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**Article (Accepted version)  
(Refereed)**

**Original citation:**

Sage, Nicholas W. (2015) *Disgorgement: from property to contract*. [University of Toronto Law Journal](#). ISSN 0042-0220

DOI: [10.3138/UTLJ.3205](#)

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**The final version of this paper will appear in the  
*University of Toronto Law Journal*, forthcoming.**

LSE Law, Society and Economy Working Papers 18/2015

London School of Economics and Political Science

Law Department

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# Disgorgement – From Property to Contract

Nicholas W. Sage<sup>\*</sup>

**Abstract:** The article develops an understanding of the disgorgement remedy in private law by moving between the proprietary context, where the remedy has long been awarded, and the contractual context, where the remedy is relatively new and still controversial. The resulting account can explain the emerging common law on disgorgement for breach of contract, which has so far eluded explanation. The account also has broader implications for private law theory. First, it suggests that asking whether the plaintiff has a right ‘to a thing’ (the paradigmatic sort of property right) may obscure the remedial analysis. Instead, the analysis should attend to another, hitherto overlooked aspect of the plaintiff’s rights: their logical scope. Second, the account suggests that a purely ‘rights-based’ understanding of private law remedies cannot adequately explain disgorgement, because it elides the crucial role that the defendant’s wrongful action plays in the explanation for the remedy.

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## I. INTRODUCTION

In the common law of contract, it sometimes seems as if everything has already happened. Much of the law has existed for centuries, and there generally seems to be little prospect of profound change. So it is striking that, relatively recently, some of the common law's highest authorities have recognized a new contractual remedy: disgorgement.<sup>1</sup> This remedy strips the defendant contract breaker of profits made from breach.

Although it is clear that disgorgement may now be awarded for breach of contract, it remains far from clear why this should be so. The plaintiff who has suffered a contractual breach is surely entitled to some redress, such as an award of expectation damages designed to place her in the same position as she would be in if the contract had been performed. But why should a breach empower the plaintiff to capture profits that the defendant has earned?

The absence of any accepted understanding of the new contractual disgorgement remedy is to some extent unsurprising. Among legal theorists, the ultimate rationale for just about every private law remedy is a matter of continual debate. However, in the case of contractual disgorgement, the failure of understanding is unusually acute. For it is not just that theorists disagree, at an abstract level, about why the remedy should be awarded. The remedy is so poorly understood that nobody can say *when* it will be awarded. The authorities invariably describe contractual disgorgement as an 'exceptional' remedy, available only in limited circumstances, but exactly what those circumstances are remains unresolved.<sup>2</sup>

Standing in conspicuous contrast to the new remedy of disgorgement for breach of contract is another, much older, private law remedy: disgorgement for a breach of *property* rights committed through trespass or conversion. If I profit by, say, selling your goods or your land to a third party, you can recover that profit.<sup>3</sup> Disgorgement in this context has been awarded for centuries.<sup>4</sup> Moreover, its rationale does not seem all that difficult to understand. Surely, if you have an exclusive proprietary right over a certain thing, then any profits that I derive through unauthorized dealings with that thing should be returned to you?

Consequently, one way that legal theorists have sought to understand contractual disgorgement is by first developing an account of the disgorgement remedy in the proprietary context, which seems relatively straightforward, and then applying that account to cases of breach of contract in order to see what, if

<sup>1</sup> *Attorney General v Blake*, [2001] 1 AC 268; Restatement (Third) of the Law of Restitution and Unjust Enrichment (2011) at § 39. See also *Bank of America Canada v Clarica Trust*, [2002] 2 SCR 601.

<sup>2</sup> *Blake*, supra note 1 at 285; Restatement, supra note 1 at § 39 & cmts a, f, rptr note c; see also Caprice L. Roberts, 'Restitutionary Disgorgement as a Moral Compass for Breach of Contract' (2009) 77 U Cin L Rev 991 at 1026, calling the Restatement provision a 'Trojan horse.'

<sup>3</sup> Restatement, supra note 1 at § 40; *Kuwait Airways v Iraqi Airways (Nos 4&5)*, [2002] 2 AC 883 at 1093.

<sup>4</sup> *Lamine v Dorrell* (1705), 2 Ld Raym 1216, 92 ER 303; *Thomas v Oakley* (1811), 18 Ves 184, 34 ER 287.

anything, is different about the contractual context that affects the remedy's availability.

That is the approach Part II of this article adopts. Beginning with a case of disgorgement for breach of property rights, the article abstracts an analytic framework that explains the availability of disgorgement more generally in private law. The framework is surprisingly simple. In essence, disgorgement of profits is available just to the extent that the defendant's profitable action is wrongful – that is, contrary to the plaintiff's rights.

The article then applies this general framework for understanding disgorgement to cases of breach of contract to see why they are so difficult to explain. The examination of contractual cases reveals an often overlooked feature of private law rights, here called a right's 'logical scope.' This feature affects the availability of disgorgement by affecting whether it is possible to establish that the defendant's profitable action is wrongful. Having noticed this feature, one can explain the emerging case law on contractual disgorgement from around the common law world.

Part III of the article contrasts the approach to contractual disgorgement developed here with a prominent existing account that also proceeds by analogizing disgorgement for breach of property rights. This account appears in the work of contemporary scholars such as Daniel Friedmann and Ernest Weinrib, but its roots are much older, and it may be called the 'traditional account.'

The contrast between the two accounts highlights the advantages of the new account developed in the present article and reveals some of its implications for the theory of private law more broadly. One implication is that a purely 'rights-based' understanding of disgorgement of the kind assumed by the traditional account is inadequate. Another implication is that focusing, as the traditional account does, on whether a given right is a right 'to a thing' (the paradigmatic sort of property right) obscures our understanding of the remedies available for the right's breach.

Because the present article's overall argument may strike some as radical, a few caveats about its scope and aims should be noted at the outset. First, the article proposes an abstract conceptual framework that makes sense of the disgorgement case law.<sup>5</sup> The article does not suggest that the framework itself is the existing positive law of any jurisdiction. Second, the proposed framework does not necessarily supply the only basis upon which to understand all disgorgement awards. There may be other ways to understand at least some awards of disgorgement – including the understanding reflected in the traditional account.

Third, the proposed framework explains when disgorgement is, in principle, an available remedy, but it does not incorporate every factor that might influence a court's decision about whether actually to award the remedy in a given case. For example, factors such as the ease of judicial supervision of the remedy or the

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<sup>5</sup> 'Licence fee' awards are not considered. This is to avoid further complexity, including the debate over whether such awards are 'gain-based' or 'loss-based.'

plaintiff's duty to mitigate may be relevant to a court's decision about disgorgement, just as they are relevant to decisions about other remedies. Such factors are not considered here.

Finally, to some the article may seem, in places, to blur the distinction between the contractual and the proprietary. For this, the reader is asked to suspend judgment at least until the overall argument is developed. Because one key upshot of the argument is that, at least for many cases of disgorgement, the distinction does not matter. There is a way of understanding disgorgement that transcends the distinction between property and contract.

## II. A NEW ACCOUNT OF DISGORGEMENT

Beginning with a fairly straightforward case of disgorgement for breach of property rights, it is possible to abstract a conceptual framework for understanding the disgorgement remedy more generally in private law. Next, the framework can be applied to the contractual context to see what special issues arise there.

### A. THE PROPRIETARY CONTEXT

A good starting point in the proprietary context is the famous *Kentucky Cave* case.<sup>6</sup> In that case, the defendant profited by showing tourists through the Great Onyx Cave in Kentucky. The defendant owned the cave's entrance and a large part of its interior. However, other parts of the cave's interior were owned by the plaintiff because the cave stretched underground through the boundary line between the parties' properties. The plaintiff sued, seeking 'an accounting of the profits which resulted from the operation of the cave'<sup>7</sup> – that is, a disgorgement remedy.

The Court of Appeals of Kentucky agreed with the plaintiff that disgorgement was appropriate. However, the court did not order disgorgement of *all* of the profits that had resulted from the operation of the cave. Rather, the court awarded disgorgement only of the portion of the profits that could 'fairly be said to arise directly from the use of [*the plaintiff's*] segment of the cave.'<sup>8</sup> The court did *not* order disgorgement of profits that had been made by showing the tourists cave 'scenes or objects'<sup>9</sup> that were located outside of the plaintiff's cave segment.

This result intuitively makes sense. And it shows that the disgorgement analysis in a case such as *Kentucky Cave* turns upon two descriptions (these may be implicit): first, a description of the plaintiff's rights; second, a description of the defendant's profitable action. In the *Kentucky Cave* case, the descriptions were something like:

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<sup>6</sup> *Edwards v Lee's Admin* 96 SW (2d) 1028 (1936).

<sup>7</sup> *Ibid* at 1029.

<sup>8</sup> *Ibid* at 1033.

<sup>9</sup> *Ibid*.

first, the right to a certain segment of the Great Onyx Cave; second, showing tourists through various segments of the Great Onyx Cave. Crucially, disgorgement is available only to the extent that the two descriptions *coincide* – to the extent that they clash or overlap. Hence in *Kentucky Cave* disgorgement was awarded only of the profits that arose from the defendant's use of the plaintiff's cave segment, rather than from his use of other parts of the cave over which the plaintiff had no rights.

Why is disgorgement available only insofar as the descriptions of the defendant's profitable action and of the plaintiff's rights coincide? Because only to this extent is the defendant's profitable action *contrary to* the plaintiff's rights. To say the same thing, only to this extent is the defendant's profitable action *wrongful*. Note that the term 'wrongful,' as used in this article, just means contrary to a legal right. It does not necessarily entail culpability in any other sense, such as ethical blameworthiness.

Thus, the *Kentucky Cave* case establishes a simple principle for ascertaining the availability of disgorgement: the remedy is available only to the extent that the defendant's profitable action is wrongful – that is, contrary to the plaintiff's rights.

However, this principle should be elaborated in one further respect in order to prevent potential confusion later on. The elaboration can be captured in a slogan by saying that the defendant's profitable action must be, not merely wrongful, but *inherently* wrongful. (That is, inherently contrary to the plaintiff's rights; again, 'wrongful' in this article just means contrary to a legal right.) To illustrate this point, let us return to the *Kentucky Cave* case.

In *Kentucky Cave*, the defendant's showing tourists through the plaintiff's cave segment was inherently wrongful. Any unauthorized use by the defendant of the plaintiff's part of the cave was directly contrary to the plaintiff's rights. There is no way that the defendant could have undertaken this sort of action – an unauthorized use of the plaintiff's part of the cave – without violating the plaintiff's rights.

By contrast, the *Kentucky Cave* defendant's showing tourists through *his own* cave segment was *not* inherently wrongful. The defendant could conceivably have undertaken this sort of action without violating anyone else's rights. The defendant would merely be using his own property, and using your own property is, in itself, no wrong against anyone else.

However, an action that is *not inherently* wrongful may, in some circumstances, turn out to cause a wrongful impact upon another person's rights. Imagine, for example, that in the *Kentucky Cave* scenario, the defendant's showing tourists through his own cave segment had produced vibrations, which then travelled over into the plaintiff's segment and damaged the plaintiff's stalactites. In this situation, the defendant's use of his own cave segment, though not inherently wrongful, would have caused a wrongful impact upon the plaintiff's property. Or indeed, consider what actually happened in the *Kentucky Cave* case itself. There, the defendant's showing tourists through his own cave segment was apparently a but-for cause of the tourists' wrongful entry onto the plaintiff's segment. The only

entrance to the Great Onyx Cave was on the defendant's land. Still, though the defendant's use of his own cave segment was in this way a cause of the wrongful interference with the plaintiff's segment, the defendant's use of his own segment was not *inherently* wrongful. Again, using your own property is, in itself, no wrong against anyone else.

The *Kentucky* court, as we have seen, limited disgorgement to profits that arose directly from the use of the plaintiff's segment of the cave, and denied disgorgement of profits that arose from the defendant's use of his own cave segment. Thus, in our terminology, disgorgement was awarded only to the extent that the defendant's profitable action was *inherently* wrongful. The court disallowed disgorgement to the extent the defendant's profitable action was *not* inherently wrongful, even though it was a cause of an interference with the plaintiff's rights.

Note that an inherently wrongful action, in the proprietary context, is one that tort law tends to treat as a so-called intentional tort such as trespass or conversion.<sup>10</sup> At least traditionally, these torts were actionable *per se*, and liability for committing them was strict. By contrast, actions that are *not* inherently wrongful tend to be treated by the law as torts such as negligence or nuisance. These torts are not actionable *per se* and liability for committing them is not strict.

Remedies *other than disgorgement* may still be available where the defendant's action, though not inherently wrongful, turns out to cause a wrongful impact upon the plaintiff's rights. For example, the defendant may have to pay the plaintiff 'loss-based' damages, calculated to put the plaintiff in the same position as if the wrongful impact had not occurred.

Just as it is insufficient for disgorgement that the defendant's profitable action, though not inherently wrongful, turns out to cause some wrongful impact upon the plaintiff's rights, likewise it is insufficient that a wrongful impact suffered by the plaintiff turns out to cause or enable a profit by the defendant, where the defendant's profitable action is not *inherently* wrongful. For example, in *Kentucky Cave*, the defendant's interference with the plaintiff's cave segment may well have been a but-for cause of all sorts of further profits by the defendant. The defendant might, say, have taken the initial profits gained from his trespass and re-invested those in another profitable enterprise, such as a swimming hole or a shooting range for tourists, located on the defendant's own land. Such enterprises, though enabled by a breach of the plaintiff's rights, would not be inherently wrongful. The defendant could conceivably use his own land in those sorts of ways without interfering with anyone else's rights.

Again, the *Kentucky* court, as we have seen, limited disgorgement to profits arising *directly* from the use of the plaintiff's segment of the cave. The court

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<sup>10</sup> The connection between disgorgement and the intentional torts has been recognized by Ernest J Weinrib, *Corrective Justice* (Oxford: OUP, 2012) at 126; Peter Benson, 'Disgorgement for Breach of Contract and Corrective Justice' in Jason W Neyers, Mitchell McInnes, & Stephen GA Pitel, eds, *Understanding Unjust Enrichment* (Oxford: Hart, 2004) at 316; Arthur Ripstein, 'As If It Had Never Happened' (2007) 48 Wm & Mary L Rev 1957 at 1991–5.



thereby excluded recovery of future profits that the use of the plaintiff's segment merely caused or enabled. It restricted the profits recoverable to those attributable to the defendant's inherently wrongful conduct.

This might be thought of as the articulation of a 'remoteness' principle for disgorgement, bearing in mind that the principle here is much stricter than that usually applied to loss-based consequential damages in tort or contract: it is insufficient that the profit making is reasonably foreseeable; it must be inherently wrongful. And of course, difficult questions of apportionment will arise where the defendant's profit is to some extent due to conduct that is inherently wrongful and to some extent due to conduct that is not, such as the employment of the defendant's own work and skill or other assets.

In summary, it is insufficient for disgorgement that the defendant's profitable action merely stands in a relationship of causation with some wrongful impact upon the plaintiff, and this holds true in both directions: whether the chain of causation runs from the profitable action to the wrongful impact or vice versa. For disgorgement, the defendant's profitable action must be *inherently* wrongful. In order to establish that the defendant's profitable action is inherently wrongful, one must describe that action, on the one hand, and the plaintiff's rights, on the other, and check that the two descriptions coincide.

## B. THE CONTRACTUAL CONTEXT

Now the framework for understanding disgorgement abstracted from the *Kentucky Cave* case can be applied to the contractual case law. Doing so reveals an overlooked respect in which contractual rights vary, from contract to contract and case to case. They vary in what we may call their 'logical scope.' The varying logical scope of contractual rights affects whether one can say that the descriptions of the defendant's profitable action and of the plaintiff's rights coincide such that the profitable action is wrongful. This makes the disgorgement analysis more complicated in contract cases and means that the remedy's availability is circumscribed.

To see this, let us begin by dividing contractual disgorgement cases into two broad categories. First, cases where the relevant contractual right may be described as a right, as between the parties, 'to a thing.' Importantly, the thing may be either a particular thing (for example, the particular chair you are now sitting on) or a type of thing (for example, a Louis XIV chair). In the second category of case, the contractual right is best described as a right 'to an act.' A contract concerning an act may be either a positive covenant (a right that some act be performed) or a negative covenant (a right that some act not be performed).

## 1. *Right to a thing*

### a. *Particular thing*

Consider first a contract providing that the plaintiff is entitled, as against the defendant, to a *particular thing*. Here, profit from the defendant's unauthorized dealing with the thing may be subject to disgorgement. This sort of contract case can be understood as equivalent, in principle, to disgorgement for breach of a property right to a particular thing in a trespass case such as *Kentucky Cave*.

It bears emphasizing that the equivalence holds *in principle*. Different doctrinal categories and concepts may be deployed by the courts in order to reach the same results in terms of disgorgement. Courts may variously invoke, for example, notions of constructive trust, the passing of title, specific performance, unjust enrichment, and so on. This article seeks to explain the availability of the disgorgement remedy – the stripping of the defendant's profits from a breach of rights – at an abstract level that ranges across the various doctrinal routes by which the profit stripping may be achieved.

The availability of disgorgement where a contract establishes a right to a particular thing is apparent, first of all, in the main branches of the law that concern contracts for corporeal things: real estate conveyance and the sale of goods.

In a typical real estate transaction, the vendor and purchaser contract for the sale and purchase of a particular plot of land. When they do, a 'constructive trust' over that land arises in favour of the purchaser. This means that, if the vendor profits from an unauthorized dealing with the land, such as by selling it to a third party for a higher price, the purchaser can recover the profits. So, in *Timko v Useful Homes*,<sup>11</sup> for example, a purchaser of a plot of land in New Jersey recovered the vendor's profits from selling that plot to a third party.

A sale of goods is often more complex because while the contract may concern a particular good, or multiple particular goods, it may alternatively concern a type of good described by specification. The law of sale has developed ways of establishing whether the parties' contract is sufficiently determined toward a particular good that *that* good belongs to the buyer.<sup>12</sup> If the sales contract is sufficiently determined toward a particular good, then when the seller fails to deliver that good, the buyer may have a cause of action for a proprietary tort such as conversion,<sup>13</sup> and in such an action, disgorgement should in principle be an

<sup>11</sup> 168 A 824 (1933); see also *Lake v Bayliss*, [1974] 1 WLR 1073.

<sup>12</sup> *Sale of Goods Act 1979* (UK), c 54 ss 16–8, and equivalent legislation throughout the Commonwealth; compare Uniform Commercial Code § 2-401. Note that some sales legislation recognizes an intermediate category between particular goods and indeterminate instances of a type of good – so-called goods 'ex-bulk': a proportion of a specified 'bulk' of goods; e.g. *Sale of Goods Act*, *ibid*, ss 20A, 20B. Disgorgement's availability here should turn upon the extent to which one can establish a coincidence between the defendant's profit making and the proportion of the bulk belonging to the plaintiff.

<sup>13</sup> *Chinery v Viall* (1860) 5 H & N 288; 157 ER 1192. Compare Uniform Commercial Code § 2-716.

available remedy.<sup>14</sup> Moreover, in this situation disgorgement has been awarded in an action for unjust enrichment in the well-known Israeli case of *Adras Building Material v Harlow and Jones*.<sup>15</sup>

*Adras* involved an Israeli company that bought several thousand tons of steel from a German seller. The price of steel subsequently spiked because of the Yom Kippur War. The German company failed to deliver some of the steel it owed because it sold instead to a third party for a higher price. The majority of the Israeli Supreme Court held that the Israeli company could obtain disgorgement of the German company's profits. (The justices debated whether the contracting parties had earmarked any *particular* steel for their contract. A number of factors suggested that the parties had done so.<sup>16</sup> However, the minority justices dissented in part because they believed no particular steel was earmarked.)<sup>17</sup>

What about contracts for particular things that are *incorporeal*? Here, disgorgement may also be available. For example, upon a contract for the sale of particular shares in a corporation, the promisor may be said to hold those shares on constructive trust for the promisee. In this situation, the House of Lords found a constructive trust in *Chinn v Collins* (rejecting the defendant's contention that the contract concerned 'merely ... the purchase of a specified *number* of shares and not ... any *particular* shares').<sup>18</sup> Again, a constructive trustee is liable to disgorge profits from unauthorized dealings with trust subject matter.

In summary, where the defendant profits by dealing with a *particular* thing belonging to the plaintiff under a contract, disgorgement may be awarded – just as in a proprietary case such as *Kentucky Cave*. This makes sense, given the conceptual framework for understanding disgorgement suggested above. The framework applies in the same way in both sorts of case. The plaintiff has a right (at least as against the defendant) to a particular thing. The defendant's profitable action is an unauthorized dealing with that thing. Therefore, the descriptions of, on the one hand, the plaintiff's rights and, on the other, the defendant's profitable action, coincide. The defendant's profitable action is inherently wrongful and the profits are subject to disgorgement.

#### b. *Type of thing*

By contrast, where the parties' contract concerns, not a particular thing, but rather indeterminate instances of a type of thing, disgorgement is unavailable. *Acme Mills*

<sup>14</sup> *Lamine v Dorrell*, supra note 4; *Biggerstaff v Rowatt's Wharf*, [1896] 2 Ch 93 at 103; Peter Watts, *Remedies for Breach of Contract* in Francis D Rose, ed, *Failure of Contracts* (Oxford: Hart, 1997) at 62. Courts must navigate semi-codified legislative remedial schemes, such as the *Sale of Goods Act*, supra note 12, ss 51–4, 62; Uniform Commercial Code §§ 1-103, 2-711–6.

<sup>15</sup> [1988] IsrSC 42(1) 221, translated in (1995) 3 RLR 235.

<sup>16</sup> For example, the steel intended to fulfil the order had arrived at the German company's premises in Hamburg, and the parties had considered treating the steel as delivered at that point, rather than awaiting its arrival in Israel; *ibid* at 253–4, 276–7.

<sup>17</sup> See *ibid*, the judgments of Ben Porath V-P and D Levin J.

<sup>18</sup> [1981] AC 533 at 548 [emphasis added]. This simple example ignores many complexities of this area of law, for discussion of which see e.g. Donovan WM Waters, Mark R Gillen, & Lionel D Smith, eds, *Waters' Law of Trusts in Canada*, 3d ed (Toronto: Carswell, 2005) at 527–8.

*v. Johnson*<sup>19</sup> is illustrative. In April 1909, Johnson contracted to sell Acme 2,000 bushels No. 2 [grade] merchantable wheat for \$1.03 per bushel. Notably, Johnson ‘was not required by his contract to deliver ... any *particular* wheat. Had he delivered [any] wheat of like quantity and quality, he would have complied with the contract.’<sup>20</sup> Then in July, Johnson agreed to sell his wheat harvest to a third party, Liberty Mills, at \$1.16 per bushel. And so upon harvesting at the end of July, Johnson failed to deliver any wheat to Acme. The Court of Appeals of Kentucky held that Johnson did not have to disgorge the thirteen cent per bushel profit from his sale to Liberty.

*Asamera Oil v Sea Oil and General*<sup>21</sup> reaches the same result with respect to indeterminate instances of a type of *incorporeal* thing. There the promisor breached his contractual obligation to return 125,000 shares in the Asamera Oil Corporation to the promisee and instead disposed of his shares to third parties. The Supreme Court of Canada considered at length whether the promisor was obliged to return any particular 125,000 shares ‘*in specie*,’ and concluded that there was no such obligation: the return of any Asamera shares would do, so long as they were 125,000 in number.<sup>22</sup> The promisee could not obtain disgorgement of profits that the promisor made on the shares he disposed of to third parties.<sup>23</sup>

Accordingly, there is a contrast between a right to a *particular* thing, where disgorgement is available, and a right to one or some indeterminate *instances of a type* of thing, where it is not. This contrast has led some to suspect that it is the ‘particularity’ or ‘uniqueness’ or ‘specificity’ or ‘fine-grained’-ness of a plaintiff’s right that makes disgorgement appropriate.<sup>24</sup> But what about a contract that concerns, not just one or some instances of a type of thing, but *all* instances of that type? Here, what the promisee acquires cannot easily be called ‘particular,’ ‘unique,’ ‘specific,’ or ‘fine-grained.’ Yet the case law shows that, in this situation, the plaintiff may obtain disgorgement.

In *Webb v Dipenta*, for example, a contract gave the promisee the right to ‘whatever interest [the promisor] may have in’<sup>25</sup> an estate in Nova Scotia, the Monastery of Petit Clairveaux. Thus, the promisee acquired a right to any or all instances of a type of thing – any interest the promisor held in the monastery. In breach of the parties’ contract, the promisor, instead of conveying the part interest he held in the monastery to the promisee, sold it to a *bona fide* third party. The Supreme Court of Canada awarded disgorgement of the profits from the sale.

An equivalent result obtains in certain agency contracts. Where parties agree that the promisor agent will obtain any or all instances of a type of thing for the

<sup>19</sup> 133 SW 784 (1911).

<sup>20</sup> Ibid at 785–6 [emphasis added].

<sup>21</sup> [1979] 1 SCR 633.

<sup>22</sup> Ibid at 642–4.

<sup>23</sup> Ibid at 672–3.

<sup>24</sup> Benson, ‘Disgorgement,’ *supra* note 10 at 326–30; Andrew Botterell, ‘Contractual Performance, Corrective Justice, and Disgorgement for Breach of Contract’ (2010) 16 Legal Theory 135 at 149–54.

<sup>25</sup> [1925] SCR 565 at 567, 572 (awarding ‘*cy-près* specific performance’).

promisee principal and the agent purports to acquire an instance for himself, profits obtained thereby will be held on constructive trust for the principal. For example, in *Berenson v Nirenstein*,<sup>26</sup> where a promisor agent agreed to acquire all of the shares in a company for the promisee but instead acquired some shares for himself, he was said to hold those shares and their proceeds on trust for the promisee.

Indeed, a contract to acquire all things of a given type may be regarded as conceptually equivalent to a sort of express disgorgement clause in which the promisor agrees to acquire or deal with all instances of a certain type of thing only for the account of the promisee. For example, in *Reid-Newfoundland Company v Anglo-American Telegraph* the promisor, who had access to a transatlantic telegraph wire, agreed ‘not to pass or transmit any commercial messages over the said special wire except for the benefit and account of the promisee.’<sup>27</sup> The Privy Council held the promisee liable as a trustee to the promisor for the profits it made by wiring commercial messages.

## 2. *The logical scope of a right*

Thus, disgorgement is available where the plaintiff has a right to a particular thing. It is also available where the plaintiff’s right concerns a type of thing but extends over all instances of that type. Call this kind of right ‘exhaustive.’ Disgorgement is not available, however, where the plaintiff’s right is neither particular nor exhaustive: where the right concerns merely one or some indeterminate instances of a type.

Why is disgorgement available where the plaintiff’s right is particular or exhaustive, but not where it is neither? The answer is that only where the right is particular or exhaustive can one establish that the plaintiff’s right and the defendant’s profitable action coincide. They coincide where the plaintiff has a right a particular thing and the defendant profits by dealing with *that* particular thing. They also coincide where the plaintiff has a right to *all* instances of a type of thing and the defendant profits by dealing with an instance of the type. In these situations, disgorgement may be available because one can establish that the defendant’s profitable action is contrary to the plaintiff’s rights.

On the other hand, where the plaintiff’s right is neither particular nor exhaustive, it is impossible to establish that the right and the defendant’s profitable action coincide. This is the case where the plaintiff has a right to an indeterminate instance (or multiple such instances) of a type of thing, and the defendant profits by dealing with an instance of that type of thing. Here one cannot say that the defendant profited by dealing with *the very thing* that belongs to the plaintiff. The defendant can always protest that he has profited by dealing with another instance of the same type of thing, over which the plaintiff has no right.

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<sup>26</sup> 93 NE (2d) 610 (Mass 1950).

<sup>27</sup> [1912] AC 555 at 558 (appeal from Canada). This contract could be characterized as conferring a right to an act, rather than a thing. It does not ultimately matter, as discussed below.

In order to forestall a potential confusion it is worth recalling, at this point, the distinction made earlier between a profitable action of the defendant's that is *inherently* wrongful and one that is *not* inherently wrongful but that nevertheless causes a wrongful impact upon the plaintiff. Where the plaintiff has a contractual right against the defendant that is neither particular nor exhaustive (such as a right to an indeterminate instance of a type of thing), it may be possible to say that the defendant's profitable action was a cause of a breach of the plaintiff's rights, but it will not be possible to say that the profitable action was itself a breach of the plaintiff's rights – that it was *inherently* wrongful. Hence disgorgement is unavailable.

For example, in *Acme Mills v Johnson*, the plaintiff had a right that was neither particular nor exhaustive: a right to some indeterminate instances of a type of thing, bushels of wheat. Near the time for performance, the defendant sold all of his wheat to a third party. Suppose that this profitable action rendered the defendant unable to supply any wheat to the plaintiff. On that supposition, the defendant's sale of his wheat to the third party caused him to breach the plaintiff's contractual right (to receive some wheat from the defendant). However, the defendant's profitable action – selling his wheat to a third party – was not *inherently* wrongful. The plaintiff had no claim over any of the particular bushels that were sold, so the sale of those bushels was not, in itself, contrary to the plaintiff's rights.

The variant descriptions of contractual rights as particular, exhaustive, or neither, which affect whether it is possible to establish that the defendant's profitable action is contrary to the plaintiff's right, are variations in what may be called a right's 'logical scope.' Consider the classic logical syllogism: 'All men are mortal; Socrates is a man; therefore Socrates is mortal.' For the conclusion of the syllogism to follow from its two premises, the premises must coincide. For that to occur, one of the relevant terms must be particular or exhaustive. The conclusion that 'Socrates is mortal' follows from the premises because the relevant term in the first premise is exhaustive: 'all men.' No valid conclusion would follow if that term were neither particular nor exhaustive. For example, no conclusion would follow from 'Some men are mortal; Socrates is a man ...'<sup>28</sup> Likewise, in the disgorgement inquiry, one can establish that the plaintiff's right and the defendant's profitable action coincide only if the plaintiff's right has the appropriate logical scope. It must be particular or exhaustive.<sup>29</sup>

The variation in the logical scope of contract rights explains why contractual disgorgement is 'exceptional' – available only in limited circumstances. It also

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<sup>28</sup> This point can also be made in modern logical terminology by invoking quantification theory or the 'type/token' distinction. See Gottlob Frege, 'Begriffsschrift' in Jean van Heijenoort, ed, *From Frege to Gödel: A Source Book on Mathematical Logic*, translated by Stefan Bauer-Mengelberg (Cambridge, MA: Harvard, 1967) at §§ 11–2; Charles S Peirce, 'Prolegomena to an Apology for Pragmatism' (1906) 16 *Monist* 492 at 505–6.

<sup>29</sup> The logical scope of *the defendant's wrongful action* may also be important in some cases (e.g. a sales 'ex-bulk' case as discussed in note 12). But usually it can be left implicit in the analysis so long as the scope of the plaintiff's right is correctly established.

explains why it is more difficult to understand the courts' decisions about disgorgement in the contractual context, as compared to other areas of law such as property. In a typical case of trespass or conversion of property, disgorgement is awarded unproblematically because the property right in question is *particular*. For example, the right is to a particular corporeality, such as a cave segment. One can therefore say that the defendant's profitable action is a dealing with *that* particular thing of the plaintiff's. Rights concerning *types* of thing are also less problematic outside of contract law because they are often exhaustive. A patent, for example, confers a right over every instance of the invention; hence disgorgement is logically unproblematic there also.<sup>30</sup>

Contrast the situation in contract, where the parties can create any right they choose. Here the logical scope of contractual rights varies. For example, a contract may describe the promisee's right by reference to a particular thing, corporeal or incorporeal (this steel or that share). Alternatively, the contract may refer to a generic type of thing, in which case the right may be either exhaustive (all steel, all shares), or non-exhaustive (some steel or shares). As a result, in contractual cases it is much more difficult to apply the basic principle that disgorgement is available only to the extent that the defendant's profitable action is wrongful. Furthermore, this difficulty is exacerbated when we consider contracts that create rights, not to things, but to *acts*.

### 3. *Right to an act*

To understand disgorgement in cases of contracts concerning the performance of actions, it is necessary to distinguish a positive covenant from a negative covenant. Commentators have noticed that courts treat these two sorts of contract differently in disgorgement cases and have been puzzled as to why.<sup>31</sup> The answer lies in the logical scope of the rights that these contracts create.

#### a. *Negative covenant*

In a negative covenant, the promisor contracts *not* to do some act. Here courts may award disgorgement where the promisor profits by performing the prohibited act. This is illustrated by the House of Lords' decision in *Attorney General v Blake* and a remarkably similar case of the United States Supreme Court, *Snepp v United States*.<sup>32</sup> Both cases involved secret service agents who published information

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<sup>30</sup> On the type/token distinction in the intellectual property context, see Laura Biron, 'Two Challenges to the Idea of Intellectual Property' (2010) 93 Monist 382. Note that disgorgement for patent infringement has been abolished by statute in the United States; see *Aro Mfg v Convertible Top Replacement*, 377 US 476 at 505–7 (1964). Also, some patent rights may be better described as rights over acts rather than things, as to which, see the next section.

<sup>31</sup> Andrew Burrows, *Remedies for Torts and Breach of Contract*, 3rd ed (Oxford: OUP, 2004) at 400; Katy Barnett, *Accounting for Profit for Breach of Contract* (Oxford: Hart, 2012) at 134.

<sup>32</sup> 444 US 507 (1980); *Blake*, supra note 1. In *Blake*, a *dictum* of Lord Nicholls suggests that the proposition that disgorgement should be available 'where the defendant has obtained his profit by doing the very thing he promised not to do' is 'defined too widely to assist'; *ibid* at 286. From the perspective of the analysis in this article, the proposition is ambiguous, but on the most natural interpretation, it is indeed defined too widely, if 'by' is taken to allow merely a relationship of causation between the contractual

about their careers in violation of negative covenants prohibiting disclosure of this sort of information. Both agents were ordered to disgorge the profit from their publications.

*Cincinnati Siemens-Lungren Gas Illuminating v Western Siemens-Lungren*<sup>33</sup> illustrates the same principle in a different context. A promisor agreed that it would not sell gas lamps in certain counties in Ohio. In breach of that negative covenant, the promisor sold lamps in those counties. The US Supreme Court held that the promisee was entitled to disgorgement of the profits the promisor made from its wrongful sales.

Two English cases involving resale price maintenance agreements confirm the same principle. In *Esso Petroleum v Niad Limited*,<sup>34</sup> a fuel retailer breached an agreement with the wholesaler not to resell fuel at prices other than those the wholesaler set. The retailer had to disgorge the profits it made from selling at other prices. In *British Motor Trade Association v Gilbert*,<sup>35</sup> Gilbert bought a Jaguar motor vehicle and promised the association he would not resell it for two years. In breach of that promise, Gilbert sold the car to a third party. The association obtained disgorgement of the profits.

One final case is worth mentioning. Peter Birks famously argued that a foundational case in the law of restitution, *Moses v Macferlan*,<sup>36</sup> must be understood as awarding disgorgement for breach of a negative covenant. The facts are rather baroque. A man named Jacob made out some promissory notes to Moses. Moses then endorsed the notes in favour of Macferlan. At the same time, Macferlan promised Moses, in a separate document, that he would not sue Moses on the notes. (He would recover from Jacob instead.) However, Macferlan reneged on the separate promise and sued Moses on the notes in Chancery. Chancery held Moses liable, ignoring Macferlan's separate promise not to sue because of a strict rule that a separate document cannot be used to raise a defence to liability on an endorsed note. Moses then sued Macferlan in the King's Bench, seeking disgorgement of the money that Macferlan had won in Chancery. In the King's Bench, Lord Mansfield held that the money should be disgorged. As Birks pointed out, because the endorsed notes had been enforced by Chancery, whose order had preclusive effect, Lord Mansfield's refund could be justified only if it was an award of disgorgement of the profits obtained through a breach of the separate promise Macferlan gave to Moses: the negative covenant not to sue on the note.

Why would courts award disgorgement for breach of a negative covenant? An act described in a contract is generally a type: a description of behaviour meeting certain specifications, of which there could potentially be various instantiations.

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breach and the defendant's profit making rather than restricting disgorgement to cases where the defendant's profit making is inherently wrongful.

<sup>33</sup> 152 US 200 (1894).

<sup>34</sup> [2001] All ER (D) 324.

<sup>35</sup> [1951] 2 All ER 641.

<sup>36</sup> (1760), 2 Burr 1005; 97 ER 676; Peter Birks, *Unjust Enrichment*, 2d ed (Oxford: OUP, 2005) at 13–4.



However, in the case of a *negative* covenant of an act, the promisee's right is exhaustive with respect to all instances of the type of act in question. The promisee has the right that the promisor not perform *any* instance of the relevant type of act. Therefore, when the promisor performs an instance of the act, it is clear that the promisee's rights and the promisor's profitable action coincide. The profitable action is contrary to the promisee's rights, and disgorgement may be available.<sup>37</sup>

It is worth emphasizing that this analysis does *not* entail that all profits obtained due to a breach of a negative covenant must always be disgorged. The analysis suggests only that disgorgement may in principle be available for breach of a negative covenant. A number of considerations will bear on a court's decision about whether actually to award disgorgement in any particular case. One important consideration will be the extent to which the defendant's profit is due to the employment of his own work or skill or other assets. For this and other reasons, the availability of disgorgement will tend to be very limited, for example, in typical cases that involve the breach of a restrictive covenant prohibiting a party from competing with his former employer or business.

b. *Positive covenant*

What about a positive covenant of an act? Here the House of Lords' decision in the Scottish case of *Teacher v Calder*<sup>38</sup> is instructive. The promisor agreed to invest £15,000 in the promisee's timber business. Instead, he invested the same amount in a distillery. The promisee was unable to recover the profits that the promisor made from the distillery investment.

This result makes sense because, if the promisee's right was that the promisor invest £15,000 in the timber business, the promisor's investment of £15,000 in a distillery was not itself contrary to the promisee's right. Even though that profit-making act may well have caused the promisor to breach his contractual obligation to the promisee.

This illustrates a key feature of most positive promises of acts. The promisee acquires only an indeterminate instance of a type of act. The promisee is not entitled to any particular performance of the act, nor does she have an exhaustive entitlement over all instances of the type of act. So even if the promisor profits by performing an action that is very similar to the act owed the promisee, and even if that profitable action causes a breach of the promisee's right, the profitable action

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<sup>37</sup> Botterell, *supra* note 24 at 149–54, seeks to explain contractual disgorgement (at least for rights that are sufficiently 'specific' or 'fine-grained') by suggesting that the defendant's primary promise to perform gives rise to an implicit, subsidiary negative promise, not to do anything 'incompatible' with performance. Because Botterell's implied promise is negative and therefore exhaustive, this allows him, in a roundabout way, to approximate the correct analysis. Only to approximate, because a profitable action that is *not* inherently wrongful but merely a cause of a contractual breach may be 'incompatible' with performance and so on Botterell's view would give rise to disgorgement.

<sup>38</sup> [1899] AC 451.

is not itself contrary to the promisee's right.<sup>39</sup> Thus, where there is a positive promise of an act, the promisor may do almost anything and profit thereby, while maintaining that his profit arose from an action of his own over which the promisee has no claim.

There is, however, an exception to this rule. Sometimes, where a contract initially creates a right to an indeterminate instance of a type of act, the parties' subsequent conduct may render that right particular because a particular act is tendered as the contractual performance. (Just as, in the sale of goods context, an initial agreement to sell indeterminate instances of a type of good may, by the parties' subsequent conduct, be determined toward particular goods.)<sup>40</sup>

The so-called 'skipped performance' cases are illustrative here. These cases generally involve a positive promise of an act. (Or, equivalently, the promise of an indeterminate instance of a type of thing.) The defendant then 'profits' by saving money, by providing a defective version of the required action that is less costly to supply. (Or, equivalently, by providing a defective instance of the required thing.) For example, in *City of New Orleans v Firemen's Charitable Association*,<sup>41</sup> the defendant association saved money by skimping on the provision of firefighting services and equipment that it was contractually obliged to provide for the city.

The case law on whether disgorgement is available in skipped performance cases is equivocal.<sup>42</sup> The framework for understanding disgorgement developed in this article explains why: these are difficult cases. Disgorgement may in principle be available because, where the defendant undertakes an action that is tendered as *the* purported performance, the plaintiff's formerly indeterminate right to an instance of a type of act may be rendered particular, becoming a right to *this* particular performance that has been tendered. For example, in *City of New Orleans*, the defendant's provision of certain firefighting services over the course of the contract period was a particular performance. However, one must then ask whether the defendant's profitable action is best described as 'profiting through the provision of defective performance itself.' Only if this is the appropriate description can disgorgement be awarded. The defendant's profitable action cannot merely be 'profiting through an action that caused, or was enabled by, the provision of defective performance.' In any given case, it may of course be very difficult to ascertain which description of the defendant's profitable action is most appropriate. Here the parties' manifested intentions will be relevant. (Just as they

<sup>39</sup> See also *Hickey & Co v Roches Stores (Dublin) (No 1)*, reported in (1995) 3 RLR 196, declining a gain-based award where Roches breached its obligation to provide space in its department store for sale of Hickey's fashion fabrics and profited by selling other fabrics; *Occidental Worldwide Investment v Skibs A/S Avanti (The 'Siboen' and the 'Sibotre')*, [1976] 1 Lloyd's Rep 293 and *AB v CD (The 'Sine Nomine')*, [2002] 1 Lloyd's Rep 805, both cases declining disgorgement where the promisee chartered a ship, acquiring permission to use it for a certain period, and the promisor ship-owner wrongfully withdrew the ship and profited by chartering it to others.

<sup>40</sup> See note 12.

<sup>41</sup> 9 So 486 (La 1891).

<sup>42</sup> E.g. *ibid*; *Castille v 3-D Chems* 520 So (2d) 1005 (La Ct App 1983); *Samson & Samson v Proctor*, [1975] 1 NZLR 655 at 656.

are relevant to determining the best description of the plaintiff's rights under the contract.)

### III. CONTRAST THE TRADITIONAL ACCOUNT

This article is not the first to approach the puzzle of contractual disgorgement by analogizing disgorgement for breach of property rights. However, others who have taken this approach have reached quite different conclusions. The present part contrasts the 'new account' of disgorgement developed in the present article with a prominent account in the existing literature, which may be called the 'traditional account.' The contrast highlights the advantages of the new account and reveals some of its implications for the theory of private law more broadly.

#### A. THE TRADITIONAL ACCOUNT

The 'traditional' explanation for disgorgement in the proprietary context is succinctly stated by Ernest Weinrib:

Because property rights give proprietors the exclusive right to deal with the thing owned, including the right to profit from such dealings, any gains resulting from the misappropriation of property are necessarily subject to restitution. Gains from dealings in property are as much within the entitlement of the proprietor as the property itself.<sup>43</sup>

A similar account of proprietary disgorgement appears in the contemporary scholarship of Daniel Friedmann<sup>44</sup> and Sirko Harder<sup>45</sup> among others.<sup>46</sup> However, the intellectual origins of this account are much older. The same sort of account is evident, for example, in Pufendorf's explanation for proprietary disgorgement:

[A] thing, dominion over which I have lost neither by my consent nor by my misdeed ... still belongs to me, as does whatever comes of it. Therefore, when it has fallen into the hands of another, and he has profited by its consumption ... he can on no excuse retain the profit which he has made, when I demand it,

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<sup>43</sup> Weinrib, *supra* note 10 at 125; see also *ibid* at 96, 159–60, 162–3. Sometimes Weinrib describes the proprietor as having a right to the thing's 'value'; e.g. *ibid* at 130–1.

<sup>44</sup> Daniel Friedmann, 'Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong' (1980) 80 *Colum L Rev* 504. Friedmann also advocates awarding disgorgement on other grounds, such as to deter wrongdoing.

<sup>45</sup> Sirko Harder, *Measuring Damages in the Law of Obligations* (Oxford: Hart, 2010) chs 12–13.

<sup>46</sup> Such as the civilian scholarship of Ernst von Caemmerer, upon which some common law commentators draw. See Friedmann, *supra* note 44 at 506; Weinrib, *supra* note 10 at 119 n 5.

since that is a part, as it were, or the fruit still remaining, of a thing that belongs to me.<sup>47</sup>

Here the plaintiff is understood to have a right to a ‘thing,’ and also its ‘fruits’ – the uses or profits or value that can be derived from the thing. Therefore, when the defendant misappropriates or wrongfully exploits the thing, in a way that produces some gain, that gain must be returned to the plaintiff, in order to restore what is rightfully hers. This is the essence of the traditional account.

To illustrate, consider the application of the traditional account to the *Kentucky Cave* case, where the defendant had to disgorge the gains resulting from the use of the plaintiff’s segment of the Great Onyx Cave.<sup>48</sup> The traditional account would interpret this as follows. The *Kentucky* plaintiff had a property right over a certain ‘thing’: a segment of the cave. This kind of right, the traditional account supposes, entails an entitlement to the ‘fruits’ of the thing – to the uses or profits or value that it may yield. Therefore, when the defendant in the *Kentucky* case profited from an unauthorized use of the plaintiff’s thing, by showing tourists through the plaintiff’s cave segment, the profits had to be returned to the plaintiff through a disgorgement award.

Now consider how the traditional account applies to disgorgement in the contractual context. In principle this is fairly simple, although complexities will of course arise in application to particular cases. On the traditional approach, disgorgement can be available for breach of contract only if the contract confers on the plaintiff a certain thing, including its fruits.<sup>49</sup> That is to say, the right that the contract confers on the plaintiff must be sufficiently akin to the paradigmatic sort of property right that, the traditional account supposes, the plaintiff has in a proprietary disgorgement case such as *Kentucky Cave*.

The traditional account is accordingly capable of explaining some cases of disgorgement for breach of contract. It can explain disgorgement where a contract confers a right to a particular corporeal thing, such as real estate or ascertained goods; or a right to a particular incorporeal thing, such as a certain share in a corporation. In those cases, the traditional account can say that the plaintiff has right to a thing and its fruits; that the defendant has profited through a wrongful use of the thing; and so the profits should be returned to the plaintiff.<sup>50</sup>

However, the traditional account is unable – at least without significant conceptual strain – to recognize the availability of disgorgement in other kinds of

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<sup>47</sup> *De Jure Naturae et Gentium*, 1688 ed, trans C H Oldfather & W A Oldfather (1934) at IV.XIII.6. See also Allan Beever, *Forgotten Justice* (2013) at 147-8.

<sup>48</sup> Cf Weinrib, *supra* note 10 at 131.

<sup>49</sup> See *ibid* at 159–60, 162–3.

<sup>50</sup> Although Weinrib proceeds to deny that disgorgement can ever be awarded for breach of contract because he contends, based on his reading of Kant’s legal philosophy, that a contract can never confer a right to a thing (even, it seems, a right to a thing that holds only between the contracting parties); *ibid* at 152–4, 163. This further Kantian argument is separable from the traditional account of disgorgement and is not examined here.

case. Most notably, the account is unable to explain awards of disgorgement for breaches of contracts that concern, not things, but the performance of actions.<sup>51</sup> This is a point to which we shall return.

## B. THE NEW ACCOUNT'S ADVANTAGES AND IMPLICATIONS

The key difference between the traditional and new accounts is that only the former requires that the disgorgement plaintiff have a right to a thing and its fruits. The traditional account regards those features, which it supposes are present in the proprietary context, as essential for the availability of disgorgement wherever the remedy appears in private law. By contrast, the new account regards these features as inessential – both in proprietary and in contractual cases. Recall that, on the new account, disgorgement is available just where the descriptions of the defendant's profitable action and of the plaintiff's rights coincide; the requisite coincidence may occur so long as the plaintiff's rights have the appropriate logical scope.

The new account's rejection of the requirement that the plaintiff has a right to a thing and its fruits are the source of its advantages over the traditional account and of its broader significance for private law theory. To see this, let us once more reconsider disgorgement in the proprietary context, before returning to the contractual context.

### 1. *The proprietary context*

Even in the relatively straightforward proprietary context, a serious difficulty arises for the traditional account. The account assumes that the disgorgement plaintiff must have some sort of initial right to the fruits of a thing owned. However, it is doubtful that someone who holds a property right over some thing thereby has a right to its fruits.

The plaintiff in *Kentucky Cave*, for example, surely had no pre-existing right to show tourists through any portion of the cave, let alone to profit by doing so. Indeed, since the cave's only entrance was on the defendant's land, showing tourists through the cave would not have been possible for the plaintiff acting alone. Nor did the plaintiff have any right to profit by having *the defendant* show tourists through the cave. All that the *Kentucky* plaintiff had, prior to the defendant's wrongful conduct, was a right to a certain segment of the cave, in the condition it was currently in – with no tourists.

That there is generally no right to the fruits that one's property may yield is confirmed by the fundamental principle of private law excluding liability for 'pure economic loss.'<sup>52</sup> If, for example, I own a store in a business district, you can, without wronging me, build a more attractive store next door, thereby taking all of

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<sup>51</sup> Ibid at 163–6.

<sup>52</sup> *Robins Dry Dock & Repair v Flint* 275 US 303 (1927); *Murphy v Brentwood District Council*, [1991] 1 AC 398; Peter Benson, 'The Basis for Excluding Liability for Economic Loss in Tort Law' in David G Owen, ed, *The Philosophical Foundations of Tort Law* (Oxford: OUP, 1995).

my customers and depriving me of the use, profit, or value that I hoped to derive from my property.

In this respect, then, the new account has an advantage over the traditional account because its explanation of disgorgement in a proprietary case such as *Kentucky Cave* does not incorporate the assumption that the plaintiff has an initial right to the fruits her property may yield. While the comparison of the two accounts could stop there, it is worth proceeding to consider why each account adopts such different assumptions about the character of the plaintiff's initial rights. The answer is that each account presupposes a different understanding of the relationship between the plaintiff's rights and the disgorgement remedy.

The traditional account presupposes a purely 'rights-based' understanding of the disgorgement remedy. According to this view, the point of a private law remedy such as disgorgement is to vindicate the plaintiff's rights, which the defendant has somehow injured or usurped.<sup>53</sup> On this view, then, the remedy must *reinstate* a right that the plaintiff enjoyed prior to the defendant's wrongful conduct.

If the point of disgorgement is to reinstate the plaintiff's initial rights, then the remedy is appropriate only where it returns to the plaintiff profits to which she initially had some sort of right. Accordingly, the plaintiff who receives a proprietary disgorgement award must be supposed to have had an initial right to the fruits that her property might yield. Then, disgorgement can be understood as merely returning something that continues to belong to the plaintiff despite the defendant's attempted misappropriation. By contrast, if the plaintiff had no initial right to the fruits of her property, disgorgement would seem to make no sense on this view. Rather than reinstating the plaintiff's rights, the remedy would give her something she never had before.

Thus, it is because proponents of the traditional account presuppose a purely rights-based understanding of the disgorgement remedy that they must posit the existence of a dubious private law right, to the fruits of one's property. The only alternative, for those who endorse the rights-based understanding, is to deny that disgorgement is appropriate in a case such as *Kentucky Cave*.<sup>54</sup>

How does the new account of disgorgement avoid this dilemma? The account does not assume that a plaintiff has an initial right to the future fruits of her property. The account accepts that the *Kentucky* plaintiff's initial right, for example, was merely a right to the relevant segment of the cave in the condition it was initially in, with no tourists. Nevertheless, the new account maintains that disgorgement may be available. The account can do so because it presupposes a different understanding of the relationship between the plaintiff's rights and the disgorgement remedy. Or more precisely, a different understanding of the relationship among the plaintiff's rights, the defendant's *wrong*, and the

<sup>53</sup> See Weinrib, *supra* note 10 at 91–6. Of course, on this view the law often provides a monetary equivalent for the plaintiff's rights rather than a reinstatement *in specie*.

<sup>54</sup> Hence Robert Stevens suggests that *Kentucky Cave* was wrongly decided; *Torts and Rights* (Oxford: OUP, 2007) at 83–4.

disgorgement remedy. By way of contrast to a purely rights-based understanding, this might be called a ‘wrongs-based’ understanding of disgorgement.

On a wrongs-based understanding, a private law remedy may serve to annul the defendant’s wrong, without reinstating any pre-existing right of the plaintiff’s. So in the *Kentucky Cave* case, for example, the disgorgement award can be understood as annulling the defendant’s wrongful action (the use of the plaintiff’s cave segment), by awarding the plaintiff the profits that action produced – even though the plaintiff had no right whatsoever to make those profits prior to the defendant’s wrong.<sup>55</sup>

On a purely rights-based understanding, the plaintiff’s initial rights are effectively sufficient to explain the disgorgement award, which merely reinstates those rights. The wrongs-based understanding concedes the importance of the plaintiff’s rights in the explanation for disgorgement, but denies that they are sufficient to explain the award. The plaintiff’s initial rights remain important because they must be carefully specified in order to establish that the defendant’s profitable action is contrary to those rights, *i.e.*, wrongful. However, viewing the plaintiff’s rights as sufficient to explain disgorgement elides the crucial role that is played in the explanation by the defendant’s wrongful action. The disgorgement award is a response to that wrongful action, rather than a mere reinstatement of the plaintiff’s initial rights.

Just as a variety of particular theories of remedies may fall within the general category of ‘rights-based’ understandings, so it would be possible to develop a variety of particular ‘wrongs-based’ remedial theories. This is not the place to develop and defend fully any particular theory. For present purposes, the key point is merely that, if the new account of disgorgement is correct, then at least some awards of this remedy must be understood as wrongs-based rather than rights-based. That in itself is sufficient to show the inadequacy of a purely rights-based understanding of disgorgement, of the kind assumed by the traditional account. Nevertheless, before moving on, a very cursory sketch of a particular wrongs-based theory will now be outlined, in order to show what this might look like and to suggest that it is at least potentially plausible.<sup>56</sup>

One can understand certain judicial remedies as ways of annulling the defendant’s wrong, by bringing about its inverse. What is the inverse of the defendant’s wrong against the plaintiff? It is the plaintiff’s recovery, from the

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<sup>55</sup> The distinction between wrongs-based and rights-based approaches here echoes debates among Commonwealth restitution scholars about the distinction between so-called ‘autonomous’ unjust enrichment (or enrichment ‘by subtraction’) and ‘parasitic’ unjust enrichment (or restitution ‘for wrongs’); see Harder, *supra* note 45 at 177–8. But the present article seeks to avoid that ‘minefield of conceptual and terminological controversies.’ *Ibid* at 177.

<sup>56</sup> A full development of this account would require, among other things, consideration of current theoretical debates about the nature of private law remedies. See Weinrib, *supra* note 10 at ch 3; Benson, ‘Disgorgement,’ *supra* note 10; Ripstein, *supra* note 10; John Gardner, ‘What Is Tort Law For? Part 1’ (2011) 30 *Law & Phil* 1; John CP Goldberg & Benjamin C Zipursky, ‘Civil Recourse Revisited’ (2011) 39 *Fla St U L Rev* 341; Stephen A Smith, ‘Breach of Contract: One Remedy or Two?’ in Gregory Klass, George Letsas, & Prince Saprai, eds, *The Philosophical Foundations of Contract Law* (Oxford: OUP, 2014). Thanks to Stephen Smith for pressing the inclusion of a sketch of a theory here.

defendant, of the equivalent of that wrong. Accordingly, a court seeking to annul a wrong must find some way to establish the wrong's equivalent – something of equal value. Usually, a court will try to establish the equivalent in money. And the equivalent of a wrong in money may be established in at least two different ways, which are reflected in 'loss-based' and 'gain-based' money awards, respectively.

'Loss-based' awards are more common. These include the standard damages awards for torts such as negligence and nuisance and consequential damages for breach of contract. A loss-based award is assessed by valuing the difference between the situation the plaintiff is in after the defendant has caused some sort of wrongful impact upon her and the situation the plaintiff would have been in had that impact not occurred. Thus, a loss-based award provides the plaintiff with the equivalent of the wrongful impact that the defendant's action has had upon her rights.

The 'gain-based' remedy of disgorgement is less common. It works slightly differently from a loss-based award. The disgorgement award is assessed by ascertaining the realized value of the defendant's wrongful profitable action. The disgorgement award accordingly provides the plaintiff not, as a loss-based award does, the equivalent of a wrongful impact that the defendant's action has had upon her rights, but rather, the equivalent of the defendant's wrongful action itself.

This is why, as we have seen, for disgorgement to be available the defendant's profitable action must be inherently wrongful. It is not enough that the profitable action merely stands in a relationship of causation with some wrongful impact upon the plaintiff's rights. Because only to the extent that the defendant's profitable action is itself wrongful does it make sense for the plaintiff to receive the equivalent of that action as a remedy.<sup>57</sup> The appropriate remedy where the defendant's profitable action is *not* inherently wrongful, but has caused some wrongful impact upon the plaintiff's rights, is a loss-based damages award that provides the plaintiff the equivalent of the wrongful impact.

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<sup>57</sup> The idea that disgorgement annuls the defendant's inherently wrongful action can also be captured by way of metaphor. One can say that the plaintiff, by taking the profits the defendant's action yields, 'ratifies' that action as if it were her own. Once ratified in this way, the action is no longer a wrong against her; cf Benson, 'Disgorgement,' supra note 10 at 320; Ripstein, supra note 10 at 1993. This metaphor has familiar resonances in the history of the common law. It recalls 'two related fictions' historically deployed by the courts, which many now believe 'bedevilled' this area of the law by obscuring judicial reasoning; see Harder, supra note 45 at 188. The first fiction is the notion that to claim disgorgement the plaintiff must waive the defendant's tort – that is, choose to forego a claim that the defendant's action wronged her and instead treat that action as if done for her benefit. The second is the notion that disgorgement is based on an implied promise by the defendant to pay the plaintiff the proceeds of his (otherwise wrongful) action. The new account of disgorgement can account for the historic appeal of these fictions. Indeed, it suggests that they are best understood not as factual fictions but as metaphorical statements of normative reality. They convey the idea that disgorgement, by giving the plaintiff the equivalent of a defendant's wrongful profitable action, annuls its wrongfulness.



## 2. *The contractual context*

The second key difficulty for the traditional account of disgorgement becomes salient in the contractual context. Recall that the traditional account assumes that the plaintiff who receives a disgorgement award must have a right to a thing and its fruits. We have doubted the requirement that the plaintiff have a right to the fruits. The requirement that she have a right to a thing is equally problematic.

The traditional account is correct to notice that disgorgement may be appropriate where the plaintiff has an entitlement to some thing or thing-like asset and the defendant profits by dealing with that thing. Here disgorgement is available because, to use the terminology developed earlier in this article, the plaintiff's rights and the defendant's wrongful profitable action coincide.<sup>58</sup> Indeed, in this situation the coincidence is especially obvious, because the thing functions as a sort of unit of account in the disgorgement analysis, allowing one to see that the plaintiff's rights and the defendant's profit making have the very same locus. The defendant has profited by dealing with *the very thing* that belongs to the plaintiff.

The difficulty with the traditional account is that it goes further and supposes that disgorgement should be available *only* where the plaintiff has a right to a thing. So the remedy should not be available, for example, where the plaintiff has a right merely that an *act* be performed by the defendant. Ernest Weinrib's version of the traditional account is especially lucid in this respect. Weinrib notices that an act does not seem to be capable of functioning as a unit of account in the disgorgement analysis, in the same way that a thing can. Weinrib contends that, where the plaintiff has a right to an act by the defendant, one can never establish that the defendant has profited by dealing with *that very act*.<sup>59</sup> Imagine, for example, that the plaintiff has the right that the defendant personally mow her lawn on Saturday. Now, the defendant may of course profit by performing an act very similar to the act he owes the plaintiff. The defendant's performance of the profit-making act might also cause the defendant to breach his contract with the plaintiff. For example, the defendant might mow somebody else's lawn at the appointed time on Saturday. Nevertheless, one cannot say that the defendant's profitable act is *the very act* that he owes the plaintiff. Weinrib concludes that disgorgement cannot be available.

In this way, the traditional approach insists upon what we may call a 'thing-based' method for establishing the availability of disgorgement. A thing is required to function as a sort of unit of account in the disgorgement analysis. Contrast the new approach to disgorgement outlined in the present article. It adopts a 'logical' method for establishing the remedy's availability. This method is more abstract. It

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<sup>58</sup> However, note that, because the traditional account is 'rights-based' and the new account 'wrongs-based,' the two accounts interpret the coincidence differently. On the traditional account, it amounts to an *identity* between the plaintiff's rights and the defendant's profitable action; Weinrib, *supra* note 10 at 152–4. On the new account, it amounts to a *negation* of the plaintiff's rights by the defendant's profitable action.

<sup>59</sup> *Ibid* at 163–6.

proceeds by ascertaining the logical scope of the plaintiff's rights – asking whether they are particular, exhaustive, or neither – and then considering whether the defendant's profitable action is contrary to those rights. This method allows one to see that disgorgement can be available, not just for the breach of a right to a thing, but also for the breach of a right to an act – so long as the right in question has the appropriate logical scope.

The logical method suggests that Weinrib mislocates the real source of the difficulty that he notices about awarding disgorgement for the breach of a right concerning an act. The difficulty arises, not because the sort of right Weinrib considers is a right to an act, but because it is a positive covenant of an act. The plaintiff who contracts that the defendant must mow her lawn on Saturday, for example, has entered a positive covenant, and so she has acquired a right merely to an indeterminate instance of the type of act in question. Her right is neither particular nor exhaustive. Therefore, even if the defendant subsequently profits by performing an instance of the relevant type of act, one cannot say that the profitable action is itself contrary to the plaintiff's rights. The situation is different, however, where the parties enter another sort of contract concerning an act: a negative covenant. Say that the defendant contracts that he will *not* mow the plaintiff's lawn. Here the plaintiff acquires an exhaustive right that the defendant not perform any instance of the type of act in question. Now, if the defendant profits by performing an instance of that type of act – mowing the lawn – one can say that the defendant's profitable action is contrary to the plaintiff's rights and so disgorgement is available.

The logical method for establishing the wrongfulness of the defendant's profitable action shows that it is ultimately irrelevant whether the plaintiff's right is described as to a thing or to an act, so long as the description used captures the logical scope of the plaintiff's right. This also allows one to explain all of the contractual disgorgement case law that the traditional account cannot, such as the negative covenant cases and the 'skipped performance' cases, in which disgorgement is awarded for breach of a contract concerning the performance of an act and there is no thing on the scene. Furthermore, the new account provides a unified explanation of disgorgement across all kinds of contractual and proprietary rights.

One final point. Some versions of the traditional account, notably those of Daniel Friedmann and Sirko Harder,<sup>60</sup> incorporate an additional feature. These versions maintain that disgorgement should be awarded only where the plaintiff has an exclusive entitlement, rather than a non-exclusive entitlement. It is not possible to engage here with the impressive detail of Friedmann and Harder's scholarship. However, a few remarks should indicate why the addition of an exclusivity requirement is unhelpful.

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<sup>60</sup> See Friedmann, *supra* notes 44; Harder, *supra* note 45.

An exclusivity requirement could be interpreted in at least two different ways.<sup>61</sup> First, ‘exclusivity’ could mean that the plaintiff’s entitlement must be exclusive *as between her and the defendant*. That is, the plaintiff must be able to exclude the defendant from interfering with her entitlement. In this sense of exclusivity, however, *all* private law rights or entitlements are exclusive. If the plaintiff were unable to exclude the defendant from interfering with what belonged to her, she would have no right or entitlement (as against the defendant) at all.<sup>62</sup>

Second, ‘exclusivity’ might refer, not to the relationship between the plaintiff and the defendant, but to relationships between, on the one hand, either the plaintiff or the defendant and, on the other, third persons. Perhaps, for example, ‘exclusivity’ means that the plaintiff must be able to exclude *all* persons, and not just the defendant, from interfering with her entitlement. Or perhaps ‘exclusivity’ means that only the plaintiff, and not other persons, has powers over the asset in question. The difficulty with this sense of exclusivity is that, when considering the liability of the defendant to the plaintiff, it should surely be irrelevant what sorts of relations might hold as between either of those parties and *other* persons.<sup>63</sup>

In any event, even assuming that a given right is exclusive in the relevant sense, one must examine the right’s logical scope in order to ensure that disgorgement can be awarded. For example, imagine that the plaintiff has a right that the defendant perform an indeterminate instance of a type of action. We can assume that this right is exclusive in the relevant sense. (Perhaps the plaintiff is the only person in the world who has this right, and perhaps she can exclude the defendant and all other persons from interfering with it.) Nevertheless, because the plaintiff’s right is merely to an indeterminate instance of the type of act – the right is neither particular nor exhaustive – then if the defendant profits by performing an instance of the type of act, one cannot say that the defendant’s profitable action is itself wrongful.

#### IV. CONCLUSION

The present article has sought to develop a new understanding of at least some awards of disgorgement that transcends the distinction between property and contract.

When a court awards disgorgement, it gives the plaintiff the realized value of the defendant’s profitable action. Such an award is appropriate only to the extent that the defendant’s profitable action is wrongful. The disgorgement award serves to annul the action’s wrongfulness.

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<sup>61</sup> Hence Harder, *supra* note 45, distinguishes exclusive entitlements ‘*inter partes*’ and ‘*erga omnes*.’

<sup>62</sup> Friedmann’s examples of non-exclusive entitlements, *supra* note 44 at 512, all seem to be exclusive as against some persons. Consider, for instance, the entitlement to a business opportunity of the kind that the trustees wrongfully acquired in *Boardman v Phipps*, [1967] 2 AC 46. Whatever sort of entitlement the beneficiaries had here, it was surely exclusive at least as against the trustees.

<sup>63</sup> Harder, *supra* note 45 at 226.

This is a ‘wrongs-based,’ rather than a purely ‘rights-based,’ understanding of disgorgement. Accordingly, the disgorgement remedy need not reinstate any pre-existing right that the plaintiff held prior to the defendant’s wrongful action. So the plaintiff who receives disgorgement of profits need not have had any pre-existing right to undertake the profit making herself – such as some sort of right to the fruits that her property might yield.

All of this amounts to a subtly but crucially different interpretation – as compared to the traditional account of disgorgement – of at least some instances of a relatively old private law remedy: disgorgement for a breach of *property* rights committed through trespass or conversion.

In order to ascertain whether a defendant’s profitable action is wrongful, one must describe that action, on the one hand, and the plaintiff’s rights, on the other, and check whether the two descriptions coincide. Only if they do is the defendant’s profitable action contrary to the plaintiff’s rights – that is, wrongful. Moreover, in describing the plaintiff’s rights, one must attend to their ‘logical scope’ because this affects whether one can say that the plaintiff’s rights and the defendant’s profitable action coincide.

This is a ‘logical,’ rather than a ‘thing-based,’ method for establishing the availability of the disgorgement remedy. Accordingly, it is not necessary for disgorgement – contrary to what the traditional account supposes – that the defendant have dealt with some thing that the plaintiff owns.

Once one attends to the possibility of variation in the logical scope of the plaintiff’s rights, one can explain the case law from around the common law world concerning a relatively newly recognized private law remedy: disgorgement for breach of *contract*.

The new account of disgorgement proposed in the present article reveals that, in the emerging body of cases awarding or denying disgorgement for breach of contract, courts are maintaining an approach that has all along been implicit in their resolution of at least some cases of proprietary disgorgement. The understanding of contractual disgorgement that we seek already exists, in a sense, in the common law itself.