



Restitutionary and Exemplary Damages Revisited*

Andrew Phang[†] and Pey-Woan Lee[‡]

Introduction

The nature of restitutionary¹ and exemplary damages, the relationship between these two problematic categories of damages, as well as the possible ways forward (particularly with regard to the award of exemplary damages in the context of a breach of contract) raise a plethora of issues that could be thoroughly examined only in a book or, at the least, a small monograph. The present article can therefore only adopt a much more modest approach. Our primary task is to raise issues. To be sure, we will attempt some preliminary suggestions and answers whenever relevant. However, in the nature of things, an even close to definitive analysis as well as a set of conclusions would require far more wide-ranging analyses.

We take as our initial point of departure the recent Federal Court of Australia decision of *Hospitality Group Pty Ltd v Australian Rugby Union Ltd*,² the facts of which were both complex and interesting. Issues pertaining to both restitutionary and exemplary damages were raised in a fact situation that embraced both the contractual and tortious contexts.

We will shift from the particular to the general. The first part of this article will consider the facts of the *Hospitality Group* case, and the second will consider the issues arising with respect to restitutionary damages. In the third part, we will consider the various issues arising with respect to exemplary damages, and we will summarise our main findings and suggestions in the Conclusion. We should add, however, that our primary focus will be on exemplary damages, having already canvassed a number of issues with regard to restitutionary damages in an earlier article in this journal.³ A few additional issues with respect to restitutionary damages do arise, however, and we will consider them briefly. We add that we do consider (particularly in the context of exemplary damages) a great many decisions across the Commonwealth; hence, the present article contains a comparative perspective as well.

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[†] Professor of Law, Singapore Management University.

[‡] Assistant Professor of Law, Singapore Management University.

¹ In this article, the term 'restitutionary damages' refers generally to all gain-based awards regardless of whether the measure of such award also corresponds to the claimant's deprivation. See, further, the main text to nn 55–62 below.

² (2001) 110 FCR 157.

³ See A Phang and P W Lee, 'Rationalising Restitutionary Damages in Contract Law — An Elusive or Illusory Quest?' (2001) 17 *JCL* 240.

The Facts and Judgment of Hospitality Group Pty Ltd v Australian Rugby Union Ltd

The plaintiff, Australian Rugby Union Limited (ARU), is a non-profit organisation and the sole administrator of international rugby union matches in Australia. Over time, the game gained a strong following in various parts of Australia. By 1999 it had become increasingly fashionable to market 'hospitality packages' in connection with the sport. Each package essentially comprised a number of 'premium' tickets to a match together with pre-match or post-match hospitality involving food and drinks. These packages were purchased mainly by corporations who would then invite their clients and staff to the matches.

ARU administered the sale and distribution of the match tickets with the principal aim of ensuring that the sales proceeds would be substantially ploughed back into the maintenance and promotion of the sport. As such, the only persons who could legitimately sell the ARU match tickets (whether directly or as part of a larger sporting package) were the authorised agents and licensees of ARU. This was achieved through a combination of arrangements, the chief of which was the restriction (the 'ticket condition') printed on the back of all tickets:⁴

It is a condition of sale that any ticket may not be resold at a premium or used for advertising, promotion or other commercial purposes without the prior written consent of the ARU. If a ticket is sold in contravention of this condition, the bearer of the ticket will be denied admission to Stadium Australia.

The intended effect of the restriction was to prohibit all commercial exploitation of the match tickets save with ARU's express authorisation. An independent operator who wished to market corporate hospitality in connection with the ARU matches would have to tender for such a right and, if successful, conduct the same in accordance with terms prescribed by ARU. Another form of commercial exploitation of the match tickets involved the sale of the match tickets as part of 'travel packages'. A travel package typically comprised a number of match tickets and travel and/or accommodation arrangements. ARU appointed several travel agents as its domestic retailers of such packages, of which Australian Tours for Sports Pty Limited (ATFS) was one. As was consistent with ARU's marketing policy described above, ATFS was restricted, under Cl 3.11 of its contract with ARU (the 'ATFS contract'), to selling the match tickets allocated to it 'as part of a travel package'⁵ only.

ARU's claims arose in connection with the Bledisloe Cup and the Centenary Test matches held in 1999 (the 'Matches'). Soon after the conclusion of the ATFS contract in March 1999, ATFS contracted to supply a number of tickets to the Matches to ICM Marketing Pty Limited (ICM), and such tickets were eventually utilised by Hospitality Group Pty Limited (THG) to supply hospitality packages to its customers. THG and ICM were both part of an international group of companies engaged in the business of providing hospitality and catering at major sporting events, but were not authorised by

⁴ (2001) 110 FCR 157 at 163.

⁵ (2001) 110 FCR 157 at 164.

the ARU to supply hospitality packages for ARU matches. At the material time, THG knew of the restrictions on the resale of the tickets and that ATFS was in breach of its contractual obligations to ARU in supplying the tickets to ICM. ARU argued, first, in contract, that ATFS was in breach of Cl 3.11 of the ATFS contract and that THG and ICM were contractually bound by and in breach of the ticket condition; it claimed, second, in tort, in particular that THG and ICM had wrongfully induced ATFS to breach the ticket condition as well as its obligations under the ATFS contract. ARU was successful⁶ at first instance⁷ and Gyles J granted an injunction to restrain the defendants from selling ARU tickets either at a premium, or in conjunction with hospitality packages.

The award of monetary relief was, however, much more problematic. Notwithstanding the commission of torts and various breaches of contract, Gyles J held that ARU had not suffered any resultant loss as it had been fully paid, at the asking price, for all the tickets sold in breach of the Ticket Condition and the ATFS contract. ARU thus argued that it should be entitled to an account of profits for THG's contractual breaches (following the lead in *Attorney General v Blake*⁸) and tortious conduct. Gyles J declined to make the award in both instances: the former would involve '[s]uch a radical change in the received wisdom as to the common law of Australia'⁹ that it could not be a matter for a single judge to decide; nor could the extension of the award in the latter circumstance be justified as such award had traditionally been available only for torts with 'proprietary overtones'.¹⁰ However, the learned judge held that THG was liable for exemplary damages assessed at A\$100,000 as its conduct fell within the second category of the test enunciated by Lord Devlin *Rookes v Barnard*.¹¹ It was an intentional tort committed with full appreciation that the profit to be derived therefrom was likely to exceed any compensation payable to ARU. Such an award was necessary, in the learned judge's view, to bolster the deterrent effect of the injunctive relief (which was thought to be inadequate) or in other words, 'to make THG smart so that it will learn that tort does not pay'.¹² THG and ICM appealed against the decision and ARU cross appealed.

On appeal, the full court (Hill, Emmett and Finkelstein JJ) affirmed the trial judge's finding on THG and ICM's tortious liability. However, the court held that THG and ICM were not contractually bound by the ticket condition since the ticket contract between ARU and the original purchasers had been neither assigned nor novated to them. They considered that Gyles J had awarded

6 The defendants raised various defences including, inter alia, that the restrictions imposed by ARU against the sub-sale and transferability of the match tickets were anti-competitive in nature and violated Pt IV of the Trade Practices Act and, further, that such restrictions amounted to unreasonable restraints of trade which were void at common law. Both defences failed. The judge's findings in these aspects were upheld on appeal though the appellate court's reasoning differed from that of the trial judge in dismissing the latter defence: see (2001) 110 FCR 157 at 180–1.

7 (2000) 173 ALR 702.

8 [2000] 3 WLR 625.

9 (2000) 173 ALR 702 at 741.

10 (2000) 173 ALR 702 at 741.

11 [1964] AC 1129 at 1226–7.

12 (2000) 173 ALR 702 at 742–3.

exemplary damages in both contract and tort, but that Australian law was to the effect that exemplary damages could not be awarded for breach of contract.¹³ Accordingly, even if the respondents had committed breaches of contract, exemplary damages could not be awarded in respect of them.

Hill and Finkelstein JJ thus turned to consider whether the award of exemplary damages could stand solely on the basis of the respondents' *tortious* conduct. They concluded that such damages ought not to have been awarded. They considered the trial judge's award of exemplary damages to have been essentially premised on two grounds (that ARU had suffered no compensable loss as a result of the respondents' torts; and that the injunctive orders would not adequately deter future breaches) both of which they considered untenable. In assessing the loss suffered by ARU, the trial judge was entitled (but failed) to take account of damages *at large*, that is, damages which have not been specifically proven but which 'may be inferred as those which would, in the ordinary course of things, have been inflicted on the plaintiff'.¹⁴ It would thus have been open to the trial judge to infer that as a result of the contractual breaches induced by THG and ICM, ARU had lost the hospitality business that THG usurped and hence also the *profits* resulting therefrom.¹⁵ As such, the threat of substantial damages was real. Further, and contrary to the trial judge's view, there was no reason to doubt that an injunctive order would effectively deter future breaches: there was no evidence that THG and ICM or their related companies were given to disobeying court orders; nor would there be any commercial wisdom in doing so given the very real risk of detection and the grave consequences which would inevitably follow.

Finally, Hill and Finkelstein JJ dismissed ARU's plea for restitutionary damages in the form of an account of profits. They considered that, in contract, such an award would confer an unacceptable windfall on the plaintiff, while, in tort, restitutionary damages were confined to cases involving the misuse of the plaintiff's property. In both instances, the overriding principle was to ensure that a claimant was *compensated* for his *loss* and, that being the case, the defendant's profit was of no relevance. Whilst agreeing with the majority that the order of exemplary damages should be set aside, Emmett J nonetheless considered that the issue of relief should be remitted to the trial judge for fresh consideration,¹⁶ and that the trial judge would have been at liberty to order an account of profits for two reasons. First, 'a claimant should be entitled to any benefits derived, as a result of wrongdoing, from that which belongs to the claimant'.¹⁷ In this instance, ARU had the benefit of the *promises* given by its contracting parties to abide by the restrictions on the resale of tickets but the defendants had by their tortious conduct deprived

13 (2001) 110 FCR 157 at 191 and citing *Addis v Gramophone Co Ltd* [1909] AC 488. But see the main text at n 123 below.

14 (2001) 110 FCR 157 at 193.

15 ARU estimated that the non-authorized companies offering hospitality at its matches made a profit of approximately A\$1.5m per match: see (2001) 110 FCR 157 at 194.

16 Which in Emmett J's view was the proper course to take since 'the case is one where impressions formed by the learned primary judge from the way in which the case was conducted at trial cannot be properly replicated on appeal': see (2001) 110 FCR 157 at 197.

17 (2001) 110 FCR 157 at 198.

ARU of such benefit.¹⁸ This justification is based on an expansive view of the concept of property to include even incorporeal rights such as contractual promises. Second, the taking of an account of profits would also be useful as ‘an appropriate deterrent against future wrongdoing’,¹⁹ even if an injunctive order had been decreed which would have achieved the same result.

Beyond Labels: Compensation, Account of Profits and Restitutory Damages

While ARU had an indubitable interest in safeguarding its quasi-monopoly rights in the commercial exploitation of the rugby union matches, its only means was to employ the aid of contractual principles. In so doing, ARU was confronted by two major constraints: first, the compensatory measure of contractual damages, which insists on specific proof of financial loss and which therefore generates the associated risk of under-compensation where the contractual obligation which was the subject of the violation was crafted not with the intention to make an immediate financial gain but to create a condition critical to the success of a larger commercial enterprise; and, second, the principle of privity — to the extent ARU’s interests were delineated principally by contractual provisions, the boundaries so carved were ineffectual as against third parties with whom it was not in direct contractual relationships. To circumvent these difficulties, ARU adopted a bifurcated approach. The first component of this approach was to enlist the aid of tort; a successful action in tort would not only effectively subject a third party to a contractual obligation to which he had not agreed but also grant access to a wider measure of damages (and plausibly deeper pockets as well). The second was to seek wider measures of financial relief through an account of profits as well as exemplary damages.

In this part, we examine whether an award of an account of profits is an appropriate response to the apparent remedial lacuna. We will argue that, despite the gain-based nature of the award, an account of profits is often utilised, in the contexts of both contract and tort, as a means of *measuring* a claimant’s *loss*. This is particularly so where the nature of such loss renders any assessment by reference to the usual market values unsuitable or impracticable. In such event, the award is in fact compensatory in nature. However, we also argue that such award can (notwithstanding the possibility of characterising the same as compensatory damages) *alternatively* be justified as a response to wrongdoing where the primary concern is to *deter* such wrongs; by which term we embrace both breaches in tortious duties as well as contractual obligations. Whilst examining the latter, we digress briefly to consider the various nomenclature commonly employed for gain-based remedies to ensure that our understanding is not obscured by linguistic uncertainty.

Compensatory and Restitutory Damages in Tort

To begin with, we ask whether ARU could have been awarded a wider measure of damages for its *loss*, in particular, by reference to THG’s *gains*. As

¹⁸ (2001) 110 FCR 157 at 199.

¹⁹ (2001) 110 FCR 157 at 200.

a preliminary point, it should be noted that the risk of under-compensation has traditionally been lower in the sphere of tort by reason of the court's willingness to presume damage and assess such damage without strict insistence on specific proof of loss, particularly where there is uncertainty as to the exact extent of the claimant's loss.²⁰ In the *Hospitality Group* case, the majority observed that ARU was in principle entitled to claim damages at large without furnishing specific proof of loss.²¹ Their Lordships were further prepared to infer that ARU had lost the hospitality business which went to THG (and hence also the profits which THG derived therefrom), even though such 'loss' was perhaps more notional than real since ARU had clearly, by selling the tickets in question to ATFS and members of the public, prevented any possibility of profiting from the sale of the same in connection with hospitality packages. Indeed, whilst it is often said that 'the gist of the action [of inducing breach of contract] is damage',²² the courts have nevertheless inferred damage even in circumstances where it is clear that the damage was not or could not have been sustained. Hence in *Nauru Local Government Council v New Zealand Seamen's Industrial Union of Workers*,²³ the plaintiff Nauruan Government was allowed to claim for loss of profits in relation to a voyage jeopardised by the defendant's tort even though the voyage would in any event have been a loss-making venture. Significantly, Richardson J opined that the value of an asset is not necessarily measured by the immediate rewards intended by the owner and said that:²⁴

If a plaintiff would have made a commercially profitable use of an asset it is entitled to more than its expenses because its actual loss is greater. *If an asset is not used for profit or if, for wider commercial or social considerations, the plaintiff was content to sustain a loss, that is not the defendant's concern or benefit. In such a case, the plaintiff is not fairly compensated if while sustaining those expenses it is to receive nothing for being deprived of a beneficial use of it.*

A similar consideration could have undergirded the majority's view in the *Hospitality Group* case. As the founder of the rugby union matches, ARU alone had the prerogative to determine the distribution of the tickets²⁵ as well as the legitimate goals thereof. It is hardly surprising that ARU should, as a non-profit organisation, utilise its rights for purposes other than generating immediate financial returns. But the supposition that ARU had sustained no loss because it chose to pursue non-pecuniary goals by no means follows. On the contrary, the failure to realise broader social and economic objectives can, and does, with the passage of time translate into substantial personal and social costs.²⁶ In expressing a readiness to infer substantial damages which the claimant did not in fact sustain, the majority has implicitly endorsed the view

²⁰ See H McGregor, *McGregor on Damages*, 16th ed, Sweet & Maxwell, London, 1997, pp 337–8.

²¹ See above, nn 14–15.

²² Per Kay LJ in *Exchange Telegraph Company v Gregory Co* [1896] 1 QB 147 at 154.

²³ [1986] 1 NZLR 466.

²⁴ [1986] 1 NZLR 466 at 473 (emphasis added).

²⁵ (2001) 110 FCR 157 at 181.

²⁶ It should be added that the grant of injunctive reliefs (which are premised on the inadequacy of damages) against future breaches in fact supports the view that ARU had sustained damage which exceeded that determined by the normal compensatory measure.

that the loss which a claimant suffers in connection with the interference of his contractual right is neither circumscribed by his immediate financial loss nor the ease or difficulty of quantifying such loss.²⁷ The assessment is a holistic one giving due consideration to the nature of the claimant's rights as well as the effects of its violation. In adopting such an approach, the court underscored the vital distinction between the fact of damage and its *assessment*; as well as the peril of denying the former merely by reason of the intractability of the latter.

Of greater significance, however, is the fact that whilst categorically rejecting an account of profits for torts in general, the majority nonetheless considered THG's profits relevant as *a measure of ARU's loss*.²⁸ This demonstrates that the refusal to order an account was not premised on any intrinsic incongruence between the remedy and the cause of action, but only on the concern that there was an insufficient correlation between ARU's loss and the quantum determined by reference to THG's profits. On the facts, the majority was content to accept that this missing link could be found in the inference that ARU lost the business that THG gained, but such a view did in fact require the court to take an exceptionally broad view of the concept of 'loss' since, as we had earlier observed, ARU had not quite intended to conduct that specific kind of business from the start. Indeed, the availability of an account of profits for various categories of torts is well established.²⁹ In many of these cases, damage is presumed (but not fictional) because the injury actually incurred by the claimant is not quantifiable with precision.³⁰ Such awards have often been justified on the ground that they concern the infringement of proprietary or quasi-proprietary rights,³¹ as was the view of the majority in the *Hospitality Group* case. But that would, to borrow Professor Birks's expression, merely be transferring the difficult questions to the definition of property.³² A better view, it is submitted, is to understand these awards as compensatory. As we have argued,³³ the fact of ARU's loss was not disputed, the only issue remaining being the *quantification* of such loss. We have also contended in an earlier article (albeit in the context of contract law) that in such circumstances, the defendant's gains may be utilised as a means of assessing such loss.³⁴ Sharpe and Waddams's³⁵ proposition that such awards reflect a claimant's loss of opportunity to bargain represents a

27 See *Exchange Telegraph Company v Gregory Co* [1896] 1 QB 147 at 153. For an arguably similar treatment of contractual damages, see *Chaplin v Hicks* [1911] 2 KB 786.

28 (2001) 110 FCR 157 at 193.

29 See eg *Ministry of Defence v Ashman* (1993) 66 P & CR 195 (trespass to land); *Weingarten v Bayer* (1905) 22 RPC 341 (passing-off) and *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 (trademark infringement).

30 See *Hogg v Kerby* (1803) 8 Ves 215 at 223; but cf *AG v Blake* [2000] 3 WLR 625 at 633, where Lord Nicholls doubted whether such reason would in fact justify the award of account of profits in all cases.

31 See generally, D Friedmann, 'Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong' (1980) 80 *Col LR* 504.

32 P Birks, 'Civil Wrongs: A New World', *Butterworth Lectures, 1990-91*, Butterworths, London, 1992, p 96.

33 See text to nn 25-7 above.

34 See Phang and Lee, above, n 3 at 251-61.

35 R J Sharpe and S M Waddams, 'Damages for Lost Opportunity to Bargain' (1982) 2 *OJLS* 290.

credible means of justifying such gain-based awards. If THG had had to acquire the right to market hospitality in connection with the matches, it is not inconceivable that its prospective profits from the sales would be one (significant) determinant of the acquisition price. But this approach has frequently been castigated as pure fiction as it attributes a bargaining process to the parties often in circumstances when they would have been unwilling or unable to do so.³⁶ In our view, however, the force of this criticism diminishes once it is recognised that the hypothetical negotiation is invoked merely as a tool to *quantify* the claimant's loss subsequent to establishing the fact of loss (or the substantive liability).³⁷ If it were accepted, as we do, that the imputation of such bargaining process provides us with a reasoned basis for valuing the claimant's loss, then either the actual occurrence or absence of such negotiation is of no consequence.

Compensation and Restitutionary Damages in Contract

The intersection of tort and contract is yet another thought-provoking aspect of the present case. The peculiarity of the tort of inducing breach of contract is that the wrongdoing is premised principally on the breach of contract.³⁸ Indeed, while there are various ways of rationalising the tort,³⁹ it is in essence concerned with the protection of contractual interests.⁴⁰ However, as a result of the different measures for compensatory damages in tort and contract, a stranger to a contract who has induced its breach could (potentially) incur a more onerous liability in tort than the contract breaker in contract. On the facts of the *Hospitality Group* case, ARU *could*, as the majority indicated, have pleaded for damages at large and hence obtained substantial damages as against THG, the tortfeasor. As against ATFS, however, its damage in contract was at best nominal as it was unable to demonstrate proof of loss. This is a baffling result. While ARU had recourse to two separate causes of action, it had sustained just one measure of damage, namely, the loss arising from ATFS's contractual breach;⁴¹ yet the measure of the same could yield

36 See eg Birks, above, n 32 at 73–6; A Burrows, *The Law of Restitution*, 2nd ed, Butterworths, London, 2002, p 477. See also, in the context of breach of contract, L D Smith, 'Disgorgement of the Profits of Breach of Contract: Property, Contract and "Efficient Breach"' (1994–95) 24 *Canadian Business LJ* 121 at 126, Lord Nicholls's comment in *AG v Blake* [2000] 3 WLR 625 at 633 and most recently, Buckley J's observations in *Experience Hendrix LLC v PPX Enterprises Inc* [2002] EWHC 1353 at para 50.

37 For a more detailed explication of this argument, see Phang and Lee, above, n 3 at 251–61, especially at 252 and 254.

38 *Allen v Flood* [1898] AC 1 at 121.

39 See eg R Epstein, 'Inducement of Breach of Contract as a Problem of Ostensible Ownership' (1987) 16 *Journal of Legal Studies* 1 (arguing that the contractual interest is proprietary in nature); R Bagshaw, 'Inducing Breach of Contract' in *Oxford Essays in Jurisprudence*, J Horder (ed), Oxford University Press, Oxford, 2000 (arguing that the same reasons which justify the protection of property interests similarly justify the tortious protection of contractual interests); and P Cane, *Tort Law and Economic Interests*, 2nd ed, Clarendon Press, Oxford, 1996, pp 121–2 and 124–5 (arguing that the tort protects the claimant against unfair competition).

40 See also J Danforth, 'Tortious Interference with Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity' (1981) 81 *Col LR* 1491.

41 As Coleridge J observed in his dissent in the seminal case of *Lumley v Gye* (1853) 2 E & B 216 at 249, 'it is the breach of contract only that is the cause of damage'.

dramatically different results depending on whether the claim was made in contract or tort. If both awards aimed solely to compensate the claimant,⁴² there is no sound basis for such inconsistency.⁴³ In particular, if ARU had, as we have contended, indeed sustained substantial loss by reason of ATFS's breach in contract which is not fairly assessed by the customary contractual measure, does not the solution then more aptly lie in the reform of the remedial response in contract rather than in invoking a wholly divergent set of principles in tort?⁴⁴

As already mentioned,⁴⁵ we have in fact argued that the defendant's gains can in some circumstances be utilised as *a measure of* the claimant's loss arising from a breach of contract and that the House of Lords decision in *Attorney General v Blake*⁴⁶ could be construed as heralding this distinct possibility.⁴⁷ While it is true that the criteria laid down by *Blake* are not without difficulties,⁴⁸ the decision nonetheless provides an authoritative recognition for the award of an account of profits as an appropriate (though exceptional) response to a breach of contract where the plaintiff's loss cannot be adequately measured by the usual compensatory measure, and where he or she has a legitimate interest in preventing the defendant's profit-making activity. As we have attempted to show,⁴⁹ the value of the performance of ATFS's contractual obligation was not limited to the value of the ticket price. That obligation was a critical link in a *larger scheme* to promote the sport and it is such wider interest which arguably justifies the deterrence of ATFS's profit-making activity. The same reasons which rendered the defendant's gains relevant in the measurement of the plaintiff's loss in the context of tort apply

42 One possible justification of the larger tortious award may lie in the more egregious conduct of the tortfeasor, though that will mean that the award is not just compensatory but punitive in nature as well. Since *Quinn v Leatham* [1901] AC 495, however, it has been established that malice is not a necessary mental element of the tort and that it would suffice if the tortfeasor knew of the existence of the contract and intended to interfere with its performance. It is thus clear that the tort is concerned with the protection of the claimant's interests instead of punishing the tortfeasor for his conduct. Even if the quality of the tortfeasor's conduct were a relevant consideration, it is by no means obvious that the tortfeasor is any more culpable than the contract breaker. There is no reason to suppose that ATFS's conduct is any less reprehensible than that of THG's — both have deliberately violated another's rights to advance their own interests.

43 For a similar argument justifying the award of *disgorgement* damages for breach of contract (albeit on restitutionary rather than compensatory grounds), see Smith, above, n 36 at 129.

44 Indeed the genesis of the tort of inducing breach of contract can be traced back to the more restrictive measure of damage in contract, see *Lumley v Gye* (1853) 2 E & B 216 at 230 and S M Waddams, 'Johanna Wagner and the Rival Opera Houses' (2001) 117 *LQR* 431 at 445 and 447.

45 See above, n 34.

46 [2000] 3 WLR 625.

47 Phang and Lee, above n 3 at 251–61. But as is to be expected, there would be considerable resistance to any unnecessary extension of such an exceptional remedy, see for instance the arbitral award in *AB Corporation v CD Company (The Sine Nomine)* [2002] 1 Lloyd's Reports 805 at 806–7, where substantial damages were available under the usual compensatory measure and hence resort to gain-based awards appeared unwarranted.

48 Phang and Lee, above, n 3 at 244–51. See also J Edelman, *Gain-Based Damages — Contract, Tort, Equity and Intellectual Property*, Hart Publishing, Oxford, 2002, pp 155–8.

49 See main text to above, nn 25–7. See also S Stoljar, 'Restitutory Relief for Breach of Contract' (1989) 2 *JCL* 1 at 2–5 and P Maddaugh and J McCamus, *The Law of Restitution*, Canada Law Book Inc, Ontario, 1990, pp 435–6.

also in the context of contract.⁵⁰ Admittedly, even if ARU had obtained an account of profits as against ATFS, such an award would still not have been commensurate with the larger award in tort. But in our view, the judicious use of gain-based awards would nonetheless, in the absence of an even more precise measure, go a long way towards alleviating the risk of under-compensation.

The Relevance of Labels

At this juncture, it is appropriate to pause and consider whether the above analysis is consistent with the terminology employed in the *Hospitality Group* case, as we anticipate the objection that the very term 'account of profits' does, without more, suggest the preclusion of the application of a compensatory rationale. Indeed, there appears to be strong judicial backing for such a view. In *Colbeam Palmer Ltd v Stock Affiliates Property Ltd*,⁵¹ for example, Windeyer J observed thus:⁵²

The distinction between an account of profits and damages is that by the former the infringer is required to give up his ill-gotten gains to the party whose rights he has infringed: by the latter he is required to compensate the party wronged for the loss he has suffered. The two computations can obviously yield different results, for a plaintiff's loss is not to be measured by the defendant's gain, nor a defendant's gain by the plaintiff's loss. Either may be greater, or less, than the other. If a plaintiff elects to take an inquiry as to damages the loss to him of profits that he might have made may be a substantial element of his claim . . . But what a plaintiff might have made had the defendant not invaded his rights is by no means the same thing as what the defendant did make by doing so.

The gist of the above quotation suggests that an account of profits is concerned primarily with the defendant's gains (as opposed to the plaintiff's loss) and is therefore intrinsically incongruent with the notion of compensation.⁵³ In our view that is not an inevitable conclusion. Whilst such an award is quantified by the defendant's profits, the true nature of the award must be ascertained by reference to its underlying *rationale*. As we have attempted to demonstrate, the true impetus behind such awards often comes from the need to adequately compensate the claimant. At the same time, there exist persuasive justifications for utilising the defendant's gains in the assessment of the claimant's loss.⁵⁴ Yet in so doing we are not pretending that such a measure is one of mathematical precision, but only a justifiable option in the absence of better options. More importantly, we do not seek, by affirming the relevance of the gain-based awards in the assessment of loss, to emaciate the profit-stripping object of such awards based on *non-compensatory* principles.

⁵⁰ See the main text to above, nn 29–37.

⁵¹ (1968) 122 CLR 25.

⁵² (1968) 122 CLR 25 at 32. See also *Dart Industries Inc v The Décor Corporation Pty Ltd* (1993) 179 CLR 101 at 111.

⁵³ See McGregor, above, n 20, para 5; A Burrows, above, n 36 at 384–6 and K Mason and J W Carter, *Restitution Law in Australia*, Butterworths, Sydney, 1995, pp 603–5 and 606–7.

⁵⁴ See the sections above entitled 'Compensatory and Restitutionary Damages in Tort' and 'Compensatory & Restitutionary Damages in Contract'.

Indeed we do acknowledge that there are instances where the award of an account of profits cannot be satisfactorily explained by reference to the compensatory rationale.⁵⁵ When this occurs, the award is intended to eliminate the defendant's gains and the claimant's loss is then immaterial. The more crucial question which immediately follows concerns the theoretical basis of such award. Here again, the analysis as well as the nomenclature utilised in the relevant debate appear to be inextricably bound together. Among commentators who eschew the compensatory rationale, an account of profits is often referred to as 'restitutionary damages', often on the premise that the principle of unjust enrichment underlies all such awards.⁵⁶ This choice of terminology has, however, been criticised on the ground that it obscures the distinction between gain-based awards aimed at reversing unjustified transfers of wealth and other awards aimed at stripping the defendant of his gains (which does not necessarily correspond to a deprivation of the claimant's wealth) in response to a wrong he or she has committed.⁵⁷ More importantly, it also conceals the distinct rationales underlying the two awards; the former class of awards, being primarily concerned with wealth-reversal or 'giving back', are premised on the principle of unjust enrichment whilst the latter awards, those concerned with profit-stripping or 'giving up', are simply an additional type of remedial response to wrongdoings which is conceptually distinct from actions premised on unjust enrichment.⁵⁸ For this reason, Professor Lionel Smith advocates that the term *restitutionary damages*, which connotes *restoration*, should apply exclusively to the former type of awards whilst the latter should be termed *disgorgement damages*. In the *Hospitality Group* case, this taxonomy appeared to have formed the basis of the plaintiff's claim which, as the majority appeal judges observed, was founded not 'in reliance on principles of unjust enrichment . . . [but] on the proposition that the remedy is available for breach of contract and in tort'.⁵⁹ Whilst Professor

55 The archetypal case being the grant of such award in equity for breach of fiduciary duty: see eg *Boardman v Phipps* [1967] 2 AC 46.

56 See A Burrows, above, n 36 at 466–8; Goff and Jones, *The Law of Restitution*, 5th ed, Sweet & Maxwell, London, 1998, pp 780–3 and K Mason and J W Carter, above, n 53 at 606–7. See also *Dart Industries Inc v The Décor Corporation Pty Ltd* (1993) 179 CLR 101 at 111, where there was explicit endorsement of the principle of unjust enrichment as the rationale underlying an account of profits.

Cf the approach advocated by S Doyle and D Wright, 'Restitutionary Damages — The Unnecessary Remedy?' (2001) 25 *Melb ULR* 1. However, as Professor Birks very aptly pointed out, the difference between an account of profits and restitutionary damages may largely be historical and that 'the semantic question whether accounts of the profits of a wrong should be brought within the concept of damages, specifically as restitutionary damages, is ultimately not very important. All that matters is that the chosen terminology should ensure that the gain-based remedy is not hidden away when measures of recovery are in issue': see Birks, above, n 32 at 60–1.

57 See L D Smith, 'The Province of the Law of Restitution' (1992) 71 *Canadian Bar Review* 672 at 694–9. See also, generally, Edelman, above, n 48, Ch 3.

58 See Smith, above, n 57 at 695.

59 (2001) 110 FCR at 195. In addition, the majority judges also appeared to have adopted the term 'disgorgement damages' with reference to an account of profits: see (2001) 110 FCR 157 at 196. Note, in contrast, Emmett J's view that ARU could have been entitled to an account of profits as *restitution* for its deprivation on the ground of *unjust enrichment*: (2001) 110 FCR 157 at 198 (emphasis added). However, it would seem in arriving at this conclusion, the learned judge had equated the unjust factor equated with the defendants'

Birks shares the view that wrongs and unjust enrichment should be analysed as distinct and independent causative events, he nevertheless considers the introduction of the term 'disgorgement' neither necessary nor helpful.⁶⁰ In his view, where a cause of action is triggered by a wrong (as opposed to unjust enrichment or a 'non-wrong'), a gain-stripping response is not restricted to 'giving up' but may, where the facts permit, include 'giving back' as well.⁶¹ In such event, the term *disgorgement* is inappropriate. Hence, while we continue to refer to gain-based awards as 'restitutionary damages', care must be taken to ensure that we are at all times mindful of the nature of the event which triggers a particular award. Professor Birks's insightful observation has pointedly re-directed our attention to the juridical premise of the award rather than its form. In the final analysis, the critical inquiry lies in the nature of the causative event leading to the gain-based award. That does not mean, however, that choice of terminology is completely immaterial. Indeed, as the recent decision in *Esso Petroleum Company Limited v Niad Limited*⁶² amply demonstrates, conceptual clarity cannot be attained except through the sagacious use of terminology.

That case concerned the implementation of one of Esso's marketing campaigns (known as 'Pricewatch'), under which it was extensively advertised that Esso's prices would be among the lowest. For this purpose, Esso contracted with its retailers whereby the latter agreed, inter alia, to implement Esso's recommended prices which were determined based on information provided by the retailers on the prices of their competitors. To finance such competition, Esso would credit the retailers with a variable margin determined in accordance with the prices then in force (the 'price support'). Niad was a retailer who contracted with Esso on these terms but breached its obligations by charging more than the recommended prices on numerous occasions. Sir Robert Andrew Morritt V-C rejected various arguments impugning the validity of the contract itself.⁶³ He also rejected various defences pleaded by the defendant.⁶⁴ For our present purposes, much significance lies in the learned judge's views as to what remedies the claimant was entitled to. While there was no doubt that Esso was entitled to compensatory damages for breach, the proof of such loss was an uphill task as it was 'almost impossible to attribute lost sales to a breach by one out of several hundred dealers who operated Pricewatch'.⁶⁵ Esso therefore sought various other remedies in the alternative, namely, an account of profits as well as a 'restitutionary remedy' for the amount by which the actual prices charged by the defendant to its customers exceeded the recommended prices.

wrongdoing (see (2001) 110 FCR 157 at 198–200), in which case the question arises as to whether or not the award is, in reality, simply a response to wrongdoing: see P Birks, 'Misnomer' in Chapter 1 of W Cornish et al (eds), *Restitution: Past, Present & Future*, Hart Publishing, Oxford, 1998, pp 14–15.

60 See Birks, above, n 59 at 13.

61 See Birks, above, n 59 at 13.

62 Unreported at the time of writing (date of judgment: 22 November 2001).

63 These included insufficiency of consideration, an absence of contractual intent, as well as insufficiency of the terms themselves.

64 These included defences centring around the concepts of set-off and variation, as well as alleged breaches by the claimants themselves.

65 See above, n 62 at para 63.

Morritt V-C found that the defendant had indeed made a profit⁶⁶ and, applying the principle laid down by Lord Nicholls in *Blake*, held that an account of profits should be available to the claimant. What is more interesting, however, is that the learned judge also allowed Esso's alternative claim for 'restitutionary damages' measured by the amount by which the pump prices exceeded Esso's recommended sale price. At first look, it is difficult to comprehend, from the scant facts given in the judgment, how the computation of this amount differed from that pertaining to an account of profits. The only (but significant) clue can be found in the motivation for Esso's claim for such 'restitutionary damages'; that an account of profits 'is unlikely to yield by way of recompense the amount of additional price support obtained by Niad from Pricewatch which it did not pass on'.⁶⁷ This suggests that the 'restitutionary damages' thus computed was a larger quantum than the account of profits, as the former took into account *both* the elements of sales *profits* as well as the additional *benefit* which Niad enjoyed through the price support given by Esso. However, as the effect of the price support was to reduce the dealer's costs, it should logically follow that such reduction would be imputed (and hence included) in the computation of profits. It would further follow that the profits so accounted should in fact approximate or even exceed the 'restitutionary damages' measured by the difference between the sale and recommended prices. Evidently, this was not the case. Unfortunately the judgment did not detail the relevant method of quantification, so one can only speculate as to how the relevant figures were quantified. In our view it is at least plausible that the court has in this instance adopted a restrictive concept of profits which did not account for the cost reduction which Niad enjoyed through the price support.

More important, however, is the fact that the court appeared to have justified the two alternative gain-based awards on two independent juridical bases. The order to account was granted as a consequence of applying the principle set out in *Blake*: that damages would be an inadequate remedy and that Esso had 'a legitimate interest in preventing Niad from profiting from its breach of obligation'.⁶⁸ The 'restitutionary' remedy was, however, based on the principle of unjust enrichment.⁶⁹ Prima facie, the foregoing appears to broadly accord with the conceptual dichotomy discussed above⁷⁰ between a gain-based award in the nature of an account of profits (or *disgorgement* damages in Smith's lexicon) and *restitutionary* damages premised on unjust enrichment. On a closer examination, however, it is (with respect) uncertain if Morrirt V-C's reasoning did in fact exemplify the said dichotomy. Two

⁶⁶ This finding is not without difficulty. There was evidence (which the learned judge appeared to have accepted) to show that Niad's profitability had in fact *declined* whilst Pricewatch was in operation. If the proper operation of the scheme had indeed improved profitability through increased sales (that is, on the assumption that demand for fuel was elastic), then Niad's failure to reduce prices should logically result in lower sales and a general decline in profits. It is thus uncertain if Niad had indeed profited *from* its contractual breaches. Morrirt V-C did not appear to consider this causal link crucial, see above, n 62 at paras 32 and 62.

⁶⁷ See above, n 62 at para 57.

⁶⁸ Above, n 62 at para 63.

⁶⁹ Above, n 62 at paras 57 and 64.

⁷⁰ See main text to above, nn 57–8.

considerations serve to underscore this point. First, as we have pointed out,⁷¹ the basis on which Niad's profits were accounted was far from clear and hence it is by no means certain that the two awards should in fact be distinguishable in the manner intended by the learned judge. Second, if in fact 'restitutionary damages' were intended to reverse the benefit which had been unjustifiably transferred from Esso to Niad on the ground of unjust enrichment, it is unclear why the quantum of the same was not determined by direct reference to the price support instead of the differential between the sale and recommended prices. Indeed, the learned judge appeared, with respect, to have conflated two distinct concepts when he concluded that '[it] is undoubted that Niad obtained a *benefit*, in the form of a *price support* . . . In these circumstances it can hardly be denied that Niad was *enriched to the extent that it charged pump prices in excess of the recommended prices*'.⁷² It is respectfully submitted that a principal cause of the myriad perplexities arising from the reasoning in this case is the mistaken assumption that the labels 'account of profits' and 'restitutionary damages' bear settled and distinct meanings when they may not. In fact, this aspect of the law is still being steered in a sea of 'choppy waters'⁷³ and until such time as the tides subside, each label used would have to be scrupulously defined.

Putting aside the linguistic difficulties for the moment, one way of rationalising the allowance of an account of profits in this instance would be to recognise that it was essentially motivated by the concern to ensure that Esso would be properly *recompensed* for its *loss*. Specifically, Morritt V-C held that Esso was entitled to an account of profits for its contractual breach because damages would otherwise be inadequate,⁷⁴ and the same ground arguably constituted Esso's legitimate interest in preventing Niad from profiting from his breach.⁷⁵ Apart from the difficulty of proof mentioned above,⁷⁶ the learned judge also took into account the fact that 'the obligation to implement and maintain the recommended pump prices was fundamental to Pricewatch. Failure to observe it gives the lie to the advertising campaign by which it was publicised and therefore undermines the effectiveness of Pricewatch in achieving the benefits intended for both Esso and all its dealers within Pricewatch'.⁷⁷ As in the *Hospitality Group* case, the usual compensatory measure was inadequate in this instance because the infringed obligation was not merely intended to bring about a direct gain. Instead, it was a critical link in a larger scheme, the failure of which affected not only Niad's sales but the sales of other retailers as well. In such circumstances, where the fact of loss is ascertained and the only outstanding issue is that of *assessment*,

71 See main text to above, n 66ff.

72 Above, n 62 at para 64 (emphasis added).

73 Per Lord Nicholls in *AG v Blake* [2000] 3 WLR 625 at 631.

74 Whilst we acknowledge that 'the inadequacy of damages' is a concept the boundaries of which are yet unsettled (see above, n 48), it is tolerably clear that in this instance the alleged inadequacy was referable to Esso's *financial loss*.

75 In our view, the criterion of legitimate interest laid down by Lord Nicholls in *Blake* is not without difficulties (see above, n 48) and it is unfortunate, we respectfully submit, that the learned judge did not utilise this opportunity to explicate the concept.

76 Above, n 65.

77 See above, n 62 at para 63.

an account of profits is one reasoned basis⁷⁸ for measuring such loss. Further, assuming that in permitting the alternative measure of ‘restitutionary damages’, Morritt V-C was in fact attempting to identify a remedial measure that would most closely approximate the value which Esso had transferred to Niad in the form of the price support,⁷⁹ then such award would, even if it was intended to be founded on restitutionary principles, be explicable on compensatory principles as well⁸⁰ (as is true for all other restitutionary awards in the nature of wealth-reversal).

Restitutionary Damages as a Response to Wrongs

For present purposes, however, the more intriguing issue which arises from *Esso Petroleum v Niad* is whether the gain-based awards permitted by Morritt V-C could in fact be justified on restitutionary principles, the plausibility of the compensatory rationale notwithstanding. The starting point of the inquiry lies, as Professor Birks has persuasively argued,⁸¹ in identifying the *causative event* calling for a remedial response which in this case is Niad’s breach of its contractual obligation. Once that is established, it is clear that the award of gain-based responses was *not* premised on unjust enrichment. No question of any such award would have arisen but for the breach of contract. The issue then becomes — can such award be justified *as a response to wrongdoing*? And that depends, in turn, on whether a breach of contract amounts to a *wrong* in the first instance.

Academic literature responding to this difficult issue almost always begins with an examination of the availability of gain-based awards in tort law. The reason is simple — the notion of wrongdoing is deeply embedded in the law of tort and the categorisation of tort as a ‘wrong’ is natural. But, even so, the task of discerning a clear conceptual basis for gain-based responses in this sphere remains a vexed one. By far the most common and restrictive approach is (as Gyles J did in the *Hospitality Group* case⁸²) to confine such rewards to breaches related to violation of proprietary rights but such an approach is, as we have argued,⁸³ unhelpful as it merely deflects the issue. At the other extreme is the view that restitutionary damages should generally be available as a discretionary remedy for *all* torts.⁸⁴ However, the breadth of such approach fails, as Professor Birks observed, to take account of ‘the extraordinary efficacy of restitutionary damages as a means of suppressing economic activity’.⁸⁵ A third approach is that advocated by Professor Birks, namely, that restitutionary damages are appropriate in cases involving *deliberate or cynical* wrongdoing.⁸⁶ Under this approach, the legitimacy of

78 As explained in the section above entitled ‘Compensatory and Restitutionary Damages’.

79 This is evident from the learned judge’s conclusion that the ‘restitutionary damages’ is the ‘most appropriate remedy in that it matches most closely the reality of the case, namely that Niad took an extra benefit to which it was not entitled’: see above, n 62 at para 64.

80 Since an award to reverse Niad’s gain would also make good Esso’s loss.

81 See text to above, n 60ff.

82 See text to above, n 10.

83 See text to above, n 32. See also Phang and Lee, above, n 3 at 246.

84 Goff and Jones, above, n 56 at 522–3 (breach of contract) and 780–3 (tort).

85 See Birks, above, n 32 at 93. See also 88–9.

86 See Birks, above, n 32 at 94–5.

gain-based awards rests on the need *deter* such conduct — the inquiry is focused on the moral calibre of the conduct. While intuitively appealing, this approach has to contend with the objection that such inquiry is unhelpful as it would ultimately descend into the disarray of subjective moral assessments. We have, however, argued before⁸⁷ (albeit in the context of breach of contract) that this is not inevitably so. On the contrary, the very premise of legal discourse and debate rests on the assumption that they will lead to objective ends; it is a task we will not recoil from even if the process is made more arduous by our inability or unwillingness to agree.⁸⁸ Indeed, moral assessments are and always will be an integral part of the larger quest for justice and fairness.⁸⁹ Further, the established availability of exemplary damages for outrageous and exceptional conduct in tort⁹⁰ has in fact proven that subjectivity is no impediment where such assessment is warranted.

In contract law, the recovery of gain-based damages as a remedy for breach has (prior to *AG v Blake*) been even more unthinkable for a more fundamental reason — that a breach of contract is not a wrong (for the purposes of restitutionary damages) — and thus the question of whether gain-based damages can be recovered for wrongdoing does not even arise. Essentially, such an objection stems from the theory of efficient breach which condones a contractual breach (even a cynical one) so long as it results in a larger gain to the defendant on the twin bases that the claimant suffers no real loss by being paid damages *and* that society as a whole benefits by a re-deployment of scarce resources. We have in fact dealt briefly with the difficulties surrounding the theory of efficient breach in an earlier article⁹¹ and do not intend to repeat the various arguments here. Suffice it to say that, in our view, it is not evident that a contractual breach that brings about more gain for the defendant than loss for the claimant would invariably optimise social welfare. If one takes into account the detriment which contractual breaches inflict on the wider societal value of *promise-keeping*, it becomes quite probable that the sum effects of the breach may well be in the negative. Once it is recognised that there is value in upholding contractual promises, it would follow that there is, in *principle*, no reason why restitutionary awards should not be available as an additional part of the armoury to deter cynical breaches. It can be anticipated that such a proposition would once again encounter resistance arising from the aversion to legal principles with overt reference to morality but, as we have argued,⁹² this problem of subjectivity is really more perceived than real. It is interesting to note that in the *Hospitality Group* case, the only reason given by the majority of the Full Federal Court for disallowing an account of profits was (albeit only as obiter dictum) the unjustifiable windfall conferred on

87 See Phang and Lee, above, n 3 at 261–9.

88 See Phang and Lee, above, n 3 at 262.

89 See Phang and Lee, above, n 3 at 264–5.

90 See generally the section entitled ‘The Scope of Exemplary Damages in the Law of Tort’ below.

91 See Phang and Lee, above, n 3 at 266–7. But cf D Campbell and D Harris, ‘In Defence of Breach, a Critique of Restitution and the Performance Interest’ (2002) 22 *Legal Studies* 208 as well as the arbitral award in *AB Corporation v CD Company (The Sine Nomine)* [2002] 1 Lloyd’s Reports 805 at 807.

92 See main text to above, nn 86–90.

ARU. However, it is not apparent why such ‘windfall’ could be tolerated in the context of exemplary damages (albeit only in tort) but not with respect to restitutionary damages.⁹³ In any event, if deterrence were indeed the true motivation of the award, it is not clear if a ‘windfall’ — a concept largely dependent on or derived from compensatory principles — even arises in the first place. In our view, the House of Lords’ decision in *Attorney General v Blake* has (at least insofar as the law of England and Wales is concerned) firmly taken us beyond the threshold point of questioning the permissibility of restitutionary awards as a response to breach of contract and has, instead, directed our minds to the (arguably more intractable) question of *when* such awards should be awarded.

It must be clear by now that we believe that there is a compelling case for allowing the use of restitutionary damages as a deterrent against deliberate and cynical breaches in the contexts of both tort and contract. On that premise, there is *in principle* no reason why the claimants in *Hospitality Group* and *Esso Petroleum* should not have been entitled to plead restitutionary damages as a remedy for the defendants’ wrongdoing in tort and contract respectively.⁹⁴ And it must follow that any refusal of such award cannot be founded simply on the gain-based nature of such award but only upon making out a case that such an award would not on the particular facts accord with its underlying rationale.

Finally, a more difficult issue which arises from the foregoing conclusion is this: that if one justification for restitutionary damages lies in the *quality* of the defaulting party’s breach, are such awards then merely an instance of exemplary or punitive damages? And, if so, is there not then a pressing need for greater conceptual consonance (or at least resonance) among the principles which underlie these two remedial forms? It is to these fascinating issues that we now turn.

Exemplary Damages⁹⁵ — Their Scope (in Tort and Contract) as well as Their Relationship to Restitutionary Damages

One major issue which arose in the present case centred around the award of exemplary damages; in particular, whether such damages could be awarded for the tort of inducing a breach of contract.⁹⁶ It should be noted that no issue as to the possible award of exemplary damages for breach of contract arose as the court found no contractual nexus as such.⁹⁷ Returning to the possible award of exemplary damages for the tort of inducing breach of contract, the

93 Admittedly such conflict does not presently arise within the boundaries of contract law since exemplary damages are not generally considered to be available for breach of contract (but cf the section entitled ‘Exemplary Damages and Breach of Contract’ below).

94 Though it should be noted that the contractual perspective is also obliquely relevant to the *Hospitality Group* case since THG’s contractual liability was in fact established at trial though reversed on appeal.

95 The English Law Commission, though, preferred the terminology of ‘punitive damages’ instead: see the *Law Commission Report* at para 5.39 and cl 1(2) of the Draft Bill.

96 Cf also *Sanders v Snell* (1997) 143 ALR 426 (Federal Court of Australia), reversed (without reference to the point) in (1998) 196 CLR 329.

97 See *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157 at 189–9.

court held that while such damages could possibly be awarded in principle, none could be awarded on the facts themselves. This is not surprising in view of the established proposition that exemplary damages will be but rarely awarded. Indeed, the English position, embodied in the seminal judgment of Lord Devlin in *Rookes v Barnard*,⁹⁸ is even more stringent. In that case his Lordship confined the award of such damages, in the main, to only two narrow situations or categories⁹⁹ (there was also a third mentioned, which is probably even rarer, involving a situation where *statute* expressly authorises the award of exemplary damages¹⁰⁰). *Rookes v Barnard* was later endorsed in another leading House of Lords decision, *Cassell & Co Ltd v Broome*.¹⁰¹ This parsimonious attitude has not, however, generally been followed in other Commonwealth jurisdictions — notably in Australia,¹⁰² New Zealand¹⁰³ and (on balance at least) Canada.¹⁰⁴ However, there has been constantly emphasised the need for restraint in the *application* of the general principle: courts in these last-mentioned jurisdictions will, in other words, but rarely award exemplary damages notwithstanding their refusal to endorse the narrow categories laid down by Lord Devlin in *Rookes v Barnard*. For the purposes of the present article, the following issues may be briefly canvassed.

- (1) Although the award of exemplary damages is not confined (as is the case in England) to the two narrow categories enunciated by Lord Devlin in *Rookes v Barnard*, the issue (which arose in the present case) was the precise scope of such awards in the law of tort. This is because, notwithstanding the relative liberality, there are certain torts for which exemplary damages may not be appropriate in principle.

195, 197. Contra, though, the decision by Gyles J at first instance: see *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* [2000] FCA 823 (20 June 2000).

98 [1964] AC 1129.

99 The two situations are, in the words of his Lordship, as follows: ‘The first category is oppressive, arbitrary or unconstitutional action by the servants of the government’ (see [1964] AC 1129 at 1226), whilst the second pertains to cases ‘in which the defendant’s conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff’ (see at 1226).

And see generally *Butterworths Common Law Series — The Law of Tort*, Butterworths, London, 2002, paras 6.21–6.28.

100 See [1964] AC 1129 at 1227. We will not focus further on this particular category for the purposes of the present comment.

101 [1972] AC 1027.

102 See eg *Australian Consolidated Press Ltd v Thomas Uren* [1969] 1 AC 590, PC (Australia). This particular decision strongly supports the proposition that the decision as to the scope of exemplary damages is, in large part, one concerning *local* policy and should be dealt with accordingly (but cf per Lord Hailsham in *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1067–8). We will not deal with this particular point (of legal method and precedent) here.

It should be noted that the Australian High Court decision itself repays careful reading: see *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118.

103 See eg *Fogg v McKnight* [1968] NZLR 330 and *Taylor v Beere* [1982] 1 NZLR 81.

104 See eg *Vorvis v Insurance Corporation of British Columbia* (1989) 58 DLR (4th) 193 and (more recently) *Whiten v Pilot Insurance Co* (2002) 209 DLR (4th) 257. And see generally S M Waddams, *The Law of Damages*, 3rd ed, Canada Law Book Inc, Toronto, 1997, pp 490–1; Ontario Law Reform Commission, *Report on Exemplary Damages*, Toronto, 1991, p 8 (hereafter referred to as ‘the Ontario Report’); and B Feldthusen, ‘Punitive Damages: Hard Choices and High Stakes’ [1998] *New Zealand Law Review* 741 esp at 749.

- (2) Given the fact that exemplary damages are canvassed, in the main, in the sphere of the law of tort, can (and/or ought) such damages be awarded for breach of *contract*? This issue did not arise for decision by the Federal Court in the present case but would certainly have been relevant in this same case at the trial stage as the learned judge there had in fact found a direct contractual nexus between the claimant and defendant as well.
- (3) What, precisely, is the relationship (if any) between exemplary damages and restitutionary damages for wrongs? In particular, can the former be a substitute for the latter, thus avoiding the many difficulties (both conceptual and practical) that surround the latter?

The Scope of Exemplary Damages in the Law of Tort

As we have seen, exemplary damages will be awarded only under very exceptional circumstances. The crucial difficulty, however, for the court is knowing when those circumstances have arisen. The nature of such damages offers us clues: it is clearly established that such damages are intended to punish the defendant and underlying the concept of punishment here are the twin elements of retribution and deterrence.¹⁰⁵ Although the central purpose of the award of such damages may appear to centre on the individuals concerned, it is suggested that one cannot ignore the *societal* aims as well.¹⁰⁶ Insofar as line-drawing is concerned, it should be noted that the English Law Commission proposed a criterion which is consistent with the existing case law¹⁰⁷ — that exemplary damages be awarded in situations where the defendant has engaged in conduct that was in deliberate and outrageous disregard of the plaintiff's rights.¹⁰⁸ However, the difficulty that remains

¹⁰⁵ See eg the *Law Commission Report* at para 4.1. And Lord Devlin, in the leading English House of Lords decision of *Rookes v Barnard* [1964] AC 1129 observed (at 1221) observed, in a similar vein thus: 'Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter'.

¹⁰⁶ See eg G Williams, 'The Aims of the Law of Tort' [1951] *CLP* 137 at 144–145 and J Mallor and B Roberts, 'Punitive Damages: Toward a Principled Approach' (1999) 50 *Hastings LJ* 969 (the latter article was originally published in (1980) 31 *Hastings LJ* 639). See also per Clement JA in the Alberta Supreme Court (Appellate Division) decision of *Paragon Properties Ltd v Magna Investments Ltd* (1972) 24 DLR (3d) 156 at 167 (dissenting, but not on this more general point) and per Thomas J in the New Zealand Court of Appeal decision of *Bottrill v A* [2001] 3 NZLR 622 at paras 95–101 (dissenting, but also not on this more general point; indeed, since the final draft of this article was completed, the Judicial Committee of the Privy Council reversed the decision of the Court of Appeal and the entire tenor of the judgment of the majority of the Board does in fact emphasise the societal aims with respect to the award of exemplary damages (see also below, n 169)).

¹⁰⁷ Including *Rookes v Barnard* [1964] AC 1129 itself.

¹⁰⁸ See, in particular, the *Law Commission Report* at paras 5.46–5.48. See also per Knox CJ in an oft-cited passage from the Australian High Court decision of *Whitfeld v De Lauret and Company Limited* (1920) 29 CLR 71 at 77, where the learned judge stated that '[c]ompensatory damages are awarded as compensation for and are measured by the material loss suffered by the plaintiffs. Exemplary damages are given only in cases of *conscious wrongdoing in contumelious disregard of another's rights*' (emphasis added). In the same case, Isaacs J also observed (at 81) that '[f]rom a very early period exemplary damages have been considered by very eminent Judges to be punitive for *reprehensible conduct and as a deterrent*' (emphasis added). Reference may also be made to the judgment

centres around the apparent subjectivity inherent in such a criterion which embodies (in part at least) a moral element.¹⁰⁹ It should, nevertheless, be noted that both Hill and Finkelstein JJ in the *Hospitality Group* case cited, with approval, various precedents which basically accord with the general test just stated.¹¹⁰ Indeed, it should be noted that the *application* of the criteria mentioned in the *Hospitality Group* case reveals the exceptional nature of the award itself. The court set aside the exemplary damages awarded at first instance, holding that mere intention without ‘something bordering on the malicious’ was insufficient to ground an award of exemplary damages.¹¹¹

One point may, however, briefly be considered vis-à-vis the much narrower *English* position. Significantly, perhaps, whilst the narrow categories referred to above continue to be in force in the English context,¹¹² the House of Lords has very recently more than hinted at a possible departure in the foreseeable future. For the present, however, the House, in *Kuddus v Chief Constable of Leicestershire Constabulary*,¹¹³ held that the power to award exemplary damages was not limited to cases where it could be shown that the cause of action had been recognised before 1964¹¹⁴ as justifying the award of such damages.¹¹⁵ However, because the issue was not fully canvassed before the House, the much larger (and more crucial) question as to the general fate of exemplary damages as a whole will have to await a future decision.¹¹⁶ Indeed, neither party was prepared to argue for either the abolition or extension of exemplary damages in English law!¹¹⁷ Lord Hutton did, however, observe that ‘if on a future occasion a party sought to argue that the law should be changed and that exemplary damages should no longer be awarded, it would be open to the House under the Practice Statement of 1966 . . . to hear such an argument and to rule upon it’.¹¹⁸ Lord Scott of Foscote was even more

of McIntyre J in *Vorvis v Insurance Corporation of British Columbia* (1989) 58 DLR (4th) 193 at 208, where the learned judge stated that ‘punitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its *harsh, vindictive, reprehensible and malicious nature*. I do not suggest that I have exhausted the adjectives which could describe the conduct capable of characterizing a punitive award, but in any case where such an award is made the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment’ (emphasis added). See now, also, the very recent Canadian Supreme Court decision of *Whiten v Pilot Insurance Co Ltd* (2002) 209 DLR (4th) 257, which also contains an excellent comparative survey of the law relating to exemplary damages.

109 Though cf A Phang, ‘Security of Contract and the Pursuit of Fairness’ (2000) 16 *JCL* 158.

110 See (2001) 110 FCR 157 at 190 and 194. See also, to like effect, the decision at first instance in *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (2000) 173 ALR 702 at 741–2.

111 See (2001) 110 FCR 157 at 194. See also generally (2001) 110 FCR 157 at 192–4 and 200.

112 See above, nn 98–100.

113 [2001] 3 All ER 193.

114 The date when the decision in *Rookes v Barnard* [1964] AC 1129 was handed down.

115 Overruling the hitherto leading decision on this point in *AB v South West Water Services Ltd* [1993] QB 507.

116 The English Law Commission had in fact recommended not only the retention but also an extension and liberalisation of exemplary damages via legislation, although the government had subsequently decided to defer any decision in this regard, advocating further judicial development by way of clarification in the meantime: see *Hansard (HC Debates)* Vol 337 at col 502 (9 November 1999).

117 See [2001] 3 All ER 193 at 202 and 211.

118 See [2001] 3 All ER 193 at 212.

emphatic and would have been 'receptive to a submission that exemplary damages awards should no longer be available in civil proceedings'.¹¹⁹ It seems that the final word on the fate of exemplary damages has yet to be pronounced. Indeed, the decision in *Kuddus* itself, whilst on a somewhat different point, manifests, on a general level, a rather more liberal approach towards the award of exemplary damages; an approach which is totally consistent with that of the recommendations of the English Law Commission itself.¹²⁰

Exemplary Damages and Breach of Contract

It appears fairly well established that exemplary damages cannot be awarded for breach of contract in the Australian context.¹²¹ Unfortunately, the possibility of reconsidering this issue did not arise in the *Hospitality Group* case at the Federal Court stage, although a contractual nexus between the parties was in fact established during proceedings before the trial court itself. This position was nevertheless endorsed (albeit obiter) by Hill and Finkelstein JJ in the *Hospitality Group* case,¹²² although the court (with respect) appears to have conflated the various categories of damages somewhat.¹²³ However, it should be noted that Wilcox J, in the Federal Court of Australia decision in *Flamingo Park Pty Ltd v Dolly Dolly Creation Pty Ltd*¹²⁴ did not dismiss the possibility of awarding exemplary damages for breach of contract out of hand; however, the learned judge was of the view (albeit by way of obiter dicta) that this 'would probably be a rare event; and if it arose it would be a matter of policy for the courts to determine whether it was appropriate to extend what some see as an anomaly — punishment in a civil action — from tort into contract law'.¹²⁵ Wilcox J was clearly more comfortable with the award of exemplary damages in the context of a *tort*, where there was more of a likelihood of circumstances occurring which evinced a 'contumelious disregard of a plaintiff's rights'.¹²⁶ It should, however, be noted that Hill and Finkelstein JJ did refer to the *Flamingo Park* case, but were of the view that it 'does not reflect the law in Australia, at least until such time as the High Court reverses the current rule'.¹²⁷ The principal task of this section is indeed to ascertain whether or not (mere assertion apart) there are good reasons in principle for reversing the current rule. As will be argued below, there are indeed good reasons to effect such a reversal.

In the United States Court of Appeals (Second Circuit) decision of *Thyssen*,

119 See [2001] 3 All ER 193 at 222.

120 See above, n 116.

121 See eg Mason and Carter, above, n 53, p 605.

122 See esp (2001) 110 FCR 157 at 191.

123 See eg the citation of the House of Lords decision in *Addis v Gramophone Co Ltd* [1909] AC 488, which concerned the refusal to award damages for mental distress in an employment context. Even here, however, the key issue was not so much the state of mind of the defendant as opposed to the other substantive reasons for the refusal to award such damages which are, in any event, in a different category.

124 (1986) 65 ALR 500.

125 See (1986) 65 ALR 500 at 526.

126 See (1986) 65 ALR 500 at 526.

127 See (2001) 110 FCR 157 at 191.

Inc v SS Fortune Star,¹²⁸ Friendly, Circuit Judge, did briefly set out a few reasons in favour of the general proscription on the award of exemplary damages for breach of contract.¹²⁹ One reason was ‘that the law of contracts governs primarily commercial relationships, where the amount required to compensate for loss is easily fixed, in contrast to the law of torts, which compensates for injury to personal interests that are more difficult to value, thus justifying noncompensatory recoveries’.¹³⁰ It is submitted that this reason is not very persuasive as the courts are well able to weigh the various factors and award an appropriate amount of damages in the case at hand. What is crucial is whether or not such damages ought, in *principle*, to be awardable in the first instance. Another reason proffered was that breaches of contract did not cause damage which would warrant a retributive element that is, of course, an integral part of exemplary damages.¹³¹ This reason, however, is persuasive only if we assume that a breach of contract involves no (or at the very most a negligible amount of) wrongdoing. This, in turn, depends on whether or not one endorses the theory of efficient breach or a contrasting perspective which endorses the moral conception of promise-keeping in contract law. Indeed, and significantly perhaps, the final reason proffered was the theory of efficient breach itself,¹³² which we have briefly discussed earlier¹³³ and will deal with in more detail below.¹³⁴ Before proceeding to do so, however, we should consider some key Canadian cases.

The following observations by McIntyre J in the Canadian Supreme Court decision of *Vorvis v Insurance Corporation of British Columbia*,¹³⁵ merit quotation in full:

In my view, while it may be very unusual to do so, punitive damages may be awarded in cases of breach of contract. It would seem to me, however, that it will be *rare* to find a *contractual breach* which would be appropriate for such an award. In tort cases, claims where a plaintiff asserts injury and damage caused by the defendant, the situation is different. The defendant in such a case is under a legal duty to use care not to injure his neighbour, and the neighbour has in law a right not to be so injured and an additional right to compensation where injury occurs. The injured party is entitled to be made whole. The compensation he is entitled to receive depends on the nature and extent of his injuries and not upon any private arrangement made with the tortfeasor. In an action based on a breach of contract, the only link between the parties for the purpose of defining their rights and obligations is the contract. Where the defendant has breached the contract, the remedies open to

128 777 F 2d 57 (1985).

129 See generally 777 F 2d 57 (1985) at 63.

130 See 777 F 2d 57 (1985) at 63. Cf also the *Law Commission Report* at para 5.72, where it is also argued that a situation in the tortious context is more readily subject to ‘state punishment’ via exemplary damages. However, both contract and tort belong to the sphere of civil obligations and there is no reason in principle why one ought to be more amenable to outrageous conduct simply because it happens to play itself out in a contractual context.

131 See 777 F 2d 57 (1985) at 63.

132 See 777 F 2d 57 (1985) at 63. See also the *Law Commission Report* at para 5.72.

133 See main text to above, n 91ff.

134 See the main text to below, nn 154–160. The reference to O W Holmes’s *The Common Law*, Boston, Little, Brown, 1881 (reprinted and edited by M D W Howe, Harvard University Press, 1963), is significant as it is often cited in arguments proffered in favour of the theory of efficient breach.

135 (1989) 58 DLR (4th) 193.

the plaintiff *must arise from that contractual relationship, that 'private law', which the parties agreed to accept. The injured plaintiff then is not entitled to be made whole; he is entitled to have that which the contract provided for him or compensation for its loss. This distinction will not completely eliminate the award of punitive damages but it will make it very rare in contract cases.*¹³⁶

Significantly, both Hill and Finkelstein JJ in the *Hospitality Group* case were of the view that *Vorvis* did signal a departure from the prevailing Australian law.¹³⁷ It is submitted, however, that a close reading of the passage just quoted nevertheless reveals some remaining difficulties, particularly in the actual *reasoning* utilised, which might actually impair the award of exemplary damages for breach of contract. In particular, whilst there is much in the above quotation that is persuasive, if this reasoning (particularly in the last part) is to be taken to its logical conclusion, exemplary damages ought *never* to be awarded for breach of contract because the claimant can only claim *compensatory* damages and *not* damages which are intended to *punish*. And, in *Vorvis* itself, Wilson J, in a dissenting judgment, observed (with respect to the distinction drawn in the quotation above between contract and tort) as follows:¹³⁸

Nor would I draw the wide divergence that my colleague does between the duties owed to a neighbour under the law of tort and the duties that are breached in contract by the type of flagrant and deliberate misconduct that would merit an award of punitive damages. I agree with the appellant that it would be odd if the law required more from a stranger than from the parties to a contract. The very closeness engendered by some contractual relationships, particularly employer/employee relationships in which there is frequently a marked disparity of power between the parties, seems to me to give added point to the duty of civilized behaviour.

As problematic, perhaps, is the further proposition that even if exemplary damages could be awarded for a breach of contract, the conduct in question must nevertheless *also* constitute a *separate and independent* action as well.¹³⁹ However, this view was rejected by Wilson J (albeit dissenting) in the Canadian Supreme Court decision of *Vorvis v Insurance Corporation of British Columbia*,¹⁴⁰ where the learned judge observed thus:¹⁴¹

136 See (1989) 58 DLR (4th) 193 at 207–8 (emphasis added).

137 See (2001) 110 FCR 157 at 191.

138 See (1989) 58 DLR (4th) 193 at 224. See also the main text to below, n 144ff.

139 See the Canadian Supreme Court decision of *Vorvis v Insurance Corporation of British Columbia* (1989) 58 DLR (4th) 193 at 206; see, further, the (also Supreme Court of Canada) decision of *McKinley v BC Tel* (2001) 200 DLR (4th) 385 at 416–18. Reference may also be made to eg *Adams v Confederation Life Insurance Co* [1994] 6 WWR 662 and *Whiten v Pilot Insurance Co* (1999) 32 CPC (4th) 3; reversed (2002) 209 DLR (4th) 257 (the separate causes of action in the two last-mentioned cases consisted in the respective defendant insurer's breach of the duty of good faith); though cf *Jennet v Federal Insurance Co* (1976) 72 DLR (3d) 20. See also generally the *Ontario Report*, p 89.

And see, in the American context, § 355 of the Restatement (Second) of Contracts, which reads as follows: 'Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable'. Reference may also be made to *Thyssen, Inc v SS Fortune Star 777 F 2d 57* (1985). See, further, Dodge, below, n 152.

140 (1989) 58 DLR (4th) 193.

141 See (1989) 58 DLR (4th) 193 at 223–4.

I do not share my colleague's view that punitive damages can only be awarded when the misconduct is in itself an 'actionable wrong'. In my view, the correct approach is to assess the conduct in the context of all the circumstances and determine whether it is deserving of punishment because of its shockingly harsh, vindictive, reprehensible or malicious nature. Undoubtedly some conduct found to be deserving of punishment will constitute an actionable wrong but other conduct might not.

It is submitted that the view of Wilson J above (albeit apparently a minority view) is to be preferred. Some very recent support for such an approach does in fact appear to emanate from yet another Canadian Supreme Court decision: *Royal Bank of Canada v W Got & Associates Electric Ltd.*¹⁴² Indeed, one commentator was of the view that this particular case represents a clear proposition to the effect that exemplary damages can be (and, in fact, were) awarded for breach of contract independent of a finding of a separate (here, tortious) liability.¹⁴³ It is submitted, however, that this decision might not represent as clear a proposition as that just proffered: the court had in fact found it *unnecessary* to consider the (tortious) issue of conversion as it had held that the damages for contract and tort were the same. The lower courts, it should be noted, did in fact find that there *had* been tortious liability in conversion as well. The clearest test situation would, of course, be one where there is no possible (concurrent) tortious liability (or any other concurrent liability for that matter), with the facts concerned pertaining solely to a breach of contract. Indeed, if this recent decision is inconclusive (as has been argued) and it is therefore still insisted that the misconduct concerned also constitutes an 'actionable wrong', we will (in instances where that 'actionable wrong' is *tortious*), in effect, be *avoiding the issue* with regard to breach of contract altogether and be considering, instead, the possible award of exemplary damages in a *wholly different* context altogether, viz, the sphere of *tort* law. A related difficulty concerns the artificiality that might result; a point that was very succinctly (and, more importantly, persuasively) put by Linden J in the Ontario High Court decision of *Brown v Waterloo Regional Board of Commissioners of Police*,¹⁴⁴ as follows:¹⁴⁵

Punitive damage awards should be part of the judicial arsenal in contract cases in the same way as they are in tort cases. I see no sound reason to differentiate between them. Canadian courts, *unlike English courts*, have retained their broad power to award punitive damages in tort cases. Thus, if a high-handed breach of contract also

142 (1999) 178 DLR (4th) 385. Cf also the Alberta Supreme Court decision of *Rowland's Transport Ltd v Nasby Sales & Service Ltd* [1978] 3 ACWS 215. However, although exemplary damages were in fact awarded in the context of a breach of contract, there was no substantive analysis as such.

143 See J Edelman, 'Exemplary Damages for Breach of Contract' (2001) 117 *LQR* 539. But cf the very recent Canadian Supreme Court decision of *Whiten v Pilot Insurance Co* (2002) 209 DLR (4th) 257, which should also be read in conjunction with the main text immediately following. Indeed, in this particular case, it was reaffirmed (following the *Vorvis* case) that an independent cause of action had to be shown, although that cause of action need not necessarily be only tortious in nature. Cf also the (also Canadian Supreme Court) decision of *Sylvan Lake Golf & Tennis Club Ltd v Performance Industries Ltd* (2002) 209 DLR (4th) 318.

144 (1981) 136 DLR (3d) 49; varied on appeal, (1983) 150 DLR (3d) 729 (Ontario CA).

145 See (1981) 136 DLR (3d) 49 at 65 (emphasis added). For attempts at evading this requirement, see Feldthusen, above, n 104 esp at 765–6.

happens to amount to tortious conduct, punitive damages would be awardable pursuant to tort theory. It is said that if this conduct is purely a breach of contract and not tortious then no punitive damages can be awarded, despite the callousness of the conduct. That makes no sense. It is wrong to treat one contract breach different from another merely because one violates tort principles while the other does not. In recent years, the principles of damages in tort and contract are becoming more consistent. That is good and should be encouraged. By allowing punitive damages for contract breach, that laudable trend will be advanced. Moreover, hopefully those who plan to breach contracts in a callous fashion will think twice.

Consequently, I conclude that it is not beyond the power of this court to award punitive damages in those rare situations where a contract has been breached in a high-handed, shocking and arrogant fashion so as to demand condemnation by the court as a deterrent.

It is submitted that the argument in the above passage is very powerful and persuasive. However, it is also admitted that the overall power of that argument itself is subject to two possible caveats, which we will now consider *seriatim*.

First, and this is embodied in the italicised words in the passage itself, the argument depends on an *expansive or liberal* approach towards the award of exemplary damages in the *tortious* context. This is not to state that such an approach will result in liberality on the part of the courts themselves; however, it does mean that the award of exemplary damages would not be constrained by the English approach and be confined only to the three situations Lord Devlin laid down in *Rookes v Barnard*.¹⁴⁶ It is suggested that this more liberal approach is in fact the preferable one to adopt, given that it is in fact the norm in other Commonwealth jurisdictions¹⁴⁷ and has also even recently been advocated by not only the English Law Commission¹⁴⁸ but has also recently had at least some implicit support in the House of Lords itself.¹⁴⁹

A second possible caveat is that one has to reject the concept of efficient breach referred to earlier.¹⁵⁰ Indeed, if the theory of efficient breach is accepted, the *entire* argument for the award of exemplary damages for breach of contract necessarily falls to the ground since the defendant's conduct becomes wholly immaterial (bearing in mind that it is precisely the outrageousness of the defendant's conduct¹⁵¹ that justifies the award of exemplary damages in the first instance). It should be noted, however, that we have earlier canvassed a number of difficulties with regard to the concept of efficient breach.¹⁵²

We would only add that it is, of course, possible for a contract to be

146 And see generally the main text to above, nn 112–120.

147 See the main text to above, nn 101–4.

148 See above, n 116.

149 In *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] 3 All ER 193. See also the main text to above, n 113ff.

150 See main text to above, nn 132–134.

151 And see main text to above, nn 108–111.

152 And see the main text to above, n 91ff. We would also point, in particular, to a very interesting (and recent) article by W S Dodge entitled 'The Case for Punitive Damages in Contracts' (1999) 48 *Duke LJ* 629. Very briefly put, the learned author argues in favour of the award of punitive damages for breach of contract. He argues, in particular, that such damages ought to be awarded for *opportunistic* breaches of contract which do not (by their

breached in an innocent, non-cynical fashion. However, in that situation, this would merely mean that exemplary damages would clearly be *unavailable*.¹⁵³ This still leaves it possible, however, for exemplary damages to be awarded if the contract breaker's conduct is indeed deplorable.¹⁵⁴ In summary, the approach one endorses depends, in the final analysis, on one's view of contract law in general and breach of contract in particular. We would suggest that there is no reason in principle why the courts should not be given a residuary power to award exemplary damages for breach of contract in truly exceptional situations when the defendant's conduct has been outrageous. Interestingly, while the countervailing argument premised on the theory of efficient breach is very heavily dependent upon societal (in particular, utilitarian) arguments, the approach presently advocated is not without societal arguments either. Indeed, as the reader may recall, one of the main functions underlying the award of exemplary damages is deterrence — a concept and aim that is itself premised on wider societal considerations.¹⁵⁵ However, we hasten to add that in addition to these considerations, the award of exemplary damages for breach of contract also aids in reinforcing the underlying *moral* conception of *promise-keeping* in contract law. This conception cannot be denied, although its importance will of course vary, depending on the particular perspective one is adopting. It is submitted that whilst purely *compensatory* damages would be adequate where a contract is breached without more, the award of *exemplary* damages does serve the function of deterring parties from breaking their respective contracts in a manner that signals, in *no uncertain terms*, that promise-keeping is wholly immaterial.¹⁵⁶ It has in fact been suggested that

very nature) increase societal wealth. He argues, in addition, that even where an efficient breach (which is not merely opportunistic) is concerned, it is still an inefficient approach compared to the threat of the award of exemplary damages which will force the parties to negotiate, thereby avoiding the more expensive costs of litigation. Finally, the author argues that punitive damages should *not*, however, be awarded for *involuntary* breaches. In this last-mentioned regard, we would suggest that the nature of an involuntary breach is such that it would not, in any event, justify the award of punitive damages. This is an interesting article and a brief note can hardly do it justice.

153 It is arguable that the breaking of a promise is itself the simultaneous breach of a moral obligation. However, we would argue that a mere breach, without accompanying outrageous conduct, would not (in and of itself) justify the award of exemplary damages. As we have just noted in the main text, a contract can be broken in a variety of ways, only some of which ought to result in an award of exemplary damages. Such an approach is also consistent with the general injunction that exemplary damages ought to be the rare exception rather than the rule. See also Dodge, above, n 152.

154 See D E R Venour, 'Punitive Damages in Contract' (1988) 1 *Canadian J Law and Jurisprudence* 87 at 103, where the author said that '[m]ost of the cases require that the contract-breaker possess a blameworthy state of mind; he must act maliciously or wantonly before he is subject to the court's displeasure. Mere negligence is not enough'. This is consistent with the general criteria, first formulated under the law of tort: see generally the section above entitled 'The Scope of Exemplary Damages in the Law of Tort'.

155 It might be noted that even the rationale of *retribution* has societal overtones as well: see eg Feldthusen, above, n 104 at 750. Such societal benefits can also be manifested in various other ways: see generally Venour, above, n 154 at 99ff.

156 See also Venour, above, n 154 at 96. The same author also refers (at 104) to the role of exemplary damages as 'helping to set minimum standards of decent behaviour for contracting parties'.

'[t]he key factor is good faith'.¹⁵⁷ Notwithstanding the fact that, as a substantive vitiating factor, good faith is (in Commonwealth law at least) still in a fledgling state,¹⁵⁸ there is no reason why it cannot be integrated into the process of ascertaining whether or not exemplary damages should be awarded. Indeed, it is submitted that a situation which merits the award of exemplary damages would, based on the criteria hitherto laid down,¹⁵⁹ probably (dare we say, necessarily) involve a situation of bad faith in any event. We do acknowledge, once again, that the countervailing theory of efficient breach does militate against such an argument but it bears repeating that that theory is subject to objections and critique and that it is, in any event, only one possible moral conception among a sea of many competing moral conceptions.¹⁶⁰

On a somewhat more modest level, it might be argued that the case for the award of exemplary damages for breach of contract is stronger in *more specific* situations where there are clearly pressing considerations. One such situation might lie within the employment context, where special intangible factors (such as the need for the employer to treat the employee with dignity, respect and compassion) are involved.¹⁶¹ A contrasting situation, on the other hand, might be one that is purely commercial in character¹⁶² and, indeed, Professor Waddams has opined that the '[r]efusal of exemplary damages is . . . appropriate in most commercial cases'.¹⁶³ The possible justification, insofar as the commercial context is concerned, may be founded on the basis that there is a need for certainty.¹⁶⁴ The learned author proceeds to observe that '[w]here, however, the plaintiff does have a personal interest in performance of the sort the court would protect by a decree of specific performance or by an injunction to restrain the breach, a case can be made for deterring interference with such interests'.¹⁶⁵ Unfortunately, however, the illustrative situation given immediately after this general proposition

157 See Mallor and Roberts, above, n 106 at 992. Cf also the *Ontario Report*, p 96.

158 See Phang, above, n 109 at 186–8, and the literature cited therein.

159 See the main text to nn 108–111, above.

160 See also Venour, above, n 154 at 104. A very useful discussion may also be found in the *Ontario Report*, pp 92–5. See also generally Phang, above, n 109.

161 And see Venour, above, n 154 at 98–100; the learned author also refers to insurance cases (see at 100–2) as well as 'community standards cases' (see at 102–3). Also cf J Swan, 'Extended Damages and *Vorvis v Insurance Corporation of British Columbia*' (1990) 16 *Canadian Business LJ* 213. See also Professor Waddams's reference to *Vorvis* in general and the employment context in particular in Waddams, above, n 104 at 498, where he was of the view that a special situation in the employment context that might merit the (exceptional) award of exemplary damages 'might, perhaps, arise where an employee had a specifically enforceable right to employment and the employer acted with the intention of defeating the right'.

162 Although it might not always be easy to distinguish between commercial and non-commercial contexts, it depending very much on which party's perspective one is adopting so that (for example) even a transaction between a commercial vendor and consumer may be characterised in quite a contrasting fashion. One other alternative is to utilise the perspective of the 'reasonable person', but, although attractive at first blush, it is (we suggest) extremely problematic when sought to be applied to a concrete situation.

163 See Waddams, above, n 104, p 497.

164 And see Venour, above, n 154 at 98.

165 See Waddams, above, n 104, p 497. It will be recalled that deterrence is one of the aims of awarding exemplary damages: see the main text to n 105, above.

concerned the *tort* of trespass (as opposed to a breach of contract).¹⁶⁶ It should be noted, nevertheless, that in (non-commercial) situations such as those involving employment contracts, the need for certainty may well be 'irrelevant because a breach will not lead to the transfer of resources from a lower to a higher value use'.¹⁶⁷

Another point supporting (albeit in a more subsidiary fashion) the award of exemplary damages for breach of contract may be briefly considered as well. It is now generally accepted that the award of exemplary damages in a situation of tortious negligence (whilst rare¹⁶⁸) is possible, although there has to be conduct that goes beyond mere lack of care and which must be blameworthy.¹⁶⁹ The situation, however, where there has been a breach of contract is more compelling than a situation of negligence. The element of blameworthiness is less likely to be a problem when there has been a breach

166 See Waddams, above, n 104, p 497.

167 See Venour, above, n 154 at 98.

168 See eg *Robitaille v Vancouver Hockey Club Ltd* (1981) 124 DLR (3d) 228 at para 77 (British Columbia CA); *Dhalla v Jodrey* (1985) 16 DLR (4th) 732 at 739; and *Coughlin v Kuntz* [1990] 2 WWR 737 at paras 41 and 42 (British Columbia CA). Both the latter cases cite from Professor Waddams's excellent work, above, n 104. See, further, the Australian High Court decision of *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 9–10 and 28–9. A more recent (and extremely important) decision is that of the New Zealand Court of Appeal in *Bottrill v A* [2001] 3 NZLR 622, which is elaborated upon briefly in the following note (reference may also be made to the New Zealand High Court decision of *McLaren Transport Ltd v Somerville* [1996] 3 NZLR 424). *Bottrill v A* has, however, been very recently reversed by the Judicial Committee of the Privy Council by the narrowest of margins (see the following note).

See also generally the *Law Commission Report* at paras 5.50–5.53; the *Ontario Report*, pp 9 and 67–70; as well as Feldthusen, above, n 104 at 753–4.

169 See eg *Robitaille v Vancouver Hockey Club Ltd* (1981) 124 DLR (3d) 228 at para 77. It would appear in fact that in a situation where the award of exemplary damages is justifiable the actual conduct would have shaded into reckless conduct: see eg *Coughlin v Kuntz* [1990] 2 WWR 737 at paras 41 and 42; reference may also be made to the English Court of Appeal decision of *John v MGN Ltd* [1997] QB 586 at 617–18. Special attention should now be paid to the New Zealand Court of Appeal decision of *Bottrill v A* [2001] 3 NZLR 622, where it was held (albeit with Thomas J dissenting) that exemplary damages could be awarded for negligence if the defendant was subjectively aware of the risk of conduct and acted deliberately or in reckless disregard nonetheless (which would, of course, be assessed on an objective basis); gross negligence, however, would be insufficient. See, further, the following note. Since the final draft of this article was completed, however, the Judicial Committee of the Privy Council *reversed* (albeit by a bare majority of 3 2) the decision of the New Zealand Court of Appeal: see *A v Bottrill* [2002] 3 WLR 1406. The Board endorsed the judgment of Thomas J and held that 'under the common law of New Zealand the court's jurisdiction to award exemplary damages in cases of negligence is not rigidly confined to cases where the defendant intended to cause the harm or was consciously reckless as to the risks involved' (see para 63). This is clearly a very significant decision and requires elaboration that cannot be undertaken here. It is suggested, however, that there is much in the views of the minority of the Board which (following the approach of the majority in the New Zealand Court of Appeal) entails a narrower focus (as briefly mentioned above). Like Thomas J, the majority of the Board nevertheless preferred to focus on the broad rationale for the award of exemplary damages (centring on the condemnation of outrageous conduct on the part of the defendant) and emphasised the need to give effect to this rationale regardless of whether or not there had been intentional wrongdoing or conscious recklessness present. It should, however, be noted that the minority concurred with the majority on the final result, albeit differing quite radically (as just noted) on the point of legal principle.

of contract, as it would (more often than not) involve a deliberate act.¹⁷⁰ What is required to be proven, of course (consistently with the general principles laid down¹⁷¹), is that that breach was committed in such an outrageous manner in disregard of the plaintiff's rights that the award of exemplary damages is justified.

There may, however, be another (albeit somewhat less powerful) argument *against* the award of exemplary damages for breach of contract which centres around the argument that the (at least English) courts will *not* award *aggravated* damages for breach of *contract*. This was clearly laid down by Woolf J in the English High Court decision of *Kralj v McGrath*,¹⁷² where the learned judge also held that aggravated damages would not be available in situations of negligence as well. It is submitted, however, that a close perusal of the learned judge's reasoning¹⁷³ would reveal that he was contemplating a situation where there had been a *concurrent* breach of both a contract *as well as* a duty of care in tort.¹⁷⁴ Even then, such an approach might conflict somewhat with the proposition (considered above) to the effect that *exemplary* damages are possibly awardable, even in a situation of tortious negligence.¹⁷⁵ This possible conflict is exacerbated by the fact that there may, in the final analysis, be little (if any) difference between aggravated damages on the one hand and exemplary damages on the other. Indeed, it is suggested that, notwithstanding the rather firm distinction drawn by the English Law Commission¹⁷⁶ (as well as in other Commonwealth jurisdictions¹⁷⁷) between exemplary damages on the one hand and aggravated damages on the other, there can be a not inconsiderable overlap¹⁷⁸ — not least because both

170 For the sake of clarity, we should note that the focus here is not only on the actual physical act but also (and more importantly) on the *result* of one's action. It is, of course, almost invariably the case that one intends one's physical act (apart from the rare instance of automatism). This point unfolds somewhat differently in the situation of *tortious negligence*: in that instance, the focus is on the actual physical act, with the overall result assumed to be that giving rise to a successful cause of action in law for tortious negligence. This last mentioned point is important because of the confusion that might otherwise result: principally because the *resultant cause of action* is *negligence*.

171 See above, the main text to nn 108–111.

172 [1986] 1 All ER 54.

173 See [1986] 1 All ER 54 at 61.

174 Cf the *Law Commission Report* at paras 2.10 and 2.26–2.36.

175 See the main text to above, n 168ff.

176 See generally the *Law Commission Report* at paras 2.2–2.3; reference may also be made to the English Court of Appeal decision of *Thompson v Commissioner of Police of the Metropolis* [1997] 3 WLR 403 at 413ff and the English High Court decision of *Appleton v Garrett* [1996] PIQR P1 at P4, as well as the decision of the Employment Appeal Tribunal in *Deane v Ealing London Borough Council* [1993] ICR 329.

177 See eg the Australian High Court decision of *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 4 and the Canadian Supreme Court decision of *Vorvis v Insurance Corporation of British Columbia* (1989) 58 DLR (4th) 193 at 201.

178 Reference may be made to the Australian High Court decision of *Lamb v Cotogno* (1987) 164 CLR 1 at 8; 74 ALR 188, where the court (in a joint judgment) observed that 'in some cases it may be difficult to differentiate between aggravated damages and exemplary damages'. Cf also per Kirby J in the Australian High Court decision of *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 34–5 (on the issue of possible overlap). Of special interest in the learned judge's observation (at 35) that '[a]ggravated damages are given for conduct which shocks the *plaintiff* and hurts his or her feelings. Exemplary damages are awarded for conduct which shocks the tribunal of fact, representing the

categories of damages would necessarily contain a penal element.¹⁷⁹ Professor Feldthusen also observes, in a similar vein, that '[a]nalytically, aggravated damages are to compensate and punitive are to punish' but that '[p]ractically, as long as the two heads are *both triggered by an identical threshold of outrageous conduct*, it will be *difficult to distinguish them* clearly in Canadian law' and that '[s]ometimes this confusion *appears to facilitate double punishment*, once under each head'.¹⁸⁰ Further, and somewhat significantly perhaps, Lord Devlin himself was of the view that in many cases where it was thought exemplary damages were awarded, these were, in effect, cases of *aggravated damages*.¹⁸¹ Although his Lordship does draw a clear distinction between exemplary and aggravated damages, the *practical difficulty* in distinguishing between these categories of damages does buttress the point from overlap just made. We would also speculate that one main reason for Lord Devlin's approach was his desire to restrict the award of *exemplary damages* as much as possible.

However, even if the award of exemplary damages for breach of contract may otherwise be justified on principle, are there sufficient (and reasonable) constraints which will ensure that any such awards are truly exceptional in character? To put it another way, how serious is the argument from 'floodgates'? Indeed, Professor Birks argues (albeit in the context of the tortious context) the primary objection to the award of both exemplary and restitutionary damages is that of indeterminacy.¹⁸² We would suggest, however, that one 'natural' (and significant) constraint would be the concept of *remoteness of damage*.¹⁸³ Another constraint is rather more subtle, but (in our view) no less real: the practice of common law judges themselves, justifying our intuitive sense that, notwithstanding the difficulty of describing (let alone analysing) it, that 'creature' that we term 'judicial commonsense' is still very much a reality in adjudication generally.¹⁸⁴ However, there do remain issues that may need more explication and analysis. Professor Feldthusen, for example, argues that there has been a shift, in the Canadian

community. Obviously the two affronts will *often coincide and overlap*' (emphasis added). Cf, further, per McIntyre J in the Canadian Supreme Court decision of *Vorvis v Insurance Corporation of British Columbia* (1989) 58 DLR (4th) 193 at 201.

179 Though cf the *Law Commission Report* esp at paras 2.15–2.36.

180 See Feldthusen, above, n 104 at 750 (emphasis added). It is submitted that these views are not confined merely to Canadian law and are applicable in a more general fashion as well.

181 See [1964] AC 1129 esp at 1229–30.

182 See Birks, above, n 32, pp 80ff. Cf also the *Law Commission Report* at para 5.72.

183 As embodied in the seminal English decision of *Hadley v Baxendale* (1854) 9 Exch 341. Though cf the very powerful critique in the New Zealand Court of Appeal decision of *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (see also Sir R Cooke, 'Remoteness of Damage and Judicial Discretion' [1978] *CLJ* 289). We would submit, however, that the principles established in *Hadley v Baxendale* are not only well established but also furnish a more coherent guide to the courts: see generally R Ahdar, 'Remoteness, "Ritual Incantation" and the Future of *Hadley v Baxendale*: Reflections from New Zealand' (1994) 7 *JCL* 53 at 62ff. We also note that the *McElroy Milne* case does not appear to have been endorsed in any significant fashion by subsequent decisions.

184 And see eg Lord Goff, 'The Search for Principle' (1983) 69 *Proceedings of the British Academy* 169 esp at 183–4 and, by the same author, 'Judge, Jurist and Legislature' [1987] *Denning LJ* 79 esp at 83, as well as Lord Steyn, 'Does Legal Formalism Hold Sway in England?' (1996) 49 *CLP* 43 esp at 46–7 and 58.

context, from the rationale of retribution to that of deterrence and that there is, as a result, ‘no reason to restrict extra damages to advertent or exceptionally outrageous conduct as there is with punishment’.¹⁸⁵ If this is true, there will indeed be genuine cause for concern, for a focus (solely or even mainly) on the rationale of deterrence would entail, in theory at least, a much broader coverage which is at odds with the avowed general principle that the award of exemplary damages must be the rare exception rather than the rule. Certainly, if the courts should endorse the proposition that exemplary damages ought to be awarded, in exceptional cases, for breach of contract, a sufficient ‘control mechanism’ must be put in place. However, we are presently dealing with the *threshold* issue as to whether or not such damages ought, in *principle*, to be awardable, and it is our submission that there is no reason in principle why they should not.

Exemplary Damages and Restitutionary Damages

Interestingly, Lord Diplock, in *Cassell & Co Ltd v Broome*,¹⁸⁶ was of the view that Lord Devlin’s second category of exemplary damages enunciated in *Rookes v Barnard*¹⁸⁷ ‘may be a blunt instrument to prevent unjust enrichment by unlawful acts’;¹⁸⁸ however, his Lordship nevertheless proceeded to observe as follows:¹⁸⁹

But to restrict the damages recoverable to the actual gain made by the defendant if it exceeded the loss caused to the plaintiff, would leave a defendant contemplating an unlawful act with the certainty that he had nothing to lose to balance against the chance that the plaintiff might never sue him or, if he did, might fail in the hazards of litigation. It is only if there is a prospect that the damages may exceed the defendant’s gain that the social purpose of this category is achieved — to teach a wrong-doer that tort does not pay.

Although the above observation was made in the context of the law of tort, the reference to the relationship between exemplary damages on the one hand and damages for unjust enrichment on the other is interesting.¹⁹⁰ Professor MacGregor very interestingly argues that ‘the real purpose behind [Lord Devlin’s second exception] is *not the punishment of the defendant but the*

¹⁸⁵ See Feldthusen, above, n 104 esp at 752.

¹⁸⁶ [1972] AC 1027.

¹⁸⁷ See above, n 98.

¹⁸⁸ See [1972] AC 1027 at 1130.

¹⁸⁹ See [1972] AC 1027 at 1130. Cf also the *Law Commission Report* at paras 3.25 and 3.26.

¹⁹⁰ Cf also *Clerk & Lindsell on Torts*, 18th ed, Sweet & Maxwell, London, 2000, p 1634, esp n 96, where the issue of the award of restitutionary damages in tort was considered, and the following observation made (emphasis added): ‘An *analogy* can here be drawn with the *second category* of *exemplary* damages recognised in *Rookes v Barnard* . . . But a restitutionary claim for the tort of deceit was denied in *Halifax Building Society v Thomas* . . . See also Burrows, above, n 36 at 394. Reference may also be made to the Australian High Court decision of *Lamb v Cotogno* (1987) 164 CLR 1 at 9–10; 74 ALR 188, where Mason CJ, Brennan, Deane, Dawson and Gaudron JJ referred to one of the bases (for the award of exemplary damages) as preventing the defendant from profiting from his own wrongdoing. Though cf per Mason CJ, Deane, Dawson and Toohey JJ in the (also Australian High Court) decision of *Dart Industries Inc v Décor Corporation Pty Ltd* (1993) 179 CLR 101 at 111 (see above, n 52); however, the learned judges in this case were referring to an *account of profits*. However, as we have seen, the terminology (and the consequent *overlap* with *restitution*) is none too clear: see generally the main text to n 55 ff, above.

prevention of his unjust enrichment'.¹⁹¹ Indeed, in *Rookes v Barnard*, Lord Devlin himself observed that '[w]here a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably layered exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity'.¹⁹² However, his Lordship was referring to the *tortious* context, and (not a little further on in the relevant passage) made the oft-cited observation that '[e]xemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that *tort* does not pay'.¹⁹³ The issue arises as to whether or not these observations (with regard to Lord Devlin's second category under English law where exemplary damages might possibly be awarded) would apply equally to the context where there has been a deliberate *breach of contract* and, if so, whether this route to recovery lessens (or even does away with) the need for a separate category of restitutionary damages¹⁹⁴ for wrongs as such, particularly since (on such reasoning¹⁹⁵) exemplary damages would include restitutionary damages as well (and, indeed, would often exceed them). It may well be argued that there is *necessarily* an element of *wrongdoing* where a tort has been committed and that whilst a similar calculative atmosphere might prevail in the situation of a breach of contract, the breach (whilst theoretically unlawful) does not exhibit a sufficient degree of (or, indeed, any) wrongdoing that ought to be punishable via an award of exemplary damages. Indeed, proponents of the theory of efficient breach would argue that there is *no* wrongdoing whatsoever; on the contrary, so the argument goes, there would be an increase in social welfare whilst the plaintiff would still be compensated by being paid the requisite damages. However, as we have already seen in an earlier part of this essay, the theory of efficient breach is far from persuasive and is subject to a number of significant objections.¹⁹⁶ It is therefore at least arguable that a deliberate breach of contract could involve a sufficient degree of wrongdoing that would justify the award of exemplary damages. If so, it is submitted that one proposition and one issue arise as a result. The proposition is this: that Lord Devlin's second exception in *Rookes v Barnard* provides a *further* argument (albeit only by way of analogy) *supporting* the award of exemplary damages for breach of contract. The issue that arises is, perhaps, even more interesting — to what extent, then, would the possibility of the award of exemplary damages for breach of contract actually do away with the need to develop the law relating to restitutionary damages, *Attorney-General v Blake* notwithstanding.

Turning, then, in more detail, to the possible relationship between

191 See H McGregor, *McGregor on Damages*, above, n 20, p 303 (emphasis added), and citing (very significantly) Lord Diplock in *Cassell & Co Ltd v Broome* (and, insofar as the learned Law Lord's views are concerned, see also above, nn 188 and 189); see also, in the same work, pp 294, n 60 and 312.

192 See [1964] AC 1129 at 1227 (emphasis added).

193 See [1964] AC 1129 at 1227 (emphasis added). See also per Lord Diplock in *Cassell & Co Ltd v Broome*, above, n 189.

194 By way of clarification, the reference to 'restitutionary damages' in this section is to gain-based damages where the main purpose (owing to the nature of the 'triggering event') is deterrence — which is also one of the main aims of exemplary damages.

195 See also the main text to above, n 153ff.

196 See the main text to above, nn 91ff and 155–160.

exemplary and restitutionary damages, it certainly seems attractive (at first blush) to argue that if exemplary damages are awardable for breach of contract, there is little (or even no) room for a separate category of restitutionary damages. As alluded to above, an award of exemplary damages could, at least possibly, encompass or include that measure that might have been awarded as restitutionary damages. However, whilst there can be (even substantial) overlaps between exemplary and restitutionary damages, there can nevertheless be *no exact* coincidence between both categories of damages as such. Professor Waddams, for example, clearly and perceptively points to *salient differences* between restitutionary damages and exemplary damages:¹⁹⁷

It might be argued that Lord Devlin's second category to some extent fills a gap in the law of restitution. It has already been pointed out that exemplary damages are not restricted, as would be a restitutionary claim, to the actual benefit obtained by the wrongdoer. On the other hand, it should be noted that a restitutionary claim will lie even against an innocent wrongdoer, whereas exemplary damages can only be awarded to mark deliberate misconduct. The category is, therefore, by no means an equivalent to a restitutionary claim.

Professor McGregor also perceptively points out that '[i]t is true that the awarding of exemplary damages is a somewhat makeshift and arbitrary method of preventing a tortfeasor's unjust enrichment'.¹⁹⁸ However, the learned author does not discount the instrumental value of the device (of exemplary damages) itself, observing that 'it will not be the first time within the common law systems that exemplary damages have been used as a means of achieving the right financial result in a limited field where the law was otherwise inadequate to do so'.¹⁹⁹ Most significantly, perhaps, he concludes thus:²⁰⁰

Perhaps the law should be regarded as being in a *transitional phase*, moving towards the time when the use of exemplary damages is *superseded* by an *extension* of the *direct, and more appropriate, remedies* as the means of ensuring that tortfeasors are not permitted to retain profits made by them through their tortious conduct.

Insofar as this particular development is concerned, it should be noted that the discussion thus far centres on the *tortious* context, and is by way of 'an extension of the remedies available through waiver of tort and by way of an

197 See Waddams, above, n 104, p 489. See also p 504, where the learned author observes thus: 'The amount of exemplary damages is unrelated to the actual loss suffered by the plaintiff, and it has, indeed, been held that exemplary damages may be awarded where the plaintiff has suffered no loss at all'.

198 See McGregor, above, n 20, p 303. See also, by the same author, at p 312, where he refers to the use of exemplary damages 'as an *indirect means* of preventing the unjust enrichment of a wrongdoer' (emphasis added).

199 See McGregor, above, n 20, p 303.

200 See McGregor, above, n 20, p 304 (emphasis added). See also Feldthusen, above, n 104 at 761, where the learned author observes that '[n]umerous Canadian courts have awarded punitive damages [under Lord Devlin's second category] on what appears to have been the restitutionary rationale of stripping the wrongdoer of the profits from the wrong'. However, he does also proceed to observe (at 762) that 'when the action is in tort, the courts have not always quantified the punitive award by measuring it in relation to the profit. Nor have the courts always noted that stripping the profit from the tort is neither punitive, nor a sufficient deterrent'.

account of profits'.²⁰¹ The question which arises in the *contractual* context is whether or not a similar approach (albeit by different means) ought also to ensue. As we have already argued earlier in this particular section of the essay, there is no reason why exemplary damages ought not to be utilised in order simultaneously to effect restitution in a contractual context.

Finally, it should be noted that Professor Birks has argued that one way forward might be to actually *synthesise* restitutionary and exemplary damages by utilising the former 'to take care of the profit actually made and, separately, to add punitive damages in an appropriate case on the ground of the wanton and malicious character of the wrong'.²⁰² Significantly, perhaps, he cites from the passage from Professor MacGregor's book quoted above,²⁰³ and concludes thus:²⁰⁴

This development will certainly be best fostered if restitutionary damages and punitive damages are allowed to work in tandem, the former taking the profits, the latter punishing the malice.

Professor Birks's suggestions appear to draw some support from Lord Nicholls of Birkenhead's observation in the very recent House of Lords decision in *Kuddus v Chief Constable of Leicestershire Constabulary*,²⁰⁵ as follows:²⁰⁶

Nor . . . am I wholly persuaded by Lord Devlin's formulation of his second category . . . The *law of unjust enrichment* has developed apace in recent years. In so far as there may be a need to go further, the key here would seem to be the same as that already discussed: outrageous conduct on the part of the defendant. There is no obvious reason why, if exemplary damages are to be available, the profit motive should suffice but a malicious motive should not.

However, the observation just quoted is at least arguably ambiguous. On one reading, the suggestion appears to be that restitutionary principles may, *in and of themselves*, suffice and that there is no need to invoke the concept of exemplary damages. On another reading, however, there is the possibility of the (complementary) award of both restitutionary as well as exemplary damages.

Lord Scott, however, was (as we have seen above²⁰⁷) much more emphatic on this score in *Kuddus*. Far from advocating a synthesis between exemplary and restitutionary damages, his Lordship appeared to suggest (on the contrary) the application of only restitutionary damages instead. He observed thus:²⁰⁸

201 See McGregor, above, n 20, p 303. Though cf (in a specific vein) the difficulty with the terminology 'waiver of tort': see Mason and Carter, above, n 53 esp p 637. Reference may also be made to Birks, above, n 32, p 68ff.

202 See Birks, above, n 32 at p 96. Reference may also be made to the *Law Commission Report* at para 4.18; Mason and Carter, above, n 53, p 628; and the *Ontario Report*, pp 62–3.

203 See above, n 200.

204 See Birks, above, n 32, p 96. See also Feldthusen, above, n 104 at 762 and 763.

205 [2001] 3 All ER 193. This case was also briefly considered above: see the main text to above, n 113ff.

206 See [2001] 3 All ER 193 at 211 (emphasis added).

207 See above, n 119.

208 See [2001] 3 All ER 193 at 222 (emphasis added).

Lord Devlin's second category, cases in which the defendant's wrongful conduct has made a profit for himself which exceeds the compensation payable to the victim of the conduct, has been *largely overtaken by developments in the common law*. Restitutionary damages are available now in *many tort actions as well as those for breach of contract*. The profit made by a wrongdoer can be extracted from him *without the need to rely on the anomaly of exemplary damages*: see the discussion of the topic in *A-G v Blake . . .* by Lord Nicholls of Birkenhead.

We should note, however, that Lord Scott was (as we have seen above²⁰⁹) of the view that exemplary damages ought to be done away with altogether. Nevertheless, his views on the relationship between restitutionary damages in the context of exemplary damages are both interesting and instructive. His Lordship was clearly of the view that the law relating to restitutionary damages after *Attorney-General v Blake*²¹⁰ was sufficient to cover the second situation envisaged by Lord Devlin in *Rookes v Barnard*. However, such a view assumes that the principles of law as laid down in *Blake* are unproblematic. As we have seen, this assumption may not be wholly free of difficulties.²¹¹ But Lord Scott's proposition is extremely interesting because it turns the initial inquiry on its head, as it were; his Lordship is arguing here that the second exception promulgated by Lord Devlin ought to be done away with because it can be covered by developments in the law of restitution instead. However, it is suggested, with respect, that if the case in favour of more liberality and flexibility in the award of exemplary damages (in both tort and contract) is accepted, the more pertinent question would be whether exemplary damages (as a *broader* category) could subsume the function of restitutionary damages under it.²¹² Or, to put it another way, whilst Lord Devlin's second category enunciated in *Rookes v Barnard* might possibly be superseded by developments in the law of restitution, it could nevertheless be argued that the law as to exemplary damages would cover this second situation as well. This particular argument is, we suggest, strengthened by the fact (also considered earlier) that most Commonwealth jurisdictions do not endorse the narrow categories laid down by Lord Devlin in the first instance;²¹³ further, even the English position might conceivably be changed in the not too distant future.²¹⁴ Another point may be briefly made: it might well be argued that Professor Birks never intended that restitutionary and exemplary damages operate in a mechanical fashion where each could be neatly separated from the other. To be sure, the learned author did apparently refer to such a distinction but it is suggested that this might only have been intended for the purposes of exposition and analysis, much in the style of Max Weber's concept of ideal types.²¹⁵ In *practice*, however, the situation is obviously much 'messier': the overall sum of damages awarded by the court would probably include elements of both where the facts so warrant. If so,

209 See the main text to above, n 119.

210 [2000] 3 WLR 625.

211 See above, n 48.

212 And cf A Kull, 'Restitution as a Remedy for Breach of Contract' (1994) 67 *Southern California Law Rev* 1465 esp at 1482–3.

213 See above, nn 101–4.

214 See the main text to above, n 112ff.

215 See eg A T Kronman, *Max Weber*, Edward Arnold, London, 1983, esp pp 7 and 75–80.

there is very little difference between Professor Birks's proposed synthesis and the proposition proffered in the present paragraph, to the effect that exemplary damages can in fact become the only category of damages which can (where the facts so warrant) include the element of restitutionary damages. There is, in *substance*, no real difference between the two positions apart from the conceptual starting points: in the former, one begins with restitutionary damages and adds exemplary damages, if necessary, whilst in the latter, one begins with exemplary damages but includes restitutionary damages, if necessary.²¹⁶

However, a fundamental point made earlier²¹⁷ should be emphasised again at this juncture that there will indeed be situations where only exemplary damages are appropriate and vice versa. For instance, where the defendant has conducted itself in an outrageous manner²¹⁸ but has not been unjustly enriched,²¹⁹ only exemplary damages may be appropriate.²²⁰ Conversely, where the defendant has not conducted itself in an outrageous manner, there might (in appropriate circumstances) be the award of restitutionary damages (whether in tort or contract²²¹), but no exemplary damages.²²² Where, of course, the defendant has not only conducted itself in an outrageous manner *and* has been unjustly enriched at the same time, there arises a situation where *both* exemplary and restitutionary damages are relevant.²²³ At the risk of appearing 'legally agnostic', therefore, we would reiterate the point made earlier to the effect that whilst there can be a substantial overlap between exemplary and restitutionary damages, there remain situations where one might apply but not the other. Where, however, an appropriate fact situation arises, there is no reason in principle why both could not be pleaded in the alternative, bearing in mind the fact that the courts will avoid double-counting when awarding damages. And, as we have seen in the preceding paragraph, there could in fact be an award of damages comprising both restitutionary and exemplary damages, although the precise conceptual basis may not be altogether clear. Indeed, it can fairly be said that a great many issues on the linkage or relationship between exemplary and restitutionary damages clearly

216 And cf the *Law Commission Report* esp at paras 3.48–3.51 as well as cl 12 read with cl 15(6) of the Draft Bill, where it is recommended that restitutionary damages may be awarded in a situation very similar to that which obtains with regard to exemplary damages insofar as the defendant's conduct is concerned (cf esp cl 3(6)). However, the Law Commission recommended that both exemplary and restitutionary damages be awarded only for a tort or an equitable wrong or (under certain stipulated circumstances) a wrong arises under an Act. But cf the main text to above, n 197ff.

217 See the main text to above, n 197.

218 See the main text to above, nn 108–111.

219 And see the *Law Commission Report* at para 4.17.

220 Professor Birks also points to the unusual situation where the 'profits are indubitable but the amount is impossible to calculate' (see Birks, above, n 32, p 95). However, there must, of course, still be the presence of outrageous conduct.

221 Though there may be difficulties (especially of line-drawing) with respect to the latter situation: see generally the main text to above, n 121ff.

222 And see main text to n 197, above.

223 And see Birks, above, n 32, p 95, where the learned author observes that 'some cases of deliberate wrongdoing for profit seem to require more than restitution of the profit made'.

remain and these would include, for example, the need for more empirical studies.²²⁴

Does the *Hospitality Group* case shed any further light on the relationship (if any) between exemplary and restitutionary damages? As we have already briefly seen above, the court set aside the award of exemplary damages at first instance.²²⁵ However, both Hill and Finkelstein JJ did observe that ‘under presently accepted principles, an injured plaintiff cannot claim a windfall to prevent a wrongdoer profiting from his own wrong, *except* in those cases where *exemplary damages are available and it is proper that illicit profits are taken into account in assessing the quantum of the award*’.²²⁶ This observation supports the general approach proffered above to the effect that exemplary damages ought to be the norm, although restitutionary damages may be subsumed within them. It should, however, be noted that this particular observation was made in the *tortious* context. We have already seen that the learned judges had all but rejected the award of restitutionary damages in a *contractual* context, *Attorney-General v Blake* notwithstanding.²²⁷ Hence, no definite proposition can be drawn with regard to the possible relationship between exemplary damages and restitutionary damages in a *contractual* context. The remaining judge, Emmett J, also considered the situation only in a *tortious* context.²²⁸ The learned judge observed thus:²²⁹

Where the remedy of an account of profits is imposed, the remedy can result in a windfall for the claimant. This is *also* the consequence of *exemplary* damages. *However*, the *difference* between exemplary damages and an account of profits is that the award of exemplary damages is in the discretion of the court, while an account of profits and forfeiture of the benefit to the claimant is measured by the wrongdoer’s gain. A *restitutionary* remedy, therefore, *may be less harsh* than the punitive remedy of exemplary damages. Wrongdoers are required to hand over only their profits. Even though the profits may have been to a large extent due to their efforts and investment risk, their capital will remain intact. On the *other hand*, *exemplary* damages may be awarded *even though* the wrongdoer made *no gain* against which the damages can be offset.

The observations just quoted are entirely consistent with the general view proposed in this part to the effect that while there may be a substantial overlap between exemplary and restitutionary damages, the two categories are still different. However, unlike both Hill and Finkelstein JJ, Emmett J appeared to premise his decision with regard to the award of damages on a *restitutionary* basis which is (in turn) based on the concept of *deterrence*.²³⁰ At this point, one may quite understandably ask whether or not the line between exemplary and restitutionary damages has become blurred.

224 See D Harris, D Campbell and R Halson, *Remedies in Contract and Tort*, 2nd ed, Butterworths, London, 2002, p 608.

225 See the main text to n 13ff, above.

226 See (2001) 110 FCR 157 at 197 (emphasis added).

227 This is, of course, not surprising in view of the fact that no contractual nexus had been established: see the main text to n 13, above.

228 See also the main text to above, n 16ff.

229 See (2001) 110 FCR 157 at 200 (emphasis added).

230 See, in particular, (2001) 110 FCR 157 at 198 and 200.

Conclusion

As outlined at the beginning of this article, our primary task has been issue-raising, although we have proffered some tentative suggestions in the process. Given this central focus, we think that it might not be inappropriate to attempt a very brief summary of the issues raised in this article. Where otherwise indicated, the points raised relate to both the contractual as well as tortious contexts.

- (1) Gain-based damages in the form of an account of profits can, where the fact of loss has been clearly established but is not adequately recompensed by the usual compensatory measure, be justified as a means measuring the claimant's loss. Such award is in fact compensatory in nature as the very impetus of the award lies in the need to seek an adequate remedy for the claimant's *loss*.
- (2) Further, while the term 'account of profits' directs one's attention to the defendant's gains rather than the claimant's loss, it by no means precludes the application of a compensatory rationale as the true nature of the award must be determined by reference to the purpose (as opposed to the form) of the award.
- (3) Notwithstanding the possible characterisation of an account of profits as compensation, there remains, in our view, instances where the award is only explicable as a restitutionary award in response to a *wrong* to strip the defendant of his gains so as to *deter* recurrence of like conduct. The main difficulty of this rationale — the subjective assessment of conduct which constitutes a wrong — is, in our view, by no means insuperable and is necessarily intrinsic to the larger pursuit of justice and fairness.
- (4) The exceptional nature of the award of *exemplary* damages in the law of *tort* has been reaffirmed in the *Hospitality Group* case inasmuch as the defendant's conduct must be 'something bordering on the malicious'. This accords with the English case law. However, we also noted that, in England itself, there appears to be a shift towards a more liberal approach inasmuch as the range of situations where such damages may be awarded is concerned (see generally the recommendations of the English Law Commission) — which would in fact bring the English position into line with that in most Commonwealth jurisdictions.²³¹ Indeed, in the recent House of Lords decision in *Kuddus v Chief Constable of Leicestershire Constabulary*,²³² it was held²³³ that the power to award exemplary damages was not limited to cases where it could be shown that the cause of action had been recognised before 1964 as justifying the award of such damages (1964 being the date when the seminal House of Lords decision in *Rookes v Barnard*²³⁴ was handed down). *However*, there was some indication of a possible shift in an *opposite*

²³¹ See above, nn 101–4.

²³² [2001] 3 All ER 193.

²³³ Overruling the then leading Court of Appeal decision in *AB v South West Water Services Ltd* [1993] QB 507.

²³⁴ [1964] AC 1129.

direction as well in the *Kuddus* case, insofar as it was suggested that the award of exemplary damages in civil proceedings might be *abolished* altogether (see, in particular, the views of Lord Scott²³⁵).

- (5) Notwithstanding what appears to be a general proscription against the award of *exemplary* damages for breach of *contract*, we have attempted to demonstrate that the arguments supporting such a proscription are not very persuasive (this includes the very important argument from efficient breach²³⁶). Indeed, such a proscription might even lead to anomalous results.²³⁷ There was, as we have seen, also some case law that (contrary to what was thought to be the established view) suggests the possibility of the award of exemplary damages in a contractual context. In the circumstances, we have argued that there is no reason in principle why the courts should not be given a *residuary* power to award exemplary damages for breach of contract in truly exceptional circumstances when the defendant's conduct has been outrageous, particularly where it would simultaneously aid in reinforcing the underlying moral conception of promise-keeping in contract law. Further, the case for the award of exemplary damages for breach of contract in *more specific* situations (for example, the employment context) may be even more compelling. There is also, we have argued, no real danger of releasing the 'floodgates'.
- (6) Finally, whilst there is often a substantial overlap between *exemplary* and *restitutionary* damages, there continue to be situations where one might apply but not the other. There nevertheless remain very interesting issues on the nature of the linkage between exemplary damages on the one hand and restitutionary damages on the other — particularly in the light of the developments in the law relating to restitutionary damages in recent years.

²³⁵ See above, n 119.

²³⁶ And see the main text to above, nn 155–160.

²³⁷ See eg per Linden J in *Brown v Waterloo Regional Board of Commissioners of Police* (1981) 136 DLR (3d) 49 at 65. And see also the main text to nn 144–5, above.