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RECONSIDERING DISGORGEMENT FOR WRONGS

Sarah Worthington*

1. Introduction

Nobody should be permitted to profit by wrongdoing: this sentiment has compelling intuitive appeal. Despite this, profits disgorgement¹ (or stripping the defendant of ill-gotten gains) turns out to be a remedy with surprisingly limited application. This may soon change. Both the Law Commission² and the judiciary³ have indicated support for wider recognition of the remedy; so too have academics.⁴ However, few would suggest the remedy ought to be available for all profit-generating wrongs,⁵ and here lies the difficulty. As yet no theory satisfactorily explains which wrongs should give rise to disgorgement and which should not. Sometimes the focus has been on the character of the wrong; at other times it has been on the moral culpability of the wrongdoer. More importantly, and more worryingly, no theory explains when the remedy should strip the defendant of every penny of the ill-gotten gain and when something less—generally ‘expenses saved’ or ‘use value’—should suffice. This article re-assesses existing law and suggests that an alternative analysis may provide some answers.

* I would like to thank Peter Birks, Michael Bryan, Gareth Jones and Ewan McKendrick, and participants at the International Conference on the Law of Restitution, University of Tel Aviv, May 1998, for their thought-provoking comments on an earlier draft of this paper.

¹ ‘Disgorgement’, rather than ‘restitutionary damages’, is used so as to better differentiate between this remedy and the remedy of restitution for subtractive unjust enrichment (‘restitution’): see L. Smith, ‘The Province of the Law of Restitution’ (1992) 71 *Can Bar Rev* 672, 683-94.

² Law Commission Report (No. 247): *Aggravated, Exemplary and Restitutionary Damages* (1997), recommendations 7-9 and Draft Bill, clause 12, suggesting that the common law ought to be allowed to develop unimpeded, but that, in addition, restitutionary damages (their preferred term) ought to be available where the defendant’s wrong (other than a breach of contract) was committed with ‘deliberate and outrageous disregard of the plaintiff’s rights’.

³ *A-G v Blake* [1998] 1 All ER 833, 844-46 (CA), suggesting (obiter and without argument or elaboration) that disgorgement for breach of contract might be appropriate where the breach consisted in doing exactly what the contract expressly prohibited or in delivering shortfall performance.

⁴ See, eg, G. Jones, *Goff & Jones: The Law of Restitution* (London: Sweet & Maxwell, 4th edn, 1993) (‘Goff & Jones’), pp 714-34; P. Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, rev’d edn, 1989) (‘Birks’), p 326-7 (provided the defendant’s breach is cynical); Sir William Goodhart QC, ‘Restitutionary Damages for Breach of Contract’ [1995] RLR 3; P. Jaffey, ‘Restitutionary Damages and Disgorgement’ [1995] RLR 30, 40 and ‘Disgorgement and Confiscation’ [1996] RLR 92, 93, 96; H. McGregor, ‘Restitutionary Damages’ in P. Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (Oxford: Clarendon Press, 1996) ch 9, p 209 (but only if the defendant’s breach is deliberate, cynical and with a view to profit).

⁵ See notes 2-4, above. Goff & Jones, p 721, come close to this, suggesting that the remedy ought to be available whenever the profit could not have been generated ‘but for’ the breach.

Put briefly, this article makes two claims. The first is based on an examination of existing case law. It is that true disgorgement (stripping the defendant of every penny of an ill-gotten gain⁶) is available *only* when the defendant has breached an obligation of ‘good faith or loyalty’.⁷ These obligations form a class which is conceptually distinct from obligations arising in contract, tort or unjust enrichment. Within this class, the disgorgement remedy is independent of the moral culpability of the defendant. Outside this class, disgorgement is not available. It is not an alternative remedial option (even in a limited circumstances) to a claim in tort, contract, or subtractive unjust enrichment. Of course, the same facts may allow a plaintiff to base claims on different causes of action; in this way, one scenario may admit the possibility of both disgorgement and damages claims, for example, but only if claimed as alternative (or perhaps cumulative?) remedies for the breach of distinct obligations.⁸ The second claim is that the law of subtractive unjust enrichment is capable of—and, moreover, is the only⁹ appropriate restitutionary vehicle for—dealing with a defendant’s unauthorised *use* of the plaintiff’s property.¹⁰ In itself this is not a new idea.¹¹ However, its corollary, that the restitutionary remedy must be quantified to reflect the defendant’s enrichment *at the plaintiff’s expense*, has not been rigorously insisted upon. If this is recognised, then the restitutionary remedy is limited to ‘use value’; the claim will not deliver disgorgement. Both of these claims are such that they readily suggest avenues for rational development of the law in the future; this article looks briefly at the possibilities. Before attempting to defend these two claims, it is useful to summarise the existing state of play.

2. ‘Disgorgement for wrongs’ as a parasitic category

⁶ ‘Ill-gotten’ imposes an important limiting qualification: the remedy of disgorgement strips only those gains derived as a result of the proven breach of duty.

⁷ The terminology is not elegant, but it will suffice. As is made clear later, the expression is intended to have a wider compass than fiduciary duties and equitable duties of confidence.

⁸ *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 illustrates this possibility. The plaintiff was the victim when a cheque was fraudulently indorsed to a third party payee. The plaintiff had a claim in subtractive unjust enrichment against the recipient of the proceeds of the cheque *and* a claim in tort against the collecting bank for conversion. The case has been variously interpreted, but it seems to illustrate the potential for alternative *causes of action* on the same facts, rather than the potential for different remedial *responses* to one tort claim. This is all the more evident where, as here, the claims are against different defendants. But cf Birks p 316, although also see p 321.

⁹ The distinction between dependent and independent claims can have significant practical consequences, so it is important that the courts choose the appropriate approach: see E. McKendrick, ‘Restitution and the Misuse of Chattels - The Need for a Principled Approach’ in N. Palmer and E. McKendrick (eds), *Interests in Goods* (London: Lloyds of London Press, 2nd ed, 1998) ch 35, p 914-5.

¹⁰ Of course, the facts may also leave open a claim in contract or tort for expectation or compensatory damages.

¹¹ See J. Beatson, *The Use and Abuse of Unjust Enrichment* (Oxford: Clarendon Press, 1991) ch 8; and D. Friedmann, ‘Restitution for Wrongs: The Basis of Liability’ in W.R. Cornish et al (eds), *Restitution Past, Present and Future* (Oxford: Hart Publishing, 1998) ch 9. However, neither commentator notes the need to limit the remedy. Most other restitution lawyers would categorise these ‘wrongful use’ claims as dependent on the wrong, not as independent claims in subtractive unjust enrichment.

The area of law dealing with ‘disgorgement’¹² has been claimed by restitution lawyers.¹³ Profits disgorgement is seen as a remedy underpinned by the principle against unjust enrichment, but in a way which is analytically distinct from restitution for subtractive unjust enrichment.¹⁴ The distinction is important. The principle against unjust enrichment asserts that a person is not permitted to be unjustly enriched at the expense of another. A claim in subtractive unjust enrichment is an autonomous or independent claim. It depends upon proof that the defendant was (i) enriched (ii) unjustly (iii) at the plaintiff’s expense. Existing case law imposes limitations which must be met in proving each of these factors. In the absence of defences, a defendant is then required to pay over the value of the unjust enrichment to the plaintiff. The remedy is termed ‘restitution’.¹⁵ ‘Disgorgement’, on the other hand, is seen as an alternative remedial response to certain wrongs (and not all wrongs fit the bill). The remedy is thus parasitic or dependent on the wrong. In this parasitic category, the principle against unjust enrichment comes into play because, given a pertinent wrong, the defendant’s ill-gotten gains are seen as made ‘at the expense of the plaintiff’ in the sense of ‘by doing wrong to the plaintiff’. The most important consequence of this dependent or parasitic analysis is that the defendant’s unjust enrichment (or ill-gotten gain) need not correspond to any subtraction from (or loss experienced by) the plaintiff. In this sense the remedy can deliver a windfall to the plaintiff.

At both a theoretical and a practical level there are problems in defending this ‘unjust enrichment principle’ approach to disgorgement. At a theoretical level, if disgorgement of the profits of wrongdoing is to fall within the principle against unjust enrichment, then the fit must be a little forced. It must be accepted that the particular wrongdoing is itself sufficient reason to class the enrichment as unjust *and* as being gained at the plaintiff’s expense. The first is not as difficult as the second.

¹² Also termed ‘restitutionary damages’ or ‘restitution for wrongs’.

¹³ See especially D. Friedmann, ‘Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong’ (1980) 80 *Col LR* 504; R. Sharpe and S.M. Waddams, ‘Damages for Lost Opportunity to Bargain’ (1982) 2 *OJLS* 290; G. Jones, ‘The Recovery of Benefits Gained from a Breach of Contract’ (1983) 99 *LQR* 443; I.M. Jackman, ‘Restitution for Wrongs’ [1989] *CLJ* 302; D. Friedmann, ‘The Efficient Breach Fallacy’ (1989) 18 *J Leg Studies* 1; J. Beatson, *The Use and Abuse of Unjust Enrichment* (1991) ch 8; R. O’Dair, ‘Restitutionary Damages for Breach of Contract and the Theory of Efficient Breach: Some Reflections’ (1993) 46 *CLP* 113; E. McKendrick, ‘Restitution and the Misuse of Chattels - The Need for a Principled Approach’ in N. Palmer and E. McKendrick (eds), *Interests in Goods* (2nd ed, 1998) ch 35; L.D. Smith, ‘Disgorgement of the Profits of Breach of Contract: Property, Contract and “Efficient Breach”’ (1994) 24 *Can Bus LJ* 121; J. Stapleton, ‘A New “Seascape” for Obligations: Reclassification on the Measure of Damages’ in P. Birks (ed), *The Classification of Obligations* (Oxford: Clarendon Press, 1997) ch 8.

¹⁴ Not all commentators adopt this approach, but this describes the majority view.

¹⁵ Or, in full, ‘restitution for subtractive unjust enrichment’.

With the first assertion (*ie* the notion that the particular wrongdoing is itself sufficient reason to class the enrichment as unjust), it is necessary to distinguish carefully between law and morality. Nevertheless, it could certainly be argued that enrichments gained by certain wrongs (or even all wrongs) are unjust and require reversal by law. Decided cases could then be examined to compile a list of the relevant wrongs, just as, in the area of subtractive unjust enrichment, there is a list of ‘unjust factors’. But it is the *justification* for including certain wrongs and excluding others that causes so many difficulties. It is not difficult to see why. The disgorgement remedy, if it is parasitic, supplies an alternative remedial response: with certain wrongs the plaintiff can choose either disgorgement or damages as a remedy. This choice needs compelling justification. It is not a choice between alternative causes of action; it is a choice between alternative remedial strings for the one cause of action. To justify this necessarily involves some rethinking the law of obligations (or certain obligations¹⁶) so that they are recognised as directed not only at preserving the plaintiff from harm,¹⁷ but also at ‘punishing’ the defaulting defendant. The ‘punishment’ is not necessarily economic;¹⁸ rather the disgorgement remedy does—and is intended to—coerce or discipline the defendant into complying with the underlying obligation. Such attempts to compel ‘good’ behaviour¹⁹ may be laudable, but they have not traditionally been seen as the function of obligations in contract or tort. Equitable obligations of good faith and loyalty are different: there the orthodox remedial response is to punish the defendant regardless of harm to the plaintiff; the obligations are seen as compelling the defendant to display more than ‘the morals of the market place’.²⁰

The second assertion, that the enrichment (or the ill-gotten gain) is gained *at the plaintiff’s expense*, creates even more theoretical difficulties. It is simply conclusionary to say that, since the gains are made by doing a wrong to the plaintiff, they are therefore made at the plaintiff’s expense. The statement itself is not intuitively correct. Indeed, if the defendant’s obligation is simply not to cause harm or to meet expectations, then the ‘expense’ suffered by the plaintiff because of a breach is more naturally seen as the financial loss caused by the harm or the unmet expectations, losses which are already remedied in tort and contract. If the ‘at the plaintiff’s expense’ requirement is simply ignored, then all that is left is the (admittedly beguiling) assertion that individuals should not be allowed to profit from their own wrongs. Enforcement of this principle might be seen as a desirable legal objective, but it cannot yet be seen as a general and unqualified rule of the existing law of contract, tort, or even unjust enrichment as that last principle is rigorously defined.

¹⁶ Since it is conceded that not all wrongs require disgorgement.

¹⁷ Intended widely, as harm to the plaintiff’s *status quo*, or harm to the plaintiff’s legitimate expectations.

¹⁸ Especially since the defendant is in no worse a position than if the obligation had not been breached. This is not necessarily the case with expectation or compensatory damages.

¹⁹ Cf O.W. Holmes, ‘The Path of the Law’ (1897) 10 Harvard Law Rev 458.

²⁰ *Meinhard v Salmon* 164 NE 545 (1928), 546 *per* Cardozo CJ.

Even at a practical level, there are problems in defending this ‘parasitic claim’ approach to disgorgement. The judges themselves rarely adopt an overtly restitutionary analysis.²¹ It is therefore left to commentators to decide whether there is a parasitic category of ‘restitution for wrongs’ and, if so, which cases ought to be assigned to it. Confident assertion of the appropriate classification of a particular case is difficult: the quantum of a remedy may be equally consistent with disgorgement, restitution, or either compensatory or expectation damages.²² In fact, if disgorgement is truly parasitic, a plaintiff will invariably be able to claim compensatory or expectation damages as an alternative remedy, and may even be able to claim restitution (based on an alternative and independent cause of action). Often the cases do not make it clear which route is being pursued. Even accounting for this difficulty, it is clear that not all wrongs warrant the remedy of disgorgement. Disgorgement (even if defined widely to include ‘use value’ or ‘expenses saved’, contrary to the terminology adopted in this article) is only available for certain equitable wrongs²³ and perhaps also for some proprietary torts;²⁴ otherwise the remedy is denied.²⁵ Various theories have been advanced to explain and justify the limitations, but none seems to be both consonant with decided cases and sufficiently precise to provide a predictive tool.²⁶ To complicate matters still further, the equitable wrongs appear to require full disgorgement of all ill-gotten gains, while the proprietary torts require only disgorgement of the ‘use value’ of the property to the defendant. In both cases this is regardless of whether the wrongdoing is innocent or cynical. In short, the picture is confused. These practical incidents make confident assertion of the theoretical underpinnings of the area very difficult. With that introduction, it is possible to address the specific issues which are central to this article.

3. Classifying and Reclassifying Proprietary Torts

²¹ Reflecting the fact that the principle against unjust enrichment has only recently received its judicial imprimatur.

²² The terminology becomes unwieldy very quickly. As far as possible, this article uses the terms ‘compensatory damages’ to refer to the normal remedy for commission of a tort, ‘expectation damages’ to refer to the normal remedy for breach of contract (both of these being plaintiff-oriented loss-based remedies), ‘restitution’ to refer to the normal remedy for subtractive unjust enrichment, and ‘disgorgement’ to refer to the remedy requiring payment over of ill-gotten gains. Notably only the last is described without reference to a causative event. Part of the thesis advanced here is that disgorgement is the normal remedy for breach of obligations of loyalty and good faith. Another point merits notice: the first two remedies are inevitably termed ‘damages’, the last two are not. This is significant. The first two are inevitably personal remedies requiring payment of a sum of money. The last two may be remedies ordered in this form, but they may also be proprietary remedies compelling transfer of assets in specie. This issue is taken up later.

²³ Eg breach of fiduciary duties and breach of confidence. The term is used loosely here, but its ambit—in the context of this article—is made clear later.

²⁴ Although this article argues that there is a crucial distinction between ‘use value’ and ‘disgorgement’ remedies.

²⁵ See *Halifax Building Society v Thomas* [1996] 2 WLR 63 (CA), [1995] 4 All ER 673, 680 *per* Peter Gibson LJ; although also note nn 2-3 above. Statutory disgorgement remedies do exist (principally for intellectual property torts), but these remedies are not necessarily motivated by the same imperatives which underpin disgorgement at common law or in equity. It follows that these statutory examples may not illustrate—never mind justify—conclusions concerning a common law practice or policy governing disgorgement. The focus in this article is exclusively on the position at common law (taken to include equity).

²⁶ Notwithstanding that, the ideas advanced here owe much to those analyses; see especially n 13 above.

The argument presented in this section is that the law of subtractive unjust enrichment is capable of—and is, in fact, the only appropriate restitutionary vehicle for—dealing with a defendant’s unauthorised *use* of the plaintiff’s property.²⁷ On this approach, the defendant will make ‘restitution’ by paying over to the plaintiff the ‘use value’ of the misused asset (no more and no less). There are three distinct issues here, although not all are given equal attention. The first is the idea that subtractive unjust enrichment is *capable* of dealing with such claims. This is not new; the detailed arguments have already been put by Beatson (although his conclusions do not match those advanced here).²⁸ Here greater emphasis is given to the corollary to this, that the restitutionary remedy must be quantified to reflect the defendant’s enrichment *at the plaintiff’s expense*. This constraint has somehow been ignored. Its recognition makes it plain that the restitutionary remedy must be limited to ‘use value’; a subtractive unjust enrichment claim will not deliver disgorgement. Finally, there is the idea that the autonomous claim is the *only* restitutionary vehicle in these misuse of property cases; ‘restitution for wrongs’, parasitic on the tort, is not available as an independent option. Admittedly this assertion is impossible to prove affirmatively. However, it does appear to be true that there are no common law misuse of property cases where the only *possible* explanation is a parasitic claim of ‘restitution for wrongs’.²⁹ Where full disgorgement of all ill-gotten gains is ordered, it always seems arguable that the defendant has breached some concurrent equitable obligation owed to the plaintiff.³⁰ Such a breach gives rise to an independent cause of action with the remedy of disgorgement; in this class, disgorgement is not a second remedial string parasitic on a claim which would ordinarily give rise to some alternative remedy.³¹ These equitable obligations are considered in the final section of this article.

²⁷ Of course, non-restitutionary claims are possible based on alternative causes of action.

²⁸ J. Beatson, *The Use and Abuse of Unjust Enrichment* (1991) ch 8. Also see D. Friedmann, ‘Restitution for Wrongs: The Basis of Liability’ in W.R. Cornish et al (eds), *Restitution Past, Present and Future* (1998) ch 9. Both commentators advocate a much wider view than that advanced here: they assert that the independent subtractive unjust enrichment claim is available even when the defendant has ‘invaded’ the plaintiff’s *non*-proprietary interests; moreover, neither commentator notes the need to limit the quantum of the remedy. The more general notion of *alternative* claims for unjust enrichment and for wrongs is widely conceded, but most restitution lawyers would put misuse (as opposed to receipt) of property cases exclusively in the latter category, not seeing the former as capable of dealing with the issue.

²⁹ See J. Beatson, *The Use and Abuse of Unjust Enrichment* (1991) ch 8. But not all would agree; see, eg, P. Birks, ‘Restitution and Wrongs’ (1982) 35 CLP 53, 63-65. However, Birks’ exceptions (apart from conversion—see n 77) are examples which might be alternatively classified as breaches of equitable obligations.

³⁰ For the common law cases on intellectual property torts, this assertion is less overtly secure. Consider passing off. On the arguments advanced here, *if* this tort is regarded as involving the *use* of another’s property (which may be arguable, given the tenor of some judgments), then a claim in subtractive unjust enrichment ought to be possible (and market valuation of the ‘use value’ might deliver an account of profits—see n 58). True disgorgement, on the other hand, would not be a remedial option on the analysis advanced here, at least not until ‘good faith’ (or ‘absence of bad faith’) was regarded as demanded at law. This possibility is considered later. Some passing off cases, in distinguishing between deliberate and innocent infringement, may lend limited support to a ‘good faith’ argument. More detailed consideration of these specific torts is clearly warranted, but is beyond the scope of this article.

³¹ Contrast this with claims for ‘restitution for wrongs’ alleged to be parasitic on a tort or breach of contract.

The discussion in this area is deliberately restricted to cases delivering common law rather than statutory remedies for proprietary torts.³² Within this category, separate consideration is given to cases where the defendant has wrongfully used the plaintiff's property (without destroying it) and cases where the defendant has wrongfully converted or made investments with the plaintiff's property (so that the original asset is no longer in the defendant's possession). The aim is to articulate a framework which explains and justifies the results of decided cases, rather than one which unites their judicial reasoning. The proponents of restitution for wrongs as a parasitic category adopt the same strategy. There is no other route: the language of restitution is rarely found in the older cases, notwithstanding that it might now be the most appropriate rationalisation.

3.1 Unauthorised use of a plaintiff's property: an unjust enrichment analysis

Unauthorised use of another's property is invariably a tort. The plaintiff victim can sue for compensatory damages. But can the plaintiff demand disgorgement as an alternative remedy for the tort? Or can the plaintiff rely on an alternative cause of action, and sue in subtractive unjust enrichment to obtain restitution? With several notable exceptions, most of the cases classed by restitution lawyers as illustrating disgorgement for unauthorised use of the plaintiff's property are couched in the language of compensatory damages to remedy the tort. Sometimes this is clearly the appropriate measure; but sometimes the judicial language conceals conceptual obstacles which demand alternative justifications. These alternative justifications lead into the disputed area of 'disgorgement' and 'restitution' remedies.

An example illustrates the issues. In *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd*³³ the defendant wrongly kept and used the plaintiff's theatre equipment after the conclusion of a period of hire. The plaintiff was held entitled to compensatory damages calculated as a reasonable hire charge for the period of detention.³⁴ Since the plaintiff was in the business of hiring out the equipment, this approach is easily justified. Compensatory damages are designed to put the plaintiff in the same financial position as if the tort had not been committed. The measure of damage is lost hiring fees. Normally a plaintiff would have to allow for the chance that the goods could not be hired out commercially. However, where the defendant is clearly a putative hirer, it hardly lies in the defendant's mouth to claim that there would have been lay-times during the relevant period.

³² See n 25, above.

³³ [1952] 2 QB 246 (CA).

³⁴ Although Denning LJ, *ibid*, pp 254-5, also viewed the claim as resembling an action for restitution.

But this traditional tort analysis will not meet all the fact situations. If the plaintiff is not in the business of hiring out equipment, then the financial loss resulting from the defendant's wrongful detention of the goods may be nil. Judicial reliance on compensation based on notionally lost hiring charges or licence fees will then not withstand scrutiny. Compensatory damages are designed to put the plaintiff in the position he or she would have been in if the tort had not been committed. This means the position, so far as money can do it, that the plaintiff would have been in had the goods been at his or her disposal for the relevant period. If the goods would not have been gainfully used by the plaintiff, then the loss (absent amenity damages) is nil.³⁵ The function of tort law is not to imply hire bargains between the parties; this is so whether or not the plaintiff might have been willing to hire out the goods.³⁶

Nevertheless, a sense of justice demands that the plaintiff be given a remedy—and in many cases the judges have acceded to these demands, albeit on questionable grounds. Commentators often claim these cases as examples of restitution for wrongs (*ie* as cases where the defendant is required to disgorge ill-gotten gains regardless of any loss to the plaintiff). The analytical difficulties in complying with orthodox compensation measurements are then replaced by difficulties of principle. Which wrongs will justify disgorgement? When will disgorgement capture all the defendant's gains? And when will it be restricted to saved expenditure (measured by notional licence or hire fees)?

³⁵ Cf R.J. Sharpe and S.M. Waddams, 'Damages for Lost Opportunity to Bargain' (1982) OJLS 290.

³⁶ Some commentators reject the compensatory damages approach only where it is clear that the plaintiff *would not* have hired out the goods (or allowed the trespass, or released the restrictive covenant). See, eg, LCCP, *Aggravated, Exemplary and Restitutionary Damages* No 132 (1993) para 7.10; H. McGregor, 'Restitutionary Damages' in P. Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (1996) ch 9, p 210; P. Jaffey, 'Restitutionary Damages and Disgorgement' [1995] RLR 30, 33. But the plaintiff's willingness to accept money is irrelevant; damages are calculated to remedy financial harm, regardless of whether the plaintiff would have agreed to suffer the harm in exchange for money. It follows that the compensatory damages approach is inappropriate in *all* cases where the plaintiff has suffered no financial harm: see, eg, *Surrey CC v Bredero Homes Ltd* [1993] 1 WLR 1361, 1369 *per* Steyn LJ.

Again an illustration highlights the issues. In *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*,³⁷ the defendant built fourteen houses without seeking the plaintiff's approval and so in breach of a restrictive covenant which had been registered as a land charge. The judgment indicates that the breach did not reduce the value of the plaintiff's land, but it did allow the defendant to make a profit of £50,000 and to save, in the judge's estimate, £2,500 in declining to bargain with the plaintiff for a release from the covenant. Brightman J decided that the plaintiff ought to receive £2,500 as compensation for the wrong.³⁸ The difficulties are clear. If the remedy is truly compensation, then £2,500 is too much: the plaintiff's proven financial loss, measured by the reduced value of its land, is nil.³⁹ On the other hand, if the remedy is truly disgorgement for wrongs, then £2,500 is not enough: the ill-gotten gains amount to £50,000, not £2,500.

This last assertion needs elaboration. The cases concerning defaulting fiduciaries provide the clearest instruction in the process of quantifying true disgorgement remedies. In the fiduciary cases the obligation to disgorge is non-controversial. Nevertheless, there is a causation test: only those gains derived from the breach need to be disgorged. The distinction between such gains and others in the hands of the defaulting fiduciary is not always easy. Sometimes fiduciaries have to disgorge all the profits of an activity;⁴⁰ at other times they must disgorge only part of the total profit derived;⁴¹ and possibly there are times when fiduciaries may keep the profits subject to disgorgement of a fee regarded as sufficiently representative of the gains attributable to the breach of duty.⁴² The particular facts of the case indicate the appropriate method of quantification; there is no hard and fast rule. The same must be true of disgorgement remedies operating outside the arena of fiduciary breaches.

³⁷ [1974] 1 WLR 798 (ChD).

³⁸ Under Lord Cairns' Act, in lieu of an injunction requiring demolition of the houses. Probably too little attention is given to the role of this statute, especially when cases are used to support generalisations. However, the valuations in this case do provide a pointed illustration of the potential impact of alternative legal responses.

³⁹ Brightman J held that the plaintiff could be put in the position it would have been in if the covenant had not been breached *either* by a payment that would put the plaintiff in the same financial position it would have been in had the houses not been built (ie nil) *or* by a payment that would put the plaintiff in the same position it would have been in if the defendant had bargained for a release from the covenant so that the houses did not constitute a breach of covenant (ie £2,500). As noted earlier, the latter route effectively substitutes an implied bargain between the parties for the granting of permission to commit torts or breaches of contract; this is something quite outside orthodox tort or contract law principles (although perhaps it can be justified under Lord Cairns' Act).

⁴⁰ Perhaps subject to an allowance which appropriately reflects the fiduciary's contribution to the choice and operation of the profit-making venture: *Boardman v Phipps* [1967] 2 AC 46 (HL).

⁴¹ *Warman International Ltd v Dwyer* (1995) 182 CLR 554; *Scott v Scott* (1963) 109 CLR 649, 662; *Paul Davies (Aust) Pty Ltd (in liq) v Davies* [1983] 1 NSWLR 440; *Australian Postal Corp v Lutac* (1991) 21 NSWLR 584. Also see L. Aitken, 'Loan Funds and Trustee's Profit' (1993) 13 *Legal Studies* 371.

⁴² It is true that the facts are unlikely to suggest a breach and yet find the profits not attributable, at least in part, to the breach. However, (and in another context) the controversial decision in *Re Tilley's WT* [1967] 1 Ch 1179 suggests the possibility.

Returning to *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*,⁴³ it is clear that if the defendant's activity had constituted a breach of *fiduciary* duty, the remedy would have required disgorgement of £50,000. This suggests that the term 'disgorgement' does not properly characterise the remedy awarded. This is all the more so with cases where the defendant's profits are not even raised as a relevant issue; instead, the focus is entirely on assessing the 'use value' to the defendant of the plaintiff's property.⁴⁴ The suggestion advanced here is that the remedy in all these cases is better seen as restitution for subtractive unjust enrichment rather than disgorgement for wrongs, although this does require some extension of orthodox unjust enrichment learning.

To fit these cases within the accepted subtractive unjust enrichment framework, the defendant must have been (i) enriched (ii) unjustly (iii) at the plaintiff's expense. In the absence of any defences, the defendant is then required to pay over the value of the enrichment to the plaintiff. In these cases where the defendant has made unauthorised use of the plaintiff's property, the fact that the defendant has been enriched is easily demonstrated; so too that the enrichment is unjust, being without the plaintiff's consent (a paramount 'unjust factor').⁴⁵ Despite its intuitive attraction, the difficulty is to demonstrate that the enrichment is 'at the plaintiff's expense' notwithstanding that the plaintiff has suffered no financial loss.

⁴³ [1974] 1 WLR 798 (ChD).

⁴⁴ See note 58 below.

⁴⁵ The issue of the 'unjust factor' deserves greater elaboration than is possible here. Suffice it to note that the lack of consent may be evidenced positively (as in *Strand Electric & Engineering Co v Brisford Entertainments* [1952] 2 QB 246—although this is a compensatory damages case, not a subtractive unjust enrichment case—where the defendant was notified by the plaintiff) or negatively (as appeared to be the case in *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538, where the plaintiff was ignorant of the use). The latter is more likely in cases where restitution, not compensatory damages, is claimed. Nevertheless, either scenario is possible; 'lack of consent' is therefore preferred to 'ignorance' to describe the 'unjust factor'.

The problem with the requirement that the enrichment must be at the plaintiff's expense is that it is so easy to slip from that formulation into a formulation which requires the defendant's (financial) gain to be matched by the plaintiff's (financial) loss.⁴⁶ The slip is encouraged because this alternative formulation appears—incorrectly—to underpin the remedy when the defendant has received some physical asset from the plaintiff. Then, it is true, the defendant's financial gain is carefully assessed; subjective devaluation is allowed. But the plaintiff's corresponding financial loss is *not* so carefully considered; assessment of the unjust enrichment is never reduced upon proof that the *plaintiff* does not value the subtraction as highly as the defendant does. In fact, 'at the plaintiff's expense' merely requires proof that the defendant's enrichment is derived directly and exclusively *from* the plaintiff (in the form of assets or services); this is all that the 'subtractive' element requires.⁴⁷ The cases involving provision of services by the plaintiff show that this must be the case.⁴⁸ The statement imposes a relational restriction, not a financial one. Given that relational factor, the defendant's enrichment is initially assessed at its market value (*quantum meruit* or *quantum valebat*), perhaps then reduced if the facts suggest that subjective devaluation is appropriate. The reduction is allowed because the gist of the remedy is to strip enrichments, not to return either plaintiff or defendant to their *status quo ante*. These steps are routinely adopted when the defendant has received goods or services from the plaintiff in circumstances which suggest that the receipt confers an unjust enrichment.⁴⁹ The analogy between enrichments gleaned from use of the plaintiff's own skills or labour and those gleaned from use of the plaintiff's own assets seems simple and compelling.⁵⁰ Yet the former are routinely consigned to the category of subtractive unjust enrichment and the latter to unjust enrichment by wrongdoing. The distinction does not seem defensible.

⁴⁶ See, eg, L.D. Smith, 'Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction' (1991) 11 OJLS 481, who sees 'at the expense of' as a 'zero sum gain' (ie 'your plus is my minus'); likewise the Canadian view that an enrichment should be matched by a corresponding deprivation: eg *Air Canada v British Columbia* (1989) 59 DLR (4th) 161 (SCt Canada), 193-4 *per* La Forest J. And restitution is then seen as returning the parties to their *status quo ante*: see, eg, Birks p 132; A. Burrows, *The Law of Restitution* (London: Butterworths, 1993) ('Burrows'), p 18. But this is not the *aim* of the unjust enrichment principle. Its aim is to reverse the unjust enrichment. Neither party is necessarily returned to the position occupied before the enriching event: see J. Stapleton, 'A New "Seascape" for Obligations: Reclassification on the Measure of Damages' in P. Birks (ed), *The Classification of Obligations* (1997) ch 8, pp 197-8.

⁴⁷ See Sir Peter Millett, 'Restitution and Constructive Trusts' (1998) 114 LQR 399, 409.

⁴⁸ It is never to the point that the plaintiff might otherwise have been unemployed, and so has suffered no financial loss (other than out of pocket expenses).

⁴⁹ These are difficult cases, but see, eg, *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783, *aff'd* [1983] 2 AC 352; *Greenwood v Bennett* [1973] QB 195; *Degelman v Guaranty Trust Co of Canada* [1954] SCR 725, [1954] 3 DLR 785 (SCt Canada).

⁵⁰ And is clearly recognised in Birks, at p 129, notwithstanding his preference for a 'restitution for wrongs' approach. The analogy is not entirely unexpected: rights to personal autonomy and rights in property are both far more complicated 'bundles of rights' than other rights (such as rights under a contract) and their various modes of protection have obvious parallels.

This is all the more so when the jurisprudential underpinnings of the law of unjust enrichment are considered. The gist of the action is not to remedy loss, nor to right wrongs. It is to compel the defendant to give up unjustified enrichments. The subtractive element in the cause of action serves to determine the person to whom the enrichment must be given up. Nevertheless, it is commonly said that the plaintiff cannot recover more than he or she has lost.⁵¹ But the true import of that statement is easily illustrated. Assume that a plaintiff cabinet-maker does substantial work on the defendant's kitchen. Assume, further, that there is no contract providing for payment (the reasons are immaterial). It might reasonably be the case that the plaintiff's labour had a market value of £5,000, but that installation of a modern kitchen increased the value of the defendant's house by £10,000. It might also be the case that the plaintiff did the work on days when he could not or would not otherwise have worked. If the plaintiff has no contractual claim for payment for his work, the law of unjust enrichment can compel the defendant to make some payment.⁵² Moreover, it is uncontroversial that the defendant's 'enrichment at the plaintiff's expense' will be seen as £5,000,⁵³ not as £10,000 (even though this is the defendant's improved financial position as a result of the plaintiff's work), nor as nil (even though this is the plaintiff's financial loss, if we assume that the plaintiff could not or would not have gainfully used the time in alternative labour). The parallels with cases where a defendant has made unauthorised use of the plaintiff's assets are stark.

The case of *Ministry of Defence v Ashman*⁵⁴ provides another illustration. The defendant tenant was a trespasser occupying the plaintiff's premises. The premises were normally let at a concessionary rent of £95 per month to service personnel, although their market rental value was £472 per month. The defendant wanted local authority housing (apparently priced at £145 per month). The Court of Appeal decided that the plaintiff was entitled to restitutionary damages assessed at the value of local authority housing. Restitution lawyers normally consign the case to the category of 'restitution/disgorgement for wrongs' because the remedy is not related to the plaintiff's financial loss (ie any lost concessionary rent, which would have been the measure of *compensatory* damages for the trespass). It is related only to the defendant's 'enrichment'. However, on another view it is clear that all of the defendant's enrichment was *from* the plaintiff, and in that sense was 'at the plaintiff's expense'. It is a separate and more difficult issue—for both analyses—to determine whether the market value of that enrichment should have been subjectively devalued in favour of a conscious wrongdoer simply because the defendant *desired* cheaper accommodation (even though the facts suggest none was available to her at the time).

⁵¹ The inference being, again, that *financial* gain must be matched by *financial* loss: see, eg, Birks p 313; A. Burrows and E. McKendrick, *Cases and Materials on the Law of Restitution* (Oxford: Clarendon Press, 1997), p 569.

⁵² See, eg, *Pavey & Matthews Pty Ltd v Paul* (1986) 162 CLR 217 (Aust HCt).

⁵³ Sometimes this sum may be reduced because of subjective devaluation, although see *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 WLR 912 (CA).

⁵⁴ (1993) 66 P & CR 195 (CA) (although Lloyd LJ expressly rejected a restitutionary analysis).

In this context, it is important to recognise that where a defendant makes unauthorised use of a plaintiff's asset, the mere fact that the asset is not 'profit-earning' in the plaintiff's hands (or is, but only to a limited extent) ought to be immaterial in calculating the *defendant's* enrichment. The enrichment calculation requires only that a 'use value' can be quantified.⁵⁵ The profit-earning nature of the asset (in the plaintiff's hands) ought to be relevant only in assessing compensatory damages.

In consigning these proprietary tort cases to the category of subtractive unjust enrichment, the historical parallels between judicial treatment of cases where the defendant has had the benefit of the plaintiff's services and cases where the defendant has had the use of the plaintiff's goods are also significant. The 'implied contract' approach adopted in the former cases has been justifiably criticised and is now overthrown. But the very same approach is still routinely adopted in cases of trespass to land and goods: as an alternative to the compensation claim for the tort, the plaintiff is seen as entitled to *mesne* profits or notional hire charges or licence fees. These remedies all import a fictional agreement between the parties to pay for the unauthorised use of the plaintiff's assets. They do this because common sense suggests that any other reaction would clearly result in the defendant being unjustly enriched. They do not do this because the defendant's particular wrong is so heinous as to warrant punishment by compelling disgorgement of the ill-gotten gains. This is not the tenor of the judgments nor the measure of the intervention ordered. Recognition of the unjust enrichment basis of these fictional agreements is slow in coming, but there are signs of judicial awakening. In *Ministry of Defence v Ashman*,⁵⁶ Hoffmann LJ pronounced that it was now time 'to call a spade a spade' and recognise that an award of *mesne* profits for trespass was a restitutionary remedy.⁵⁷

Up to this point the argument has been devoted to advancing the idea that 'use value' remedies awarded in proprietary tort cases might reasonably be regarded as restitution for subtractive unjust enrichment. If this were accepted, then an independent claim in unjust enrichment would simply be an alternative to the claim in tort. It is also part of the thesis advanced here that the *tort* claim does not give rise to alternative remedial responses: more specifically, the remedy of disgorgement is not available as an alternative to the remedy of compensation. Proof of this assertion is impossible. Nevertheless, the relevant cases invariably adopt a notional 'consent to use' fee in quantifying the remedy, and do this regardless of the defendant's actual ill-gotten profit. This accords more naturally with an assessment of the defendant's subtractive unjust enrichment at the plaintiff's expense, rather than with disgorgement of the defendant's ill-gotten gains.⁵⁸

⁵⁵ But see *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, 252, 257, where Romer and Somervell LJ leave this issue open.

⁵⁶ (1993) 66 P & CR 195 (CA).

⁵⁷ *Ibid* 201. Also see *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, 254-5 *per* Denning LJ: 'It is an action against [the defendant] because he has had the benefit of the goods. It resembles therefore an action for restitution *rather than* an action for tort' (emphasis added).

⁵⁸ See, eg, *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (ChD); *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359 (QB); *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538, especially 541-2 *per* Lindley LJ. In *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 it was commented that if the defendant *had* profited from the use, then disgorgement of those profits would *not* be required (*per* Somervell LJ at 252) *or* might be (*per* Denning LJ at 255). On the other hand, there are cases where a

If unauthorised use of the plaintiff's assets were seen as giving rise to a restitutionary claim grounded only in subtractive unjust enrichment, would the resulting analysis provide any advantages which are not delivered by an analysis grounded in disgorgement for wrongs? Three important benefits seem to follow. First, the re-classification of the 'use value' cases would highlight the fact that true disgorgement (of *all* ill-gotten gains) is currently restricted to a very narrow class of cases, cases which invariably concern equitable, not common law, obligations.⁵⁹ Secondly, the re-analysis would allow for a rational explanation of why the remedy in these re-classified cases is restricted to 'use value', rather than full disgorgement, and why only limited classes of wrongs—involving unauthorised use of property⁶⁰—give rise to this 'restricted disgorgement' remedy. Finally, the existing scholarship on subtractive unjust enrichment would indicate how 'use value' should be calculated in different circumstances.

The last of these advantages merits elaboration. If the 'use value' remedy awarded in proprietary tort cases is seen as being for subtractive unjust enrichment, rather than for the wrong (and dependent on proof of the wrong), then issues of subjective devaluation and change of position become important. They enable proper quantification of the restitutionary remedy when the defendant's tort involves innocent (albeit unauthorised and wrongful) use, or no use, or no profitable use, of the plaintiff's property.

percentage of the defendant's profits might be regarded as the only appropriate measure of a 'right to use' fee. This will be particularly so where the use is intimately tied to the profits generated and where, on any objective assessment, a 'use fee' would only ever be negotiated to reflect that fact. *Edwards v Lee's Administrators* 96 SW 2d 1028 (1936) (CA of Kentucky) (the Great Onyx Cave case) might be seen as such a case, although this was not the reasoning adopted by the court. Also see the arguments put by Beatson and Friedmann, n 28 above.

⁵⁹ The reason for this is considered below.

⁶⁰ Although 'property' may be an expanding concept: see section 3.4 below.

Innocent but unauthorised use of the plaintiff's property will constitute a tort, and the defendant's liability for compensatory damages will be strict. But the same is not necessarily true of the remedy in unjust enrichment. If the defendant reasonably (although incorrectly) believed that the plaintiff had given consent, or was obliged to give consent, to the use, then it seems open to the defendant to argue for subjective devaluation of the use; perhaps even to devalue the use to nil, on the basis that the defendant would not have made use of the asset on terms other than those assumed to exist.⁶¹ The obvious analogy is with the innocent recipient of a mistaken non-monetary benefit.⁶²

If the defendant's profitable wrongdoing does not involve *any* use of the plaintiff's property, an analysis based on subtractive unjust enrichment can explain why the defendant should be liable for compensatory damages for the tort, but not for restitution for unjust enrichment.⁶³ The position of a warehouseman wrongfully detaining goods is commonly cited as an illustration. The *possibility* of use where use was not made is not an enrichment,⁶⁴ notwithstanding that the defendant may have committed a wrong (even cynically, and with or without causing financial damage to the plaintiff) and may even have profited from that wrong. *Stoke-on-Trent City Council v W & J Wass Ltd*⁶⁵ provides an illustration. The defendant conducted an unauthorised market, thereby interfering with the plaintiff's authorised market. No disgorgement was ordered. The reasoning in the case has been justifiably criticised,⁶⁶ but the result may be right. The defendant undoubtedly caused a nuisance, thus entitling the plaintiff to claim compensation for any resulting loss. However, the defendant did not '*use*' the plaintiff's proprietary market right: that market right did not give the plaintiff any proprietary interest in surrounding sites, in particular the site used by the defendant.⁶⁷ Even if the defendant's wrong generated a profit, it was not from the physical use of the plaintiff's property; it was not *from* the plaintiff in this sense.⁶⁸ The only way that a subtractive unjust enrichment analysis could get around this, and so capture the profit (or part of it), is to enlarge the concept of property to

⁶¹ Perhaps this explains *Morris v Tarrant* [1971] 2 QB 143, where the defendant husband was, technically, a trespasser as against his ex-wife, but was not required to pay any 'use value'; there had been inconclusive and continuing negotiations between the parties during the period. Another difficult case is *Inverugie Investments v Hackett* [1995] 1 WLR 713 (PC). The parties were in continuing dispute over their respective rights. Assuming the dispute was legitimate, it seems proper that restitution for unjust enrichment might be limited by subjective devaluation. The remedy actually awarded therefore seems more easily justified as compensatory, not restitutionary, notwithstanding Lord Lloyd's view (at p 718) that the user principle was not exclusively compensatory or restitutionary. As in *Strand Electric & Engineering Co v Brisford Entertainments* [1952] 2 QB 246, discussed earlier, damages for lost rent in *Inverugie* were not reduced by to allow for periods of likely vacancy. The case seems more difficult to justify on restitutionary principles, although see C. Mitchell, 'Mesne Profits and Restitutionary Damages' [1995] LMCLQ 343.

⁶² Of course, a reduction might conceivably be allowed even if the analysis were grounded in disgorgement for wrongs. But then another difficulty arises: how to distinguish cases where a reduction is permissible from all those where it is not, the defendant's innocence notwithstanding (as in the fiduciary cases).

⁶³ And, if appropriate, return of the asset itself or its value, a remedy which some see as restitutionary but others do not, preferring instead to regard the non-transfer of title as pre-empting the need for restitution. See P. Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] NZLR 623 and the literature cited therein.

⁶⁴ See, eg, *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, 250, 254, 256. The only 'enrichment' is possession of the asset. This is remedied by compelling return of the asset or its value (see previous note). By way of contrast, alternative rationalisations of the

include all ‘rights’, including those derived from personal obligations owed to the plaintiff in contract and tort. This seems both undesirable and unwarranted; it would deny any distinction between property and obligation.⁶⁹

Consider one more example. If the defendant’s wrongful use of the plaintiff’s asset is not profit-generating, an analysis based on subtractive unjust enrichment can explain why, notwithstanding this, it may be legitimate to require restitution from the defendant. Consider a defendant who makes unauthorised use of the plaintiff’s car as a taxi, but is unsuccessful in the venture. The defendant’s ‘enrichment’ is the use value of the car. Prima facie this is the market value of such hire, and, assuming that the defendant is aware that the use is unauthorised, there seems to be no basis for subjective devaluation. On the arguments advanced here, this enrichment is derived *from* the plaintiff, and is thus ‘at the plaintiff’s expense’. It is irrelevant that the plaintiff has suffered no financial loss from the defendant’s use: remedying this is the function of tort law, not the law of unjust enrichment.⁷⁰ It is also irrelevant that the defendant has not made a financial gain from the wrong,⁷¹ although this would be crucial in any real disgorgement remedy.⁷² On the other hand, if the facts indicated that the defendant’s use was innocent, then not only is subjective devaluation of the benefit a possibility, but so is a complete change of position defence: it is conceivable that the defendant would not have used the car at all had the true facts been known. Significantly, innocence would be irrelevant in assessing the defendant’s liability in tort.

3.2 Unauthorised use of a plaintiff’s property: applying the analysis to investments made using the plaintiff’s property

proprietary torts cases (see n 13 above)—based on either ‘loss of dominion’ or ‘loss of the opportunity to bargain’—would suggest there ought to be some remedy, restitutionary or compensatory, for mere unauthorised possession. With ‘loss of dominion’ this is perhaps less obvious, but (on reasoning criticised here) the plaintiff’s loss of dominion has a money value; this means that so too does the defendant’s gain of dominion; restitution of an enrichment can therefore be justified.

⁶⁵ [1988] 1 WLR 1406 (CA).

⁶⁶ Eg I.M. Jackman, ‘Restitution for Wrongs’ [1989] CLJ 302, 307; Burrows pp 392-3; Goff & Jones pp 722-3.

⁶⁷ The case is thus fundamentally different from that of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (ChD), discussed earlier, where the plaintiff did have a proprietary interest in the land (mis)-used by the defendant. Classification of certain interests as proprietary and others as personal is controversial, especially at the margins, but as the law currently stands these cases fall on opposite sides of the divide, notwithstanding superficial similarities.

⁶⁸ Although, as already noted, the proponents of ‘disgorgement for wrongs’ give this expression an additional meaning—a legal meaning not tightly related to the linguistic sense—that the term also connotes ‘from a wrong to the plaintiff’.

⁶⁹ However, for a wide view of the rights warranting such protection, see I.M. Jackman, ‘Restitution for Wrongs’ [1989] CLJ 302; D. Friedmann, ‘The Efficient Breach Fallacy’ (1989) 18 *J Leg Studies* 1.

⁷⁰ And if the plaintiff *has* suffered a loss (eg if the plaintiff normally used the car as a taxi), then that loss is appropriately remedied by compensatory damages for the tort.

⁷¹ Note the analogy with mistaken payments: ignoring possible defences, the law of subtractive unjust enrichment will require a mistaken payee to make restitution notwithstanding subsequent loss or dissipation of the mistaken payment.

⁷² As fiduciary law indicates: eg, if the fiduciary engages wrongfully but *unprofitably* in a competing business, the principal will have no remedy for the breach. Of course, given amenable facts, other causes of action (in contract, tort or unjust enrichment) may provide the plaintiff with a remedy.

One further matter merits attention in this context. The previous section was devoted exclusively to cases where the defendant wrongfully used the plaintiff's property without destroying it or passing it to some third party. But, on a very wide definition, 'use' might also include instances where the defendant wrongfully converts or makes investments with the plaintiff's property so that the original asset is no longer in the defendant's possession. In these latter cases, full disgorgement is sometimes claimed through the back door, invariably without articulating what is being done, perhaps without recognising what is being done. The issue arises where the plaintiff has a proprietary claim to assets in the defendant's hands and, before the claim is brought, the defendant successfully invests or exchanges the plaintiff's asset for other more valuable assets. For example, the defendant might sell the plaintiff's shares and invest

the traceable proceeds in a painting which turns out to be a masterpiece. The plaintiff's ownership of the shares (whether at law or in equity) allegedly justifies the plaintiff's ownership of the painting. This result effectively compels the defendant to disgorge the profits of the successful investment. This form of disgorgement appears unjustified unless the defendant happens to be a fiduciary or, alternatively, on the arguments advanced later, the defendant is in breach of an obligation of good faith.⁷³

To date, and bar one case,⁷⁴ the argument in favour of *general* disgorgement of investment gains remains academic.⁷⁵ In all the frequently cited cases the defendant is either a fiduciary (so quite different rules apply) or the defendant's investments have not enhanced the value of the plaintiff's assets (so there is no investment gain to be disgorged). The proponents of this form of profits disgorgement justify the remedial response either as 'restitution for wrongs' or as a 'second measure'⁷⁶ or 'value surviving' response to the original subtractive unjust enrichment.

The first route is simply not supported by the cases. In the illustration given, conversion of the plaintiff's shares is clearly a wrong, and the defendant's ownership of the masterpiece may well be causally related to that wrong. Nevertheless, the cases on proprietary torts—discussed earlier—confirm that full disgorgement of all traceable gains is not the orthodox remedy.⁷⁷ A desire to strip wrongdoers of ill-gotten gains is not enough.

The second route, based on a 'second measure' or 'value surviving' response to the original subtractive unjust enrichment, is equally suspect. It rests on various assumptions or assertions which cannot be defended. Sometimes it is alleged that the plaintiff's shares are being traced into the painting, and that ownership of the first results in ownership of the last. But this ignores the truth about tracing: it is simply a technique for locating the current value of the plaintiff's original asset; it tells us nothing of the plaintiff's claim to the locus. The claim at the end of the tracing exercise remains just the same claim as the one which existed at the beginning of the

⁷³ Stated in this form, the phrase appears unacceptably expansive; in the later discussion it is in fact quite narrowly defined.

⁷⁴ *Trustee of the Property of FC Jones & Sons v Jones* [1996] 3 WLR 703.

⁷⁵ And general disgorgement is usually supported: see, eg, Birks ch III, but see pp 352-5; R. Chambers, *Resulting Trusts* (Oxford: Clarendon Press, 1997) pp 21-27; L.D. Smith, *The Law of Tracing* (Oxford: Clarendon Press, 1997) pp 156-9; Burrows p 59; A. Tettenborn, *Law of Restitution in England and Ireland* (London: Cavendish Publishing, 2nd ed, 1996) pp 42-3.

⁷⁶ See Birks ch XI.

⁷⁷ Unless the defendant is a fiduciary, where an account of profits or constructive trust will often achieve this end. Note that claims to the proceeds of sale of the primary asset do not raise the same issue. If, for example, the shares were sold by the defendant for more than their apparent market value, the plaintiff would certainly be able to recover this sum from the defendant, either as compensatory damages for the tort of conversion (because the court is persuaded that the actual sale price reflects the true market price) or as restitution for unjust enrichment (with the sale price serving to quantify the defendant's incontrovertible benefit).

exercise.⁷⁸ Even conceding the (often questionable) existence of a proprietary claim to the original shares, the plaintiff's unjust enrichment claim at the start is only a claim to the shares *in specie* or to their *unjust enrichment value* in the defendant's hands. It remains this at the end of the tracing exercise. In truth, it is the proprietary *nature* of a claim that can persist in traceable proceeds; ownership cannot be assumed. It follows that a plaintiff with an initial proprietary claim to the shares could undoubtedly assert a *lien* over the painting for the value of the shares plus interest. But a further claim to the painting itself (or its entire value) must be justified.⁷⁹ Nor will the analogy with purchase money resulting trusts suffice.⁸⁰ The intention to provide the funds *as purchase funds* is crucial to the analysis in those cases;⁸¹ only when the defendant is a fiduciary is absence of that intention irrelevant.⁸² Nor will it do to say that unauthorised use of the plaintiff's property automatically entitles the plaintiff to the proceeds of that use. That is mere assertion, and depends on the truth of the claim that such gains are *ipso facto* unjust enrichments derived at the plaintiff's expense. As discussed earlier, even the cases claimed as illustrating disgorgement for wrongful use of the plaintiff's assets do not strip the defendant of all derived gains,⁸³ but only of a 'use value' for unauthorised use of the plaintiff's asset. In short, neither by recourse to second measure claims for restitution nor by disgorgement arguments is it possible for the plaintiff to lay claim to the defendant's successful investment. Of course, the result would be quite different if the defendant were a fiduciary, but then the claim would be based on a different cause of action, relying on a distinct and different breach of duty.

In summary, the view advanced here is that a plaintiff cannot claim the benefits of the defendant's successful investments *simply* because they are derived from assets which were initially the plaintiff's. Unauthorised use (including use to make alternative

⁷⁸ Cf Sir Peter Millett, 'Restitution and Constructive Trusts' (1998) 114 LQR 399, 408: 'The effect of a successful tracing exercise is to confer on the parties the same rights and obligations *mutatis mutandis* in respect of the substituted asset as they ... had to the original asset.' The inference (especially given the reference to *FC Jones & Sons v Jones* [1997] Ch 159 immediately following this sentence) is that an initial right to return of the original asset or its value will translate to a right to return of the substituted asset or its value. Although this is often true (eg with claims against fiduciaries), it seems inaccurate as a generalization. It is important to distinguish between tracing for the purpose of asserting the original restitutionary claim (since identification of substituted value may enable the plaintiff to *secure* the original restitutionary claim against the substituted asset) and tracing to locate the profits of substitutions (which is only relevant if the plaintiff can assert a claim to those profits). Neither the availability of proprietary restitutionary claims, nor the availability of claims to profits (disgorgement) can be assumed; tracing says nothing about either.

⁷⁹ This, with respect, was the error in *Trustee of the Property of FC Jones & Sons (a firm) v Jones* [1996] 3 WLR 703 (CA).

⁸⁰ But see the assertion to the contrary in R. Chambers, *Resulting Trusts* (1997), eg at p 21, where it is suggested that use of resulting trust principles requires only a slight extension of orthodoxy.

⁸¹ As recognised (but not conceded) in R. Chambers, *Resulting Trusts* (1997), p 27, citing, eg, *Aveling v Knipe* (1815) 19 Ves 441; *Hussey v Palmer* [1972] 1 WLR 1286, 1293 (CA); *Calverley v Green* (1984) 155 CLR 242, 246; W.J. Mowbray, *Lewin on Trusts* (London: Sweet & Maxwell, 16th edn, 1964) p 130; D.W.M. Waters, *Law of Trusts in Canada* (Toronto: Carswell, 2nd edn, 1984) p 305; K. Gray, *Elements of Land Law* (London: Butterworths, 2nd edn, 1993) p 390; H.A.J. Ford and W.A. Lee, *Principles of the Law of Trusts* (Sydney: Butterworths, 3rd edn, 1996) para 2111.

⁸² Eg *Ryall v Ryall* (1739) 1 Atk 59, relied on by R. Chambers in *Resulting Trusts* (1997), eg at p 27. Where the defendant is a fiduciary, the resulting (or constructive?) trust is defensible on other grounds. On the arguments advanced later in this article, the same grounds would apply where the defendant was in breach of a duty of good faith.

⁸³ Unless the defendant is a fiduciary, and then, as argued later, the rationale is not restitutionary.

investments) will justify a restitutionary remedy (including ‘use value’), but full disgorgement is, it seems, only justified when such unauthorised use can be additionally characterised as a breach of more onerous and demanding equitable obligations.

3.3 Unauthorised use of a plaintiff’s property: is the restitutionary remedy proprietary?

If the remedy in these cases of unauthorised use of the plaintiff’s property is seen as restitution for unjust enrichment rather than as disgorgement for wrongs, does this affect the analysis of whether the remedy is or can ever be proprietary? If the remedy is classified as restitution for wrongs, the disgorgement response is readily regarded as punishing the defendant and as granting a windfall to the plaintiff. In these circumstances it is easily argued that the remedy should not be proprietary,⁸⁴ and perhaps even that it should be subordinated to the claims of the defendant’s other creditors.⁸⁵

On the other hand, if the remedy is seen as restitution for unjust enrichment, then orthodox restitution scholarship would see the remedy as proprietary if the plaintiff can show an initial proprietary base and can identify an unbroken chain of events linking that base to identifiable substitutions.⁸⁶ This will sometimes be possible where the defendant has made unauthorised use of the plaintiff’s asset by *exchanging* it for other assets. But this argument is not so easy where the defendant has simply *used* the plaintiff’s asset, say by hiring it out. Even if the hiring fees constitute an identifiable fund, careful analysis suggests that the restitutionary remedy will not—and cannot—be classed as proprietary.

What seems to underpin a proprietary restitutionary remedy is the existence of alternative formulations for the initial claim: the defendant is required to return the plaintiff’s asset *in specie* or its *unjust enrichment value*. If the asset is no longer in the defendant’s hands, but its traceable proceeds can be identified, then the alternative claim can legitimately be secured against those traceable proceeds.⁸⁷ But if the plaintiff’s unjust enrichment claim is simply for the defendant to pay over the ‘use value’ of an asset, there is no alternative proprietary formulation: the ‘use value’ measures enrichment; it does not identify a discrete fund required to be paid over *in specie*.⁸⁸ This makes it irrelevant that the use has generated identifiable proceeds; the remedy cannot be proprietary.⁸⁹

⁸⁴ See, eg, R. Goode, ‘Property and Unjust Enrichment’ in A. Burrows (ed), *Essays on the Law of Restitution* (Oxford: Clarendon Press, 1991) ch 9; R. Goode, ‘The Recovery of a Director’s Improper Gains: Proprietary Remedies for the Infringement of Non-Proprietary Rights’ in E. McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Oxford: Clarendon Press, 1992) ch 7.

⁸⁵ See especially P. Jaffey, ‘Restitutionary Damages and Disgorgement’ [1995] RLR 30, 44.

⁸⁶ Birks pp 378-85.

⁸⁷ See S. Worthington, *Proprietary Interests in Commercial Transactions* (Oxford: Clarendon Press, 1996) ch 8.

⁸⁸ So the arguments from *A-G for Hong Kong v Reid* [1994] 1 AC 324 will not assist.

⁸⁹ Were this not the case, many torts would provide plaintiffs with secured damages claims eg damages for defamation might be secured against the profits derived by the defendant from the tort. This is not the law.

3.4 *Unauthorised use of a plaintiff's property: future developments?*

In all of the preceding discussion the focus has been on the use of land or chattels; the use of money has not been considered. It ought to be possible to adopt exactly the same approach if the defendant has made unauthorised use of the plaintiff's money. Where it can be established that a defendant has used money which is the plaintiff's (either at law or in equity),⁹⁰ it ought to follow from the arguments advanced here that profits disgorgement would not be required, but that restitution of the 'use value' of the money would. The defendant's unjust enrichment is the benefit obtained at the plaintiff's expense from the unauthorised use of the plaintiff's funds. Prima facie, this should be calculated as interest on the original sum: this is the 'use value' of money.⁹¹ If such an approach were adopted, then some of the current difficulties with awards of interest might disappear.⁹²

How much further can the analogy be stretched? Will it accommodate the defendant's unauthorised use of intangible property? Will it stretch to the use (or abuse) of personal rights? Certainly it seems appropriate for the same reasoning to be applied to intangibles, notwithstanding that sometimes there will be additional difficulties in valuing the use-benefit received.⁹³ It also follows that any developments in the law of personal property which conceded 'property' status to rights previously regarded as purely personal would, in addition, enlarge the scope for application of subtractive unjust enrichment principles. The arena where this seems likely to happen first is with information rights. Information is not regarded as property, yet the push of the information age demands some recognition of the many striking parallels. Such a development would liberate the protection of information from the confines of breach of confidence requirements (where it is the relationship of confidence, not the information *per se*, which is all important) and from the limitations of statutory regimes (where protection is extended only to tightly defined categories). Unjust enrichment principles could then provide an alternative and additional avenue of protection in regulating the unauthorised use of information.

⁹⁰ And this will not necessarily be easy: see *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] AC 669, especially the judgment of Lord Browne-Wilkinson.

⁹¹ In most situations this will be compound interest; simple interest will rarely reflect 'use value'. However, the defendant's innocence may be relevant in determining the appropriate value; views concerning the issues of incontrovertible benefit and subjective devaluation are obviously relevant.

⁹² This is a controversial area: see *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] AC 669. Also see the discussion in K. Mason and J.W. Carter, *Restitution Law in Australia* (Sydney: Butterworths, 1995) ch 28.

⁹³ Sometimes this will be easy: dividend payments might be seen as part of the 'use value' of shares.

On the other hand, it does not seem appropriate to try to adopt the same reasoning with use (or, more appropriately, abuse) of personal rights.⁹⁴ Such rights are designed to achieve more limited ends (avoidance of harm to others; legitimization of expectations), and the remedies are justified and quantified so as to further those ends. All these rights are defined and delimited by the remedies they attract. We may wish for different rights—and other jurisdictions attest to the practical possibility—but it would signify a radical change in English law were it to be suggested that contractual rights and obligations, for example, were premised not only on meeting legitimate expectations but also on restricting self-interested behaviour.⁹⁵ This is notwithstanding that some cynical and profitable infringements of personal rights seem to call into question the merits of this restrictive approach. In the next section it is argued that these concerns are better met through principled developments within the law concerning obligations of good faith and loyalty, rather than through the vehicle of unjust enrichment law.

3.5 Unauthorised use of a plaintiff's property: summary

To reiterate, the argument presented in this section is that the law of subtractive unjust enrichment is capable of—and, even more than that, is *the* appropriate restitutionary vehicle for—dealing with a defendant's unauthorised *use* of the plaintiff's property. The reason this approach has not been adopted earlier appears to rest, at least in part, on an unstated assumption that an enrichment is only 'at the plaintiff's expense' if the plaintiff is in a worse financial position after the event. This is unduly restrictive. By analogy with unjust enrichment claims relating to provision of services, the true limitation is better seen as requiring only that the enrichment be derived exclusively *from* the plaintiff (whether from the plaintiff's services, assets, or use of those assets). If this approach were adopted, then the existing common law cases currently seen as illustrating disgorgement for wrongs could be divided into two quite separate classes. The first, the proprietary tort cases, would be seen as simple instances of subtractive unjust enrichment. The remedy would be restitution, restricted to the 'use value' of the asset misused; it would not be disgorgement. The second class, comprising the equitable wrongs, would be cases of true disgorgement, but the remedy, as will be seen later, would be underpinned not by a principle against unjust enrichment but by a principle of good faith and loyalty. There would then be no need either for theories

⁹⁴ This says nothing about cases underpinned by specific receipts. With these cases the remedy is based on conventional notions of subtractive unjust enrichment, not on any purported valuation of the *use* of the plaintiff's personal rights: see, eg, *Astley v Reynolds* (1731) 2 Str 915 (money paid under duress to recover pawned goods); *Kettlewell v Refuge Assurance Co* [1909] AC 243 (return of insurance premiums acquired through deceit); and other examples cited in LCCP, *Aggravated, Exemplary and Restitutionary Damages* No 132 (1993).

⁹⁵ Cf R. Nolan, 'Remedies for Breach of Contract: Specific Enforcement and Restitution' in F. Rose (ed), *Failure of Contracts* (Oxford: Hart Publishing, 1997) ch 3, pp 43-4, who argues that disgorgement is an appropriate response to breaches of contract because the plaintiff has *exclusive* rights to the performance promised, and the defendant who profits from a breach of contract makes those profits by denying the plaintiff that to which he or she is exclusively entitled. But arguably there is a flaw in the initial premise: the defendant has only promised to satisfy the plaintiff's bargained-for expectations, not to subject himself or herself to obligations of self-denial; the latter would convert all contracting parties into fiduciaries. Otherwise there seems to be room for this type of argument only where the contract is specifically enforceable and the plaintiff thereby acquires equitable ownership of an asset which the breaching defendant uses to make the ill-gotten profits.

defining which wrongs will support disgorgement remedies or for complementary theories justifying limits on the extent of disgorgement required.

4. Breaches of the obligations of good faith and loyalty: the ‘equitable wrongs’

Outside the category of proprietary torts, the other class of cases described as illustrating disgorgement for wrongs comprises the cases on equitable wrongs.⁹⁶ Whatever might be said about the classification of remedial responses to proprietary torts, it is unquestionably the case that disgorgement is the orthodox remedy for breaches of fiduciary obligation and breaches of equitable obligations confidence. The purpose of this section is to advance the idea that if these cases on equitable obligations are the only true disgorgement cases, and if (as is commonly accepted) the disgorgement response in these cases is seen as essential to the effective protection of the relationship, then this provides a rational basis for segregating these cases. They can be seen as forming a coherent class. Within this class, and only within it, the law provides for a disgorgement remedy. The remedy is justified simply as the most effective means of supporting the underlying obligation.

4.1 Equitable wrongs: a disgorgement analysis

In advancing this argument, two issues must be addressed. The first is to recognise the difference between the quantification process adopted in these disgorgement cases and that adopted in assessing ‘use value’ in the proprietary tort cases. The second is to affirm that disgorgement—true disgorgement—is only available where the defendant has breached an equitable obligation of good faith or loyalty;⁹⁷ if a different type of obligation is breached, a different form of remedy is ordered.

⁹⁶ Contrary to the arguments advanced here, some might suggest it also necessary to add a class for ‘disgorgement for breach of contract’ following *dicta* in *A-G v Blake* [1998] 1 All ER 833, 844-46 (CA), but see n 3 above and the discussion which follows.

⁹⁷ The difficult issue of whether this disgorgement remedy ought to be proprietary is not considered.

On the first issue, quantification of ‘disgorgement’ is analytically distinct from quantification of ‘use value’, notwithstanding that the calculation may sometimes produce the same monetary sum. The disgorgement remedy, by its terms, requires payment to the plaintiff of all the defendant’s ill-gotten gains. However, gains are only ill-gotten to the extent that they are derived from a breach of the obligation in issue, so quantification may sometimes be difficult.⁹⁸ Consider a breach of the equitable duty of confidence. If the information wrongfully used by the defendant was vital to the defendant’s whole venture, then full disgorgement of the net profits of the venture is the appropriate disgorgement measure.⁹⁹ On the other hand, if the information was not particularly valuable to the venture, being information which might have been obtained for a fee from alternative sources, then disgorgement of the profits of the breach requires careful (and often difficult) assessment of the proportion of the profits realistically attributable to the use of the information.¹⁰⁰ The plaintiff is not necessarily limited to the ‘use value’ or ‘licence fee’ for the information, but is prima facie entitled to a proportionate share of the profits.¹⁰¹ In every case, the aim, in quantifying the disgorgement remedy, is to strip the defendant of *all* ill-gotten gains, but no more and no less.

⁹⁸ See nn 40-42 above.

⁹⁹ As in *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402, where, notably, the remedy was for breach of the equitable obligation of confidence, not the contractual one. Also see *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 61 DLR (4th) 14.

¹⁰⁰ See, eg, the approach adopted in *Celanese International Corp v BP Chemicals Ltd*, The Times, 5 November 1998 (Mr Justice Laddie), a patent infringement case. Also see *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109 (HL), where *The Sunday Times* was not required to disgorge the entire profits of the relevant day’s publication, but only the profits which could reasonably be attributed to the wrong.

¹⁰¹ See *Celanese International Corp v BP Chemicals Ltd*, The Times, 5 November 1998. Of course, sometimes a ‘licence fee’ is the appropriate measure of the profit the defendant has gleaned from the breach: see *Seager v Copydex (No 2)* [1969] 1 WLR 809, 813 *per* Lord Denning MR.

If the remedy in these equity cases is full disgorgement of the defendant's ill-gotten gains, then the next issue is what justifies such a response? A common understanding of this area of the law is that the disgorgement response is directed at protecting particular types of relationships.¹⁰² The law recognises certain relationships as warranting legal protection and provides that protection by imposing additional obligations of good faith and loyalty on one of the parties. These additional obligations arise by operation of law, not by agreement between the parties. In this sense they parallel obligations imposed by the law of tort or unjust enrichment, and differ from obligations imposed by contract. But what sets these obligations apart from contract, tort and unjust enrichment is that their focus is on the social value of the relationship, not on the moral obloquy of the defendant or the need to protect the plaintiff from harm. A defendant may be found in breach of these equitable obligations notwithstanding that the breach was committed in ignorance,¹⁰³ or in good faith, or that it did no harm to the plaintiff, and may even have provided a benefit.¹⁰⁴ It is clearly the relationship which is valued, not any underlying property or information, because the obligations may be imposed in the absence of any property¹⁰⁵ and regardless of the economic value of the information.¹⁰⁶ The fact that it is equity's social concern to protect certain relationships is further reinforced by the availability of defences which appeal to even higher social interests; for example, obligations of confidence can be breached where to do so is in the public interest.¹⁰⁷

¹⁰² The notion has a long history: see, eg, *Keech v Sandford* (1726) Sel Cas Ch 61; *ex parte James* (1803) 8 Ves 337; *Bray v Ford* [1896] AC 44.

¹⁰³ Ignorance that the *act* is in breach of the defendant's equitable obligation is irrelevant: see, eg, *Seager v Copydex* [1967] 1 WLR 923. However, it seems that the defendant must know (or must have once known) that the *relationship* itself exists. Whether this requires actual knowledge or constructive notice (as is commonly the case in applying equitable doctrines) is a difficult point: see, eg, *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47-8 *per* Megarry J; *AG v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281 *per* Lord Goff (*obiter*); Goff & Jones pp 685-6. This knowledge requirement ensures that resulting and constructive trustees may sometimes escape liability to disgorge: see *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] AC 669(HL), [1996] 2 WLR 803, 828-9 *per* Lord Browne-Wilkinson.

¹⁰⁴ The most familiar examples are *Boardman v Phipps* [1967] 2 AC 46 (HL); and *Regal (Hastings) Ltd v Gulliver* [1942] 2 All ER 378 (HL).

¹⁰⁵ Eg the fiduciary obligation between solicitor and client exists independently of any property which might be subjected to the relationship.

¹⁰⁶ Eg *Prince Albert v Strange* (1849) 2 DeGex & Sm 652, 64 ER 293; *Argyll v Argyll* [1967] 1 Ch 302, 332 *per* Ungood-Thomas J. In *Seager v Copydex Ltd* [1967] 1 WLR 923, 931 *per* Lord Denning, the jurisdiction was seen as founded on broad principles of equity which required the defendant not to take unfair advantage of the plaintiff, and not on some property basis; also see *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1, 28 *per* Shaw LJ, and Goff & Jones p 684 and the cases cited there. This view that the obligation is imposed to effect a social purpose is reinforced by the special considerations which apply where the relationship is between government and subject: the subject is only bound in confidence if disclosure would *damage* the public interest; see, eg, *AG v Jonathan Cape Ltd* [1976] QB 752; *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 (Aust HCt).

¹⁰⁷ Eg *Lion Laboratories Ltd v Evans* [1985] QB 526 (CA); *D v NSPCC* [1977] 1 All ER 589, 594 *per* Lord Diplock.

These protected relationships are seen as sufficiently important that the remedy is designed, as far as remedies can be, to ensure that the imposed obligation is *not* breached, not that a breach does no harm. The aim is to exact particular standards of conduct in protected relationships; to this end, the relevant law is concerned with proscribing certain activities, not with precluding particular outcomes. The appropriate remedial response for breaches of these equitable obligations is disgorgement because this is the remedy which best supports the legal obligation being enforced. Outside the arena of these equitable obligations, other remedies will suffice to support the ends which are desired.¹⁰⁸ Across the legal system, this differential approach is efficient: it imposes the minimum degree of legal intervention necessary to achieve the ends desired; this is what justifies the imposition of different remedies for breach of different obligations, and why it seems incongruous to suggest that the entire remedial menu of the common law should be available to remedy any cause of action.¹⁰⁹

4.2 Equitable wrongs: future developments?

If these equitable obligations—and no others—give rise to disgorgement remedies, then the fear is that courts will be tempted to re-characterise torts and breaches of contract as breaches of fiduciary (or other equitable) obligation. The fear is not fanciful. Several Canadian decisions, in particular, illustrate the difficulties which can arise with an instrumental use of the fiduciary label.¹¹⁰ That approach is not part of the thesis advanced here. In fact, if the proper function of these equitable obligations were fully appreciated, then their roles might be seen as confined to strictly limited circumstances: ‘fiduciaries’ and ‘confidants’ are only needed where the law sees the plaintiff as entitled to the protection that such a role will deliver;¹¹¹ that ought to be so only when the relationship cannot function effectively without such additional safeguards. To define these circumstances restrictively should be no more difficult than defining obligations of care restrictively, and just as necessary.

¹⁰⁸ This is much narrower than the view advanced by I.M. Jackman, ‘Restitution for Wrongs’ [1989] CLJ 302: in defining which wrongs will give rise to ‘restitution for wrongs’ and which will not (since he concedes that not all profitable wrongdoing merits this response), Jackman concludes that the remedy is available to protect a variety of ‘facilitative institutions’, namely private property, relationships of trust and confidence, and (with some qualification) contracts. Under each of these heads, Jackman gives illustrations of cases where the court has awarded ‘restitution for wrongs’ (although there is no attempt to differentiate between full disgorgement and ‘use value’). His approach is inductive, but it does not demonstrate why only (or all) these institutions *need* this form of protection to survive. Property and contract appear adequately protected by alternative means.

¹⁰⁹ Although see *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, 301.

¹¹⁰ See, eg, *Norberg v Wynrib* (1992) 92 DLR (4th) 449 (SCt Canada) (fiduciary relationship between doctor and patient); *M(K) v M(H)* (1993) 96 DLR (4th) 449 (SCt Canada) (fiduciary relationship between child-abuser and victim).

¹¹¹ P.D. Finn, ‘Fiduciary Law and the Modern Commercial World’ in E. McKendrick, *Commercial Aspects of Trusts and Fiduciary Obligations* (1992) ch 1 p 9; and P.D. Finn, ‘The Fiduciary Principle’ in T.G. Youdan (ed), *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) ch 1 pp 1, 4.

Nevertheless, an approach based on obligations of good faith and loyalty does provide scope for principled developments in the law. The imposition of these equitable obligations is sometimes seen as a sign of the increasing sophistication of a legal regime.¹¹² That development continues. There are already signs of a desire to import an additional ‘good faith’ obligation into some, if not all, dealings between individuals.¹¹³ The standard of conduct being mooted is not one which demands self-denial (ie a fiduciary standard) in all relationships; that would be inappropriate. It probably does not even go so far as to require positive regard for the legitimate interests of others (ie a conventional good faith standard). What it seems to demand is avoidance of activities which display cynical *disregard* for the legitimate interests of others—true, this is not as demanding as a strict obligation of good faith;¹¹⁴ it is perhaps more correctly styled as an obligation not to act with contumelious bad faith.¹¹⁵

If the law were to develop to recognise that all (or perhaps only some) relationships warrant the additional protection which might be derived from an obligation of good faith—or at least an obligation not to act with contumelious bad faith—then this obligation would be added to the stable of existing equitable obligations and enforced by imposition of a disgorgement remedy. The ‘equitable’ tag is used simply to underline the fact that the obligation is directed at protecting relationships; it is not, for example, a tort obligation directed at protecting affected individuals from harm (and compensating that harm). It also serves to underline the fact that the disgorgement remedy is not simply parasitic: disgorgement does not follow from proof that a tort, for example, has been committed; it would only follow from proof that an obligation of good faith had been breached (by acting with cynical disregard for the plaintiff’s rights).

¹¹² See, eg, J.P. Dawson, *Unjust Enrichment: A Comparative Analysis* (Boston: Little Brown, 1951) pp 39-40.

¹¹³ See, eg, P.D. Finn, ‘The Fiduciary Principle’ in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) ch 1, especially pp 10-24; F. Kessler and E. Fine, ‘Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study’ (1964) 77 *Harvard Law Rev* 401; B.J. Reiter, ‘Good Faith in Contracts’ (1983) 17 *Valparaiso UL Rev* 705; H.K. Lücke, ‘Good Faith and Contractual Performance’ in P.D. Finn (ed), *Essays on Contract* (Sydney: Law Book Co, 1987) ch 5.

¹¹⁴ Even in civilian jurisdictions, where such an obligation is common, it is attenuated to meet particular circumstances. It can, however, justify disgorgement for certain bad faith breaches of contract: see, eg, *Adras Building Material Ltd v Harlow & Jones GmbH* [1995] RLR 235 (Israel SCt), noted in R. Nolan, ‘Remedies for Breach of Contract: Specific Enforcement and Restitution’ in F. Rose (ed), *Failure of Contracts* (1997) p 58, n 83.

¹¹⁵ Awards of exemplary damages in similar circumstances demonstrate that the issue is already a concern of the law, although so far it is only dealt with in a rather unstructured and *ad hoc* manner: see *Rookes v Barnard* [1964] AC 1129 (HL) for the jurisdictional limitations in England. In other Commonwealth jurisdictions, the remedy is available for torts which display the defendant’s wanton and contumelious disregard of the plaintiff’s rights: see A. Burrows, ‘Reforming Exemplary Damages’ in P. Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (1996) ch 7, p 165 and references cited there.

5. Conclusions

The thesis advanced in this article can be simply stated: it is that there is no dependent or parasitic category of restitution for wrongs, no category which imposes a disgorgement remedy on wrongdoing defendants as an alternative to the ‘normal’ remedy for the wrong. Broadly speaking, rights or obligations do appear to map onto discrete remedies. Torts usually give rise to compensatory damages;¹¹⁶ breaches of contract to expectation damages; unjust enrichments to restitution. The only obligations which seem to give rise to a disgorgement remedy are equitable obligations of good faith and loyalty. This is not to deny that the same set of facts can give rise to alternative claims: a plaintiff may be in a position to advance claims in contract, tort, unjust enrichment and obligations of good faith and loyalty. What the thesis does deny is that a claim in tort, for example, could result in *either* compensatory damages or disgorgement.¹¹⁷ In order to establish an entitlement to disgorgement, it seems the plaintiff must do more than show that a tort (even a tort of a restricted class) has been committed; the plaintiff must show that the defendant has also breached an equitable obligation of good faith or loyalty.

This follows from the observation that cases which are commonly assigned to the category of restitution for wrongs might usefully be reassigned; they do not seem to fit easily within their current classification. Some cases—the ‘proprietary torts’—are better seen as cases where the plaintiff is entitled to restitution for subtractive unjust enrichment for unauthorised use of the plaintiff’s property. The measure of the defendant’s unjust enrichment is the ‘use value’ of the asset to the defendant. This claim in unjust enrichment is an alternative to the plaintiff’s claim for compensatory damages for the tort, but it is not dependent on commission of the tort; it is an independent claim requiring only proof of the defendant’s unauthorised use of the plaintiff’s property (ie use without the plaintiff’s consent). Other cases—the ‘equitable wrongs’—are true examples of disgorgement, but they are better seen as cases falling entirely outside the law of unjust enrichment. The reversal of unjust enrichment (even unjust enrichment from wrongdoing) is not their rationale. The obligations in issue are not like obligations in tort or contract or unjust enrichment; these obligations merit a class of their own to recognise this difference.

This suggested reclassification is grounded in an attempt to rationalise the principles governing disgorgement. It recognises two significant issues. First, it identifies the importance of the obligation to make restitution of *all* unjust enrichments. Use of the plaintiff’s property is a source of enrichment just as much as use of the plaintiff’s services. An unjust enrichment is not derived solely from possession of the property itself. Secondly, it recognises that the remedy of disgorgement is mediated by different legal imperatives from those governing restitution, or compensatory or expectation damages. This can only be recognised—and should be recognised—by

¹¹⁶ Sometimes punitive damages may be awarded. It seems desirable to retain this remedial option even if the thesis advanced here is accepted. It is true that many cases where punitive damages are currently awarded could be re-analysed as cases where an obligation of good faith has been breached and disgorgement is therefore appropriate; however, there will still be cases where the defendant has not profited (or not greatly), and yet punitive damages seem warranted (eg deliberate pollution, or deliberate defamation). Significantly, the objective underpinning the award of punitive damages, even in these cases, remains protection of socially desirable relationships.

¹¹⁷ Cf Birks p 316.

dissociating these cases from cases in the other categories. For good reason the common law responds differently to torts, unjust enrichments, breaches of contract and breaches of equitable obligations of good faith and loyalty.