

Chapter 4

Disgorgement in Ireland

Niamh Connolly

Abstract Ireland is a common law jurisdiction whose private law largely resembles that of England and Wales. Irish law recognises disgorgement as a remedy in a variety of ways. Certain statutes provide for disgorgement of profits wrongfully achieved through intellectual property infringements or stock market abuses. The law of equity has long recognised disgorgement, or liability to account, for breaches of fiduciary duty. In addition, Irish common law allows for disgorgement in both contract and tort scenarios. Domestic case law has envisaged disgorgement for contractual breaches done in bad faith since before the United Kingdom House of Lords introduced disgorgement in *Attorney-General v Blake*. However, cases of direct disgorgement for breach of contract remain vanishingly rare, resulting in uncertainty about the standard of misconduct required. Disgorgement more commonly occurs in tort cases. The Irish Law Reform Commission has approved the availability of disgorgement in both contract and tort as a means of preventing people from profiting from their wrongdoing. Besides direct recognition of disgorgement, Irish law also contains a number of functional equivalents, including notably the remedial constructive trust. In addition, claims for compensation or exemplary damages may in some cases take account of profits made by the defendant. However, it is not possible to bring class actions in claims for damages and this may erect a practical obstacle to full disgorgement taking place where wrongdoing has affected many victims. Beyond the realm of private law, the Criminal Assets Bureau is an administrative body empowered to strip wrongdoers of the proceeds of criminal activity.

Keywords Disgorgement in Ireland • Restitution for wrongs

Introduction

Ireland is a common law jurisdiction, whose private law has diverged slowly from that of England and Wales since independence in 1922. Consequently, there is a broad similarity between the responses given in Irish courts to cases concerning

N. Connolly (✉)

Trinity College, University of Dublin, House 39, New Square, Dublin 2, Ireland

e-mail: niamh.connolly@tcd.ie

© Springer International Publishing Switzerland 2015

E. Hondius, A. Janssen (eds.), *Disgorgement of Profits*, Ius Comparatum - Global Studies in Comparative Law 8, DOI 10.1007/978-3-319-18759-4_4

disgorgement and those articulated in England or other common law jurisdictions, such as Canada. Irish law recognises various pure disgorgement remedies as well as functional equivalents, created by statute, equity and the common law. In this paper, I will consider: statutory disgorgement; equitable account of profits; common law disgorgement damages; constructive trusts; compensation for loss calculated by reference to the defendant's gain; punitive or exemplary damages, and forfeiture to the State of the proceeds of crime. Distinctive features in this landscape include the recognition of disgorgement damages for certain cases of breach of contract before the English decision in *Attorney General v Blake*,¹ and a liberal application of the new model remedial constructive trust.

Despite the diversity of doctrines connected to disgorgement, the prevention of unjust enrichment through wrongdoing emerges as a unifying objective. The Irish Law Reform Commission examined the issue in 2000. It approved of restitutionary damages as an "important supplement" to compensation in both tort and contract, considering it an interest "well recognised by the law of damages" to ensure that wrongdoers do not profit by their actions.² It recommended the continued development of disgorgement remedies through case law.

Terminology

"Account of profits" is the dominant phraseology concerning disgorgement in Irish case law and statute. Terms such as "disgorgement" and "restitutionary damages" appear in a tiny handful of Irish cases, although the latter is the term chosen for the Law Reform Commission Report on the subject.³ "Restitution for wrongs" does not figure.

The language of "account" reflects the historical roots of this form of damages in equity. However, the rationale for various remedies espouses the logic of stripping wrongful gains, so that a transition to the language of disgorgement would not require a change in thinking. If the language were to change, "disgorgement" would be preferable to "restitution" because these cases do not involve handing back to the plaintiff a benefit received from him, but giving to the plaintiff a benefit received from a third party.⁴

¹*Attorney General v Blake* [2000] UKHL 45; [2001] 1 AC 268 (United Kingdom House of Lords).

²Law Reform Commission of Ireland Report (LRC 60–2000) *Aggravated, Exemplary and Restitutionary Damages* (2000), para 6.37–6.38.

³Law Reform Commission n 2 above, Chap. 6.

⁴*Ibid* para 6.03; Smith (1994), 121–140, 123.

A Rationale Based on Unjust Enrichment

Irish cases consistently explain disgorgement in terms of unjust enrichment.⁵ The statutory right in intellectual property or market abuse cases is regarded as one instance of the broader right developed in the common law.⁶ This fits with a conception of unjust enrichment law as designed to remove from the defendant wealth which he should not be entitled to retain.⁷ Likewise, the Law Reform Commission Report on Aggravated, Exemplary and Restitutionary Damages characterises restitutionary damages as “a particular application of the principle of unjust enrichment, whereby the law can strip away profit wrongfully acquired at the expense of another.”⁸ Their purpose is not to compensate the plaintiff, but “to restore the position of the defendant, by removing the profits earned by the wrong”⁹ This objective is also one possible rationale for the common law rules on illegality: to prevent a person benefitting from illegal conduct.¹⁰

The Law Reform Commission considers disgorgement damages easier to justify than exemplary damages.¹¹ Because it views the purpose of disgorgement as simply to prevent wrongdoers from profiting from wrongdoing, it says, “the basis of restitutionary damages awards is not in the moral quality of the defendant’s behaviour.”¹² This conception implies that a low threshold of misconduct could suffice to trigger disgorgement.

Distinction from Subtractive Unjust Enrichment

Although Irish law clearly views the rationale for disgorgement as a species of unjust enrichment, disgorgement is conceptually distinct from subtractive unjust enrichment. Invoking unjust enrichment to explain disgorgement remedies suggests a broader conception of unjust enrichment which encompasses encroachment or restitution for wrongs.

It is readily apparent why Irish judges relate the concept to unjust enrichment: it is “unjust” to profit from wrongdoing. However, this is “unjust” in a different sense to that in which “unjust” is defined within the English and Irish law of unjust

⁵House of Spring Gardens Ltd v Point Blank Ltd [1984] 1 IR 611 (Irish Supreme Court), 707; Duhan v Radius Television Production Limited [2007] IEHC 292 para 43 (Irish High Court).

⁶Duhan v Radius Television Production Limited [2007] IEHC 292 para 43 (Irish High Court); Quinn v Irish Bank Resolution Corporation Limited [2012] IEHC 36, G11 (Irish High Court).

⁷Criminal Assets Bureau v JWPL [2007] IEHC 177, para 3.2 (Irish High Court).

⁸Law Reform Commission n 2 above, para 6.01.

⁹Ibid para 6.01.

¹⁰Quinn v Irish Bank Resolution Corporation Limited [2012] IEHC 36, G11 (Irish High Court).

¹¹Law Reform Commission n 2 above, para 6.41.

¹²Ibid para 6.43.

enrichment. In unjust enrichment law, we channel the unjust question through the unjust factors, which generally reflect the impairment of the plaintiff's consent to a transfer. The defendant's "wrongfulness" or culpability is not a concern within the unjust factors approach.

Secondly, we require that the enrichment of the defendant be "at the expense of" the plaintiff. This requires a direct transfer from plaintiff to defendant, whereby the value is subtracted from the plaintiff's assets and added to the defendant's. When a person profits by encroaching on the rights of the plaintiff, or wrongly attracting to himself a benefit which ought properly have flowed instead to the plaintiff, it might be "at the plaintiff's expense" in a broader, colloquial sense, that the plaintiff has lost out, but it does not fit the pattern of subtractive enrichment. While restitution for wrongs is certainly contiguous with unjust enrichment, it seems proper within the modern taxonomy of the common law to maintain the distinction between restitution for unjust enrichment and disgorgement of wrongful gains.¹³

Disgorgement in Irish Law

Statutory Disgorgement

Statutes provide for disgorgement in cases concerning intellectual property and breaches of share trading rules.

Breach of Copyright

The Copyright and Related Rights Act 2000 provides that the remedies for knowing infringement of copyright include an account of profits.¹⁴ The courts also enjoy wide statutory discretion to award such damages as they consider just, including aggravated or exemplary damages.¹⁵ The Act's predecessor made greater express reference to the concept of disgorgement. It envisaged "an account of profits" for unwitting infringements, and identified the benefit gained by the defendant's infringement as an indicator of when additional damages were needed to offer "effective relief".¹⁶

The case law applying the statute turned on whether, in each case, compensation was an adequate and effective remedy. In *Folens v Ó Dubhghaill*, an author reused material in breach of the publisher's copyright: he gained a commercial advantage,

¹³Smith (2001), 2115–2176, 2116.

¹⁴Section 127, Copyright and Related Rights Act 2000 (Ireland).

¹⁵Section 128, Copyright and Related Rights Act 2000 (Ireland).

¹⁶Section 22(4), Copyright Act 1963 (Ireland).

but the plaintiff had not lost much money.¹⁷ The Supreme Court overturned the award of additional damages under the Copyright Act: such an award was authorised only where necessary to provide an effective remedy, and in the circumstances, an injunction and compensatory damages sufficed. In *House of Spring Gardens Ltd v Point Blank Ltd*, the Supreme Court upheld an award of disgorgement damages, described as an account of profits, for breach of contract, breach of confidence through misusing confidential information, and infringement of copyright.¹⁸

Insider Trading and Market Abuse

The Companies Act 1990 requires a person who commits prohibited insider dealing to compensate other parties to a transaction for their loss, and to account to the company that issued the shares for any profit resulting from the prohibited dealing.¹⁹ These orders do not displace any common law liability that may apply; the amounts can be reduced to reflect any other payments ordered by the court. There is similarly statutory provision for disgorgement in cases of market abuse.²⁰ Those who breach the regulations are liable to compensate other parties who trade in shares for the loss they suffer due to price distortion, and to account to the issuing body for any profit acquired by acquiring or selling the instruments.²¹

Account of Profits: Equitable Disgorgement, But Not Damages

Liability to account for profits requires a person to cede to another the proceeds of certain actions. Account is “an equitable remedy, given in lieu of an order for the payment of damages.”²² Its function is clearly disgorgement: “the defendant is going to be required to disgorge profits made by it in the course of unlawful activity.”²³

Sometimes the expression “liability to account as a constructive trustee” is used.²⁴ This means that the liability is analogous to a constructive trust, not that it is a constructive trust: it is personal, not proprietary. Liability to account as a

¹⁷Folens v Ó Dubhghaill [1973] 1 IR 255 (Irish Supreme Court).

¹⁸House of Spring Gardens Ltd v Point Blank Ltd [1984] 1 IR 611 (Irish Supreme Court).

¹⁹Section 109, Companies Act 1990 (Ireland).

²⁰The Investment Funds, Companies and Miscellaneous Provisions Act 2005 (Ireland); Quinn v Irish Bank Resolution Corporation Limited [2012] IEHC 36 (Irish High Court).

²¹Section 33, Investment Funds, Companies and Miscellaneous Provisions Act 2005 (Ireland), implementing Council Directive 2003/6/E.C. of the 28th January, 2003 on insider dealing and market manipulation.

²²House of Spring Gardens Ltd v Point Blank Ltd [1984] 1 IR 611, 685 (Irish Supreme Court).

²³McCambridge Ltd v Joseph Brennan Bakeries [2013] IEHC 569, para 60 (Irish High Court).

²⁴See Smith (1999), 294–302.

constructive trustee can also be triggered by dishonest assistance in a breach of trust, even though the defendant has not in this case received the misapplied property.²⁵

Both statute and case law expressly distinguish the remedy of an account of profits from damages. In *McCambridge Ltd v Joseph Brennan Bakeries*, the court refused to allow the defendants, who had breached copyright, to use the lodgement procedure, on the ground that a claim for an account of profits is not an action for damages.²⁶ The plaintiff could not be expected to predict in advance the amount of profits which the defendant would be ordered to pay him, since the remedy of account involves the defendant revealing the amount of his profits.²⁷ However, if it has sufficient information, the court may itself calculate the amount due in an account of profits, rather than ordering the defendants first to make an account and then pay over the resulting amount.²⁸

Disgorgement Damages in the Common Law

Categories of Damages

The Supreme Court has identified three main categories of damages for wrongs: compensatory damages, aggravated damages (compensatory damages increased by reference to the defendant's conduct),²⁹ and punitive or exemplary damages. Compensatory damages "must always be reasonable and fair and bear a due correspondence with the injury suffered."³⁰ In principle, damages for breach of contract should be compensatory. The Law Reform Commission does not approve of exemplary damages in contract, as being inconsistent with the nature of contract law.³¹ It concedes that where the contractual issue is accompanied by a tort or other wrong, the courts can award punitive damages based on the wrong.³² However, Irish case law has also endorsed disgorgement damages, and did so in a breach of contract case. The Law Reform Commission approves of this principle.³³

²⁵Keane (2011), 241.

²⁶Section 22(3), Copyright Act 1963 (Ireland); *McCambridge Ltd v Joseph Brennan Bakeries* [2013] IEHC 569, paras 39, 41 (Irish High Court).

²⁷*McCambridge Ltd v Joseph Brennan Bakeries* [2013] IEHC 569, para 60 (Irish High Court).

²⁸*House of Spring Gardens Ltd v Point Blank Ltd* [1984] 1 IR 611, 708 (Irish Supreme Court).

²⁹Law Reform Commission n 2 above, para 5.15.

³⁰*Barrett v Independent Newspapers Ltd.* [1986] IR 13, 24 (Irish Supreme Court).

³¹Law Reform Commission n 2 above, para 1.55.

³²Clark (2013), 675; *Garvey v Ireland* (Unreported, Irish High Court, 19 December 1979) (Irish High Court); *Kennedy v Allied Irish Banks Ltd* (Unreported, Supreme Court, 29 October 1996) 46 (Irish Supreme Court).

³³Law Reform Commission n 2 above, para 6.48.

Disgorgement Damages in Contract: *Hickey v Roches Stores*³⁴

In *Hickey v Roches Stores*,³⁵ the High Court ruled that there could be disgorgement damages arising from both contractual and tortious wrongs, in cases where the defendant acted in bad faith by calculating and intending to achieve a gain by his wrongdoing.³⁶ The parties contracted for the plaintiffs to sell their drapery products in the defendants' store. The defendants terminated unlawfully and began selling their own drapery products. Finlay P accepted that, although the general purpose of damages in contract and tort is compensatory, contract damages need not always be strictly limited to compensation. He indicated that the circumstances giving rise to disgorgement could vary between different causes of action.³⁷ He set out a general principle that,

Where a wrongdoer calculated and intended by his wrongdoing to achieve a gain or profit which he could not otherwise achieve and has in that way acted *mala fide* then irrespective of whether the form of his wrongdoing constitutes a tort or a breach of contract the court should, in assessing damages, look not only at the loss suffered by the injured party by also to the profit or gain unjustly or wrongfully obtained by the wrongdoer.

Where the profits obtained by such a wrongdoer exceed the plaintiff's loss, "damages should be assessed so as to deprive him of that profit."

However, emphasising the need for the extent of contractual obligations to be certain, Finlay P carefully circumscribed the availability of disgorgement damages in contract cases to "*mala fides*". In this instance he did not apply the disgorgement principle because the defendants' *mala fides* were not pleaded: it was not shown that the defendants designed the breach to usurp the goodwill which should have benefited the plaintiffs.

The criterion of *mala fides* is a "significant limitation".³⁸ It is not clear what conduct is required. There has never been a case in which Finlay P's criterion for the award of disgorgement damages has been met.³⁹ Certainly, where a person believes his conduct to be lawful, the *Hickey* test is not met.⁴⁰ In *Vavasour v O'Reilly*, the plaintiff was wrongfully excluded from a jointly-held franchise.⁴¹ He sought "additional damages" based on the defendant's *mala fides* as well as compensation.

³⁴*Hickey v Roches Stores* (Unreported, Irish High Court, 14 July 1976), reported at [1993] 1 Restitution Law Review 196 (Irish High Court).

³⁵*Ibid*; Law Reform Commission n 2 above, para 6.32.

³⁶*Hickey v Roches Stores* (Unreported, Irish High Court, 14 July 1976), reported at [1993] 1 Restitution Law Review 196 (Irish High Court); Clark n 32 above 668; see also *Maher v Collins* [1975] IR 232, 238 (Irish Supreme Court).

³⁷*Hickey v Roches Stores* (Unreported, Irish High Court, 14 July 1976), reported at [1993] 1 Restitution Law Review 196 (Irish High Court), 208.

³⁸Law Reform Commission n 2 above, para 6.34.

³⁹Clark (2013), 677.

⁴⁰*Conneran v Corbett and Sons Limited* [2006] IEHC 254 (Irish High Court).

⁴¹*Vavasour v O'Reilly and Windsor Motors Ltd* [2005] IEHC 16 (Irish High Court).

Clarke J accepted that *Hickey* provides for disgorgement damages, but found that they were only relevant where the defendant gains more from his breach than the plaintiff loses.

The *Hickey* disgorgement principle predates the English decision in *Attorney General v Blake*.⁴² Sometimes in Irish law, domestic innovations are later subsumed by the adoption of similar precedents from England and Wales. *Blake* is probably part of Irish law, but has not yet been the basis of any decision.⁴³ This is unsurprising, given the paucity of cases in which disgorgement rather than compensation would be appropriate. The relationship between the *Hickey* and *Blake* tests for disgorgement is therefore uncertain. The Law Reform Commission considers that the *Hickey* test is probably broader than *Blake*.⁴⁴ Because it views the purpose of disgorgement as simply to prevent wrongdoers from profiting from wrongdoing, the Commission, perhaps surprisingly, argues against the strict circumscription of the disgorgement remedy.⁴⁵ More case law is needed to delimit the contours of disgorgement damages in Irish common law.

Constructive Trusts

Constructive trusts are an equitable proprietary remedy. In some cases they are pure disgorgement remedies, because a remedial constructive trust may be declared over property which did not originate in the hands of the plaintiff, on grounds of wrongful conduct. In other cases, they are a functional equivalent which, as proprietary remedies, extend to the full measure of any gain received by the defendant, and thereby effect full disgorgement.

Constructive Trusts for Breach of Fiduciary Duty or Knowing Receipt of Trust Property

As in English law, a fiduciary must account to his beneficiary for any advantages he gains by his position.⁴⁶ This disgorgement required of fiduciaries does not depend on the beneficiary having suffered a loss.⁴⁷ Constructive trusts also arise where a person receives trust property in breach of trust with either actual or constructive

⁴²*Attorney General v Blake* [2000] UKHL 45 (United Kingdom House of Lords).

⁴³*Victory v Galhoy Inns Ltd* [2010] IEHC 459 (Irish High Court).

⁴⁴Law Reform Commission n 2 above, para 6.6.34.

⁴⁵*Ibid* para 6.413.

⁴⁶*Regal (Hastings) Ltd v Gulliver* [1942] UKHL 1; [1942] 1 AER 378 (United Kingdom House of Lords); *Phipps v Boardman* [1966] UKHL 2; [1967] 2 AC 46 (United Kingdom House of Lords).

⁴⁷*Fyffes plc v DCC plc* [2005] IEHC 477, [2006] IEHC 32, [2007] IESC 36; [2009] 2 IR 417 (Irish Supreme Court).

notice of the breach. Ireland's Supreme Court endorsed the *Belmont Finance*⁴⁸ constructive trust, which responds to the misapplication of corporate assets, in *Re Frederick Inns*.⁴⁹

Remedial Constructive Trusts in Ireland

The remedial constructive trust is imposed by law in response to unconscionable conduct. The archetypal example is to prevent a person from benefiting from the proceeds of fraud. The imposition of a constructive trust does not necessarily reflect the continuation of a plaintiff's pre-existing property right.⁵⁰ It is a discretionary remedy. Whereas English law has not recognised the new model constructive trust,⁵¹ cases such as *Murray v Murray*⁵² and *Kelly v Cahill*⁵³ are clear authority that the remedial constructive trust is recognised in Irish law. These trusts are sometimes called a "new model constructive trust"⁵⁴ or a "remedial constructive trust".⁵⁵ While the constructive trust was applied in some cases prior to the 1990s, it has become more established in this jurisdiction since then.⁵⁶

In principle, the causative event that gives rise to a constructive trust should be a wrong, as opposed to unjust enrichment. In *NAD v TD*, Barron J articulated the orthodox view:

the question is not [. . .] even what is fair, but whether or not the conduct of the owner of the property has been such that equity ought to impose a trust for the benefit of the contributor.⁵⁷

In *Re Custom House Capital Limited (In Liquidation)*, the High Court found that there was a constructive trust over money invested in a scheme on foot of fraudulent representations.⁵⁸ Finlay Geoghegan J identified fraudulent conduct as the criterion required for a constructive trust.

⁴⁸*Belmont Finance Corporation v Williams Furniture Ltd. (No. 2)* [1980] 1 All ER 393 (England & Wales Court of Appeal).

⁴⁹*In Re Frederick Inns* [1994] 1 ILRM 387 (Irish Supreme Court); see also *Fyffes plc v DCC plc* [2009] 2 IR 417 (Irish Supreme Court).

⁵⁰*Dublin Corporation v Building and Allied Trade Union* (Unreported, High Court, 6 March 1996) 117 (Irish High Court).

⁵¹*In Re Polly Peck International (No. 2): Marangos Hotel v Stone* [1998] 3 AER 812 (England & Wales Court of Appeal).

⁵²*Murray v Murray* [1996] 3 IR 251 (Irish High Court).

⁵³*Kelly v Cahill* [2001] 2 ILRM 205 (Irish High Court).

⁵⁴Mee (1996), 9–13.

⁵⁵O'Dell (2001), 71–96.

⁵⁶*HKN Invest OY v Incotrade PVT Ltd.* [1993] 3 IR 152 (Irish High Court); *Kelly v Cahill* [2001] 2 ILRM 205 (Irish High Court).

⁵⁷*NAD v TD* [1985] ILRM 153, 162 (Irish High Court).

⁵⁸*In Re Custom House Capital Limited (In Liquidation)* [2013] IEHC 559 (Irish High Court).

In practice, however, the courts do not always adhere strictly to the requirement of misconduct, and sometimes constructive trusts are imposed to remedy unjust enrichment.⁵⁹ Lord Denning's judgment in *Hussey v Palmer*⁶⁰ has influenced the development of the constructive trust in Ireland. In *Murray v Murray*, Barron J articulated a liberal view of the court's discretion to impose a constructive trust, stating,

the law will impose a constructive trust in all circumstances where it would be unjust and unconscionable not to do so.⁶¹

Accordingly, he declared a trust in the absence of misconduct or any factor affecting the conscience of the legal owner.⁶² Similarly, in *Kelly v Cahill*, Barr J identified the purpose of the remedial constructive trust as being to prevent unjust enrichment, and applied it in a liberal manner which threatens the fundamental criterion of unconscionability.⁶³ A deceased testator intended to leave his land to his wife, but his attempted transfer was ineffective. The court ruled that his nephew was constructive trustee of property which he legally owned. These developments show that the remedial constructive trust is a tool to order disgorgement, but that, controversially, it can arise in the absence of wrongdoing.

Functional Equivalents to Disgorgement in Irish Law

Calculating Loss by Reference to Gain

There are a number of circumstances in which compensation for loss is calculated taking into account the gains made by the defendant. These offer a functional equivalent to disgorgement, even though they are conceptually distinct.

Wrotham Park Damages

The first example is Wrotham Park Damages for encroachment, which exists in Irish as in English law. In *Conneran v Corbett*, Laffoy J accepted that *Wrotham Park* damages are an alternative to the normal measure of diminution in value

⁵⁹See *East Cork Foods Ltd v O'Dwyer Steel Co Ltd* [1978] IR 103 (Irish Supreme Court); *In the Matter of Irish Shipping Ltd (In Liquidation)* [1986] ILRM 518 (Irish High Court); *Murphy v Attorney General* [1982] 1 IR 241, 317 (Irish Supreme Court); Gill (1986), 97–99; Keane (2011), 253 et seq.

⁶⁰*Hussey v Palmer* [1972] EWCA Civ 1; [1972] 3 AER 744 (England & Wales Court of Appeal).

⁶¹*Murray v Murray* [1996] 3 IR 251, 255 (Irish High Court).

⁶²Mee (1996), 9–13.

⁶³*Kelly v Cahill* [2001] IR 56, 62; O'Dell (2001), 71–96; Hourican (2001), 49–50, 50.

for trespass.⁶⁴ In *Victory v Galhoy Inns Ltd*, the High Court awarded damages for an innocent encroachment onto the plaintiffs' property, calculated in part by the defendants' profit. The defendants ran a nightclub and, mistakenly believing they had a right of way, trespassed on the plaintiffs' property in order to create a legally-required fire exit. The defendants argued for damages to be limited to the diminution in value of the plaintiffs' property. However, McMahon J ruled that the plaintiffs were entitled to "an enhancement" of their damages, "related to the value of the exit to the defendants' enterprise, and in particular to the profits which the enterprise generates for the defendant."⁶⁵ This was regarded as a fair proportion of the profits from the defendants' business, which could not operate without the infringement. The Law Reform Commission considers that, while the conceptual basis of *Wrotham Park* damages⁶⁶ in English law is uncertain, it is more "straightforward and realistic" to view them as "restitution of the gain".⁶⁷

Losses Measured by the Defendant's Gain: *Hickey v Roches Stores* (No. 2)

The first judgment in *Hickey v Roches Stores* established the existence of pure disgorgement damages, but these were not applicable on the facts. As an alternative head of damages, Finlay P was willing to award aggravated damages to represent the loss suffered by the plaintiffs in losing customers to the defendants, even after the contract would have ended, because of their breach of the non-compete clause. In a second hearing, Finlay P calculated this award as a proportion of the defendants' business.⁶⁸

Although the damages under this head in *Hickey* were compensatory in objective, they were calculated by reference to the wrongdoer's gain, and therefore from a practical perspective resemble disgorgement. This leads Clark to conclude that the award of aggravated damages to take full account of the loss suffered by the plaintiff will combine both compensatory and disgorgement functions, without introducing inappropriate "quasi-criminal" remedies to contract law.⁶⁹

These aggravated damages, allowed to compensate the plaintiffs for their loss due to the wrongful competition by the defendants, are different to exemplary or punitive damages.⁷⁰ The difference is that exemplary damages are based on the intention of the wrongdoer at the time of his misconduct to make a profit, whereas the calculation

⁶⁴Conneran v Corbett and Sons Limited [2006] IEHC 254 (Irish High Court).

⁶⁵Victory v Galhoy Inns Ltd [2010] IEHC 459, para 45 (Irish High Court).

⁶⁶Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 2 AER 321 (England & Wales High Court).

⁶⁷Law Reform Commission n 2 above, para 6.08.

⁶⁸Hickey v Roches Stores [1980] ILRM 107 (Irish High Court).

⁶⁹Clark (1978), 128–133, 132.

⁷⁰Ibid 131.

of the claimant's loss by reference to the defendants' profit envisaged in Hickey is retrospective, guided by the amount of profit actually made by the wrongdoing.

Exemplary Damages

Punitive or exemplary damages may provide another functional equivalent to disgorgement, even though they have a distinct objective. The Law Reform Commission identifies the purposes of exemplary damages as to punish and deter, with the incidental benefit of compensating the plaintiff.⁷¹ Exemplary damages mark the court's "particular disapproval" of the defendant's conduct.⁷² In *Shortt v Commissioner of An Garda Síochána*, which concerned the outrageous persecution of an innocent citizen by the police, Murray CJ affirmed that, given their distinct purpose of disapproving of egregious conduct, it was not necessary to relate them to the amount of the plaintiff's loss.⁷³ However, exemplary damages are not awarded where the amount payable in the form of compensatory damages constitutes a sufficient public disapproval of and punishment for the form of wrongdoing.⁷⁴

Exemplary damages may be appropriate where a party acts in "wilful and conscious wrongdoing in contumelious disregard of another's rights".⁷⁵ In *Rookes v Barnard*, one of the circumstances in which Lord Devlin proposed that exemplary damages should be available was where the defendant has calculated that he will profit from his wrongdoing. In *O'Brien v Mirror Group Newspapers Ltd*,⁷⁶ the Supreme Court approved the House of Lords ruling in *Broome v Cassell & Co* that exemplary damages are an appropriate response where a defendant wilfully defames a plaintiff on foot of a calculation that its profits from doing so will exceed any compensatory damages which it must pay out.⁷⁷ Irish law does not limit exemplary damages to the categories outlined in *Rookes v Barnard*.⁷⁸

The *Hickey* test of *mala fides* for disgorgement damages might seem to bring restitutionary damages within the rubric of exemplary damages. It seems to subsume the *Rookes v Barnard* heading of exemplary damages for calculatedly profitable wrongdoing. However, it is preferable to recognise disgorgement damages as a distinct category, their rationale and measure being fully to deprive the defendant of wrongful gains (even if they might be triggered by a cynical breach). Moreover,

⁷¹Law Reform Commission n 2 above, para 1.01.

⁷²*Conway v Irish National Teachers Organisation* [1991] 2 IR 305, 317 (Irish Supreme Court).

⁷³*Shortt v Commissioner of An Garda Síochána* [2007] 4 IR 587, 619 (Irish Supreme Court).

⁷⁴*Noctor v Ireland* [2005] 1 IR 433 (Irish High Court).

⁷⁵*Conway v Irish National Teachers Organisation* [1991] 2 IR 305, 323 (Irish Supreme Court).

⁷⁶*O'Brien v Mirror Group Newspapers Ltd* [2001] 1 IR 1 (Irish Supreme Court).

⁷⁷*Broome v Cassell & Co* [1972] AC 1027 (United Kingdom House of Lords).

⁷⁸*Rookes v Barnard* [1964] UKHL 1; [1964] AC 1129 (United Kingdom House of Lords).

exemplary damages are viewed as inappropriate in pure contract cases, whereas disgorgement is permitted.⁷⁹ This is another good reason to differentiate these forms of damages.

Restitution of Unjust Enrichment

Restitution of unjust enrichment logically involves an incidental element of disgorgement. When a plaintiff recovers a transfer which he made to the defendant with impaired consent, the defendant must give up this benefit to him. However, there are several reasons why this is not true disgorgement. The hallmark of disgorgement is that its purpose is to remove assets from the defendant, and, accordingly, its measure corresponds to the defendant's gain. The purpose of the action in unjust enrichment is to restore the value to the plaintiff, not to strip it from the defendant.⁸⁰ The reason for restitution is the plaintiff's lack of consent, not any wrongdoing on the part of the recipient. Its measure is the value transferred by the plaintiff. The identity of the plaintiff's loss and the defendant's gain is at the heart of the corrective justice rationale for unjust enrichment, but this correspondence does not mean that unjust enrichment is gain-based.⁸¹ Lastly, the remedy is usually a personal one, not a proprietary one. For all these reasons, subtractive unjust enrichment should not be regarded as a disgorgement tool.

Procedural Issue: Class Actions in Ireland

From a procedural perspective, the availability of class actions may be a useful tool to ensure full disgorgement in cases where wrongful conduct affects a large number of people. The Law Reform Commission issued a report on multi-party litigation in 2005, which highlighted the restrictions on the mechanisms for class actions in the Irish legal system.⁸² Where multiple persons have a shared interest in a matter, one person may bring a representative action on behalf of the others.⁸³ Crucially, the representative action is unavailable in actions for damages, because it is considered that the parties' interests are no longer identical. Furthermore, the procedural rules for the circuit courts explicitly exclude representative actions in

⁷⁹Law Reform Commission n 2 above, para 6.41.

⁸⁰Cf *Criminal Assets Bureau v JWPL* [2007] IEHC 177, para 3.2 (Irish High Court).

⁸¹Smith (2001), 2115–2176, 2116.

⁸²Law Reform Commission of Ireland Report (LRC 76–2005) *Multi-Party Litigation* (2005), para 1.19.

⁸³Oder 15, Rule 9, Rules of the Superior Courts 1986 (Ireland).

tort cases.⁸⁴ The Law Reform Commission noted that the exclusion of multi-party actions for damages makes it impossible to bring collective actions for damages which would not individually be economically viable. This is a barrier to class actions providing a vehicle to achieve disgorgement.

The unofficial alternative in practice is a test case, with other prospective parties waiting to see the outcome. In such a case, the judge decides on remedies without taking into consideration the other prospective claims and there is uncertainty as to the total liability which will result from all the claims.⁸⁵ In *Conway v INTO*, Barron J estimated the number of other actions arising from the same violations, proposed a global sum for exemplary damages, and allocated a share of this to the plaintiff.⁸⁶ The Supreme Court upheld this speculative assessment of a likely global figure for exemplary damages.

Beyond Civil Law: Ireland’s Criminal Assets Disgorgement Regime

The disgorgement rationale has an important incidence outside civil law. The Criminal Assets Bureau is a public body empowered to seize property resulting from crime.⁸⁷ This has the “public policy objective of depriving beneficiaries of criminal conduct of proceeds of such conduct”.⁸⁸ In *Criminal Assets Bureau v JWPL*, the plaintiff applied to seize assets deemed to be the result of corrupt enrichment. The defendant disputed the jurisdiction of the Irish courts, invoking the Brussels Regulation. The case turned on the distinction between disgorgement to the State and civil remedies. The defendant argued that the State’s claim was equivalent to a civil law action for restitution for wrongs. Feeney J held that even if *AG v Blake* reflects Irish law, the powers of the Criminal Assets Bureau are more extensive: it must not show that the assets were derived at the expense of any party, and there is “no suggestion of any breach of duty fiduciary or otherwise”.⁸⁹ Consequently, Feeney J found that the powers of the Criminal Assets Bureau were not comparable to any private law right.

⁸⁴Order 6, Rule 10, Circuit Court Rules 2001 (Ireland).

⁸⁵Law Reform Commission n 82 above, paras 1.25–1.26.

⁸⁶*Conway v Irish National Teachers Organisation* [1991] 2 IR 305, 310 (Irish Supreme Court).

⁸⁷Proceeds of Crime Acts 1996 and 2005 and Criminal Assets Bureau Acts 1996 and 2005 (Ireland); see Murphy (1999), 160–175.

⁸⁸*Criminal Assets Bureau v JWPL* [2007] IEHC 177, para 4.4 (Irish High Court).

⁸⁹*Ibid* para 3.6.

Conclusion

Irish civil law recognises a number of tools which directly pursue disgorgement. The remedial constructive trust is relatively frequently used, as are statutory disgorgement provisions, especially for intellectual property infringements. While the law has for many years allowed for disgorgement damages arising from *mala fides* transgressions in contract and tort, this principle is rarely used and there is uncertainty about the criteria for its operation. Besides these true disgorgement remedies, there are other circumstances in which compensatory or exemplary damages may be calculated by reference to the defendant's gain from a breach. However, despite the availability of mechanisms to achieve disgorgement, the exclusion of class actions in claims for damages may be a practical obstacle to disgorgement taking place in circumstances where wrongdoing has affected many individuals.

Bibliography

- Clark, R. 1978. Damages and unjust enrichment. *Northern Ireland Legal Quarterly* 29: 128–133.
- Clark, R. 2013. *Contract law in Ireland*. Dublin: Round Hall.
- Gill, A.V. 1986. Constructive trusts and the recovery of money paid under mistakes of fact – a novel Irish development. *Irish Law Times* 4: 97–99.
- Hourican, M. 2001. The introduction of “New Model” constructive trusts in this jurisdiction. *Conveyancing and Property Law Journal* 6: 49–50.
- Keane, R. 2011. *Equity and the law of trusts in the Republic of Ireland*, 2nd ed. Dublin: Bloomsbury Professional.
- Mee, J. 1996. Palm trees in the rain – new model constructive trusts in Ireland. *Conveyancing and Property Law Journal* 1: 9–13.
- Murphy, S. 1999. Tracing the proceeds of crime: Legal and constitutional implications. *Irish Criminal Law Journal* 9: 160–175.
- O’Dell, E. 2001. Unjust enrichment and the remedial constructive trust. *Dublin University Law Journal* 8: 71–96.
- Smith, L. 1994. Disgorgement of the profits of breach of contract: Property, contract and efficient breach. *Canadian Business Law Journal* 24: 121–140.
- Smith, L. 1999. Constructive trusts and constructive trustees. *Cambridge Law Journal* 58: 294–302.
- Smith, L. 2001. Restitution: The heart of corrective justice. *Texas Law Review* 79: 2115–2176.

List of Cases

Ireland

- Barrett v Independent Newspapers Ltd. [1986] IR 13 (Irish Supreme Court)
- Conneran v Corbett and Sons Limited [2006] IEHC 254 (Irish High Court)
- Conway v Irish National Teachers Organisation [1991] 2 IR 305 (Irish Supreme Court)
- Criminal Assets Bureau v JWPL [2007] IEHC 177 (Irish High Court)

- Criminal Assets Bureau v JWPL [2007] IEHC 177 (Irish High Court)
 Dublin Corporation v Building and Allied Trade Union (Unreported, High Court, 6 March 1996) (Irish High Court)
 Duhan v Radius Television Production Limited [2007] IEHC 292 (Irish High Court)
 East Cork Foods Ltd v O'Dwyer Steel Co Ltd [1978] IR 103 (Irish Supreme Court)
 Folens v Ó Dubhghaill [1973] 1 IR 255 (Irish Supreme Court)
 Fyffes plc v DCC plc [2005] IEHC 477, [2006] IEHC 32, [2007] IESC 36; [2009] 2 IR 417 (Irish Supreme Court)
 Garvey v Ireland (Unreported, High Court, 19 December 1979) (Irish High Court)
 Hickey v Roches Stores (Unreported, Irish High Court, 14 July 1976), reported at [1993] 1 Restitution Law Review 196 (Irish High Court)
 HKN Invest OY v Incotrade PVT Ltd. [1993] 3 IR 152 (Irish High Court)
 House of Spring Gardens Ltd v Point Blank Ltd [1984] 1 IR 611 (Irish Supreme Court)
 In Re Custom House Capital Limited (In Liquidation) [2013] IEHC 559 (Irish High Court)
 In Re Frederick Inns [1994] 1 ILRM 387 (Irish Supreme Court)
 In the Matter of Irish Shipping Ltd (In Liquidation) [1986] ILRM 518 (Irish High Court)
 Kelly v Cahill [2001] 2 ILRM 205 (Irish High Court)
 Kennedy v Allied Irish Banks Ltd (Unreported, Supreme Court, 29 October 1996) (Irish Supreme Court)
 Maher v Collins [1975] IR 232 (Irish Supreme Court)
 McCambridge Ltd v Joseph Brennan Bakeries [2013] IEHC 569 (Irish High Court)
 Murphy v Attorney General [1982] 1 IR 241, 317 (Irish Supreme Court)
 Murray v Murray [1996] 3 IR 251 (Irish High Court)
 NAD v TD [1985] ILRM 153 (Irish High Court)
 Noctor v Ireland [2005] 1 IR 433 (Irish High Court)
 O'Brien v Mirror Group Newspapers Ltd [2001] 1 IR 1 (Irish Supreme Court)
 Quinn v Irish Bank Resolution Corporation Limited [2012] IEHC 36 (Irish High Court)
 Quinn v Irish Bank Resolution Corporation Limited [2012] IEHC 36 (Irish High Court)
 Shortt v Commissioner of An Garda Síochána [2007] 4 IR 587 (Irish Supreme Court)
 Vavasour v O'Reilly and Windsor Motors Ltd [2005] IEHC 16 (Irish High Court)
 Victory v Galhoy Inns Ltd [2010] IEHC 459 (Irish High Court)
- England and Wales*
- Attorney General v Blake [2000] UKHL 45; [2001] 1 AC 268 (United Kingdom House of Lords)
 Belmont Finance Corporation v Williams Furniture Ltd. (No. 2) [1980] 1 All ER 393 (England & Wales Court of Appeal)
 Broome v Cassell & Co [1972] AC 1027 (United Kingdom House of Lords)
 Hussey v Palmer [1972] EWCA Civ 1; [1972] 3 AER 744 (England & Wales Court of Appeal)
 In Re Polly Peck International (No. 2): Marangos Hotel v Stone [1998] 3 AER 812 (England & Wales Court of Appeal)
 Phipps v Boardman [1966] UKHL 2; [1967] 2 AC 46 (United Kingdom House of Lords)
 Regal (Hastings) Ltd v Gulliver [1942] UKHL 1; [1942] 1 AER 378 (United Kingdom House of Lords)
 Rookes v Barnard [1964] UKHL 1; [1964] AC 1129 (United Kingdom House of Lords)
 Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 2 AER 321 (England & Wales High Court)

Niamh Connolly is an Assistant Professor in the Law School of Trinity College, University of Dublin.