lifestyle".[207] A designated enforcement body can also seek a civil "recovery order" in High Court proceedings against any person whom it thinks holds "recoverable property", broadly meaning "property" obtained by conduct which the court is satisfied, on the balance of probabilities, is criminally unlawful conduct.[208]

The natural domain of restitutionary awards is more obviously crowded. Within the law of wrongs, ordinary compensatory damages often subsume any possible restitutionary award in cases of subtractive wrongful enrichment. This is even more true on wider analyses that rationalise reasonable fee awards as 'substitutive' compensatory awards.[209] Otherwise, much of the work of restitutionary awards can be achieved, beyond the law of wrongs, by personal restitutionary remedies that arise within the law of unjust enrichment to reverse the defendant's unjust enrichment at the claimant's expense,[210] or in a sub-set of cases, by proprietary restitutionary mechanisms.[211] 'Unjust', as it is used here, is a generic term for a limited set of grounds or 'unjust factors' that are recognised by English law as justifying a restitutionary remedy. Some rest on the fact that the claimant's intention to benefit the defendant was absent, vitiated or conditional;[212] whilst others reflect limited policy objectives.[213] On the now-dominant view, the fact that a benefit is obtained by committing a wrong does not make it an unjust enrichment for this purpose: 'restitution *for wrongs*' must be distinguished from 'restitution *for unjust enrichment*'. Nevertheless, in practice, many situations of *subtractive* wrongful enrichment also reveal an alternative claim in unjust enrichment: the claimant can show facts establishing both a civil wrong *and* an independent cause of action that supports a restitutionary remedy for unjust enrichment, based on some recognised

[206] There are other, more specific provisions – e.g. Prevention of Social Housing Fraud Act 2013, s 4 (unlawful profit order). Cf the more limited jurisdiction for a criminal court to make a 'restitution order', directing the restoration of stolen goods or their value to the person who would be entitled to recover them – Powers of Criminal Courts (Sentencing) Act 2000, s 148.

[207] Proceeds of Crime Act 2002, Part 2, esp ss 6–10.

[208] Proceeds of Crime Act 2002, Part 5, esp ss 243, 266, and 304, read with ss 316 and 241.

[209] See the text at notes 67–68 above.

[210] See Mitchell et al. (2011), Chap. 1 and generally.

[211] See section "Proprietary restitution", discussing proprietary restitution.

[212] E.g. lack of consent/want of authority, mistake, duress, failure of basis.

[213] E.g. ultra vires receipts by public bodies.

unjust factor (e.g. mistake[214] or duress).[215] Where this is the case, a claimant is allowed a free election between claims – English law is generous in allowing for the possibility of concurrent causes of action and in generally allowing a claimant a free choice to select that which suits him best.[216]

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[214] E.g. where fraudulent misrepresentations by the defendant amounting to the tort of deceit induce the conferral of benefits on the defendant; the same facts could support claim in unjust enrichment to restitution of the value of these benefits on the ground of mistake.

[215] E.g. where wrongful pressure is exerted by the defendant amounting to a tort (e.g. a tortious detention of the claimant's goods), which induces the conferral of benefits on the defendant; the same facts could support a claim in unjust enrichment to restitution of the value of these benefits on the ground of duress.

[216] For explicit recognition of this in other contexts, see e.g. Henderson v Merrett Syndicates Ltd [1995] 2 AC 145, 193–194 (contract and tort); Kleinwort Benson v Lincoln City Council [1999] 2 AC 349, 387 (different grounds of action in unjust enrichment); Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners [2006] UKHL 49, [2007] 1 AC 558, [136]-[137] (different grounds of action in unjust enrichment).

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