A Gain-based Remedy for Breach of Contract in English Law: Some Lessons for South African Law

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Abstract

A gain-based remedy for breach of contract is aimed at taking away the profits acquired through breach of contract. Traditionally, contractual damages can be claimed only if the breach caused the plaintiff patrimonial loss. There is an assumption that breach of contract causes a loss to the plaintiff, and as a result the defendant should compensate the plaintiff. However, in the past, courts have been confronted with cases where the opposite of this assumption is true. This is in instances where a defendant breaches a contract and gains profit as a result of that breach, whereas the plaintiff suffers little or no patrimonial loss. Unfortunately, in these circumstances the plaintiff may be left with no remedy or legal recourse for the breach, while the defendant may keep the profits generated as a result of the breach. However, in English law the courts have recognised a gain-based remedy in the circumstances outlined above, allowing the disgorgement of such ill-gotten profits. But a similar remedy has not yet gained recognition in the South African law of contract. The purpose of this article is to explore how South African law can draw some valuable lessons from English law in developing and recognising a gain-based remedy for breach of contract in order to deal with the profits generated through breach of contract.

Keywords: Contractual damages; law of contract; gain-based remedies; disgorgement; ill-gotten profits; unjustified enrichment

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Introduction

In the past decade there has been a gradual shift in focus from the position the plaintiff is in to that of the defendant when contractual damages due to breach of contract are assessed. Traditionally, when awarding contractual damages, the focus has always been solely on the loss the plaintiff suffered as a result of breach of contract, and nothing else.[1] Consequently, there is an assumption that breach of contract causes a loss to the plaintiff and that the defendant should compensate the plaintiff.[2] However, some courts have been confronted with cases where the opposite of this assumption is true: where the defendant had benefitted as a result of breach of contract and the plaintiff suffered little or no loss as a result.[3]

For the sake of clarity, a distinction should be drawn between two types of benefits that the defendant may acquire due to breach of contract. The first are those benefits or profits that were conferred on the defendant by the plaintiff during the performance of the contract. This usually happens in instances where the plaintiff performs their side of the contract, but before the defendant is able to perform, the agreement is cancelled due to breach of contract. In those circumstances, the defendant might be left with benefits naturally flowing from the plaintiff as they performed their side of the contract. The second are those benefits or profits that the defendant generates as a result of their act of breach of contract and they have no connection to the plaintiff.[4] It is in this latter category that the term 'disgorgement of profits' is used, that is, when these benefits are taken away from the defendant. Therefore, the focus of this article will be on the latter category of benefits by looking at how the law of contract, both in South Africa and in England, responds to these ill-gotten profits or benefits.

Generally, as it will be discussed below, there is an obligation, in terms of *restitutio in integrum*, on both parties to restore benefits conferred by one party to other pursuant to their contractual agreement in cases where that contract is cancelled.[5] However, this is not the case when it comes to benefits or profits generated purely due to breach of

1 For English law see *Robinson v Harman* [1848] 1 Ex 850, 855; *Photo Production Ltd v Securicor Ltd* [1980] AC 827 (HL) 848–849. For South African law see *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22; *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) 687.

2 Hugh Beale (ed), *Chitty on Contracts* (Sweet & Maxwell 2004) 1598. The same appears to be the case in South African law: see Johan Potgieter, Loma Steynberg and Tomas Floyd, *Visser & Potgieter: Law of Damages* (Juta 2012) 20–24.

3 *Attorney-General v Blake* [2001] 1 AC 268 (HL); *Esso Petroleum Co Ltd v Niad* [2001] EWHC 458 (Ch); cf *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch).

4 James Edelman, Simon Colton and Jason Varuhas (eds), *McGregor on Damages* (Sweet & Maxwell 2019) 491–494 para 14-002–14-004; David Winterton, *Money Awards in Contract Law* (Hart Publishing 2015).

5 *Sonia (Pty) Ltd v Wheeler* 1958 (1) SA 555 (A) 561.

contract which have no connection to the plaintiff. However, some developments in English law may suggest that the position regarding benefits or profits acquired through breach of contract may soon change in that jurisdiction.[6]

English Law

In English law, breach of a contractual obligation gives rise, among other things, to a duty to pay compensatory damages to the party aggrieved by the breach.[7] The primary objective of compensatory damages awarded for breach of contract is to protect, among other things, the performance interest of the aggrieved party. This is done by awarding the aggrieved party the sum of money to put them in the position they would have been in had the contract been fully performed.[8] Therefore, the general position is that damage suffered by the plaintiff as a result of the defendant's breach is assessed according to the loss the plaintiff suffered rather than by the profits gained by the defendant.[9] It is unusual for courts to assess contractual damages in any way that deviates from this traditional assessment standard.

To indicate the English courts' strict adherence to this traditional assessment approach, gain-based remedies that seek to take away profits acquired through breach of contract were considered incompatible with a breach of contract.[10] The reason for this is that the primary objective of contractual remedies is to protect the performance interest of the aggrieved party. This is done by a monetary award in a form of contractual damages to compensate the plaintiff as fully and commensurably as possible for the loss suffered. As a result, no consideration should be given to the gains or profits the defendant acquires as a result of their breach when contractual damages are assessed.[11] Ordinarily, courts use the financial loss suffered by the plaintiff resulting from a breach to measure the defendant's liability for damages. However, it should be noted that a gain-based remedy that seeks to take away benefits conferred by one party on another during the

6 See *Blake* (n 3) 283–284; *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499.

7 *Photo Production* (n 1) 848–849.

8 *Robinson* (n 1) 855; John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Bloomsbury Publishing 2016) 262; *McAlpine (Alfred) Construction Ltd v Panatown Ltd* [2001] 1 AC 518. See Janet O'Sullivan, 'Loss and Gain at the Greater Depth: The Implications of the Ruxley Decision' in Francis Rose (ed), *Failure of Contracts – Contractual, Restitutionary and Proprietary Consequences* (Hart Publishing 1997) 1; Janet O'Sullivan, 'Reflections on the Role of Restitutionary Damages to Protect Contractual Expectations' in David Johnston and Reinhart Zimmermann (eds), *Comparative Law of Unjustified Enrichment* (Cambridge University Press 2002) 327–347; see Brian Coote, 'The Performance Interest, Panatown and the Problem of Loss' (2001) 117 Law Quarterly Review 81.

9 *Robinson* (n 1) 855; *McAlpine (Alfred) Construction Ltd* (n 8).

10 *Tito v Waddell* (No 2) [1977] Ch 106.

11 *Tito* (n 10).

subsistence of the contract may be awarded should there be a breach of contract. The assessment of this remedy is based on the gains acquired rather than the loss suffered and these damages are regarded as restitutionary awards. In terms of these restitutionary awards, a contracting party may be forced to give up benefits or profits that were conferred on them by the claimant.[12] As a result, restitutionary awards were limited only to benefits or profits conferred by the claimant.

However, English courts have indicated a willingness to deviate from this general principle by recognising a disgorgement remedy that seeks to take away gains or profits acquired as a result of breach of contract.[13] In terms of this measure, the defendant is forced to disgorge benefits or profits that they may have acquired as a result of their breach of contract and not only those profits or benefits conferred by the claimant. English courts have awarded two specific remedies in order to achieve the disgorgement of profits for breach of contract, namely, an account of profit remedy and a hypothetical licence fee remedy.

In an unprecedented move, the House of Lords recognised disgorgement of profits for breach of contract by awarding an account of profit.[14] And in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*, the court ordered the defendant to pay the plaintiff a reasonable or hypothetical licence fee the plaintiff would have charged to allow the defendant to breach the contract even though there was no proven loss on the part of the plaintiff.[15] As will be discussed, these rulings have the effect of taking away any profits the defendant may acquire through their breach of contract.

Disgorgement of Profits Recognised for Breach of Contract

For some time now, there have been notable exceptions to the general rule which forbids considering profits that accrue to the party in breach, purely as a result of their act of

12 See Ralph Cunnington, 'The Measure and Availability of Gain-based Damages for Breach of Contract' in Djokongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing 2008) 207–242; James Edelman, *Gain-based Damages – Contract, Torts, Equity and Intellectual Property* (Hart Publishing 2002); Adam Kramer, *Law of Contract Damages* (Hart Publishing 2014) 558; Katy Barnett, *Accounting for Profits for Breach of Contract – Theory and Practice* (Hart Publishing 2012); See also Paul Collins, 'Liability for Profits in Breach of Contract: Revisiting Attorney-General v Blake' (LLM Dissertation, University of Melbourne 2015) 28–30.

13 *Blake* (n 3); *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 1 WLR 798 Ch; cf *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch); *Novoship* (n 6); cf *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20.

14 *Blake* (n 3) 285.

15 *Wrotham Park* (n 13) 798.

breach, when contractual damages are assessed.[16] Two lines of cases have emerged, signalling a significant change in the way that courts have traditionally measured contractual damages. In both lines, the courts have adopted an assessment approach, where the breaching party's profits are of paramount importance in the assessment of contractual damages. In the one line of cases, the courts recognised a gain-based damages claim for breach of contract, in which the breaching party was ordered to pay a 'hypothetical fee' or a reasonable fee that represents the amount the plaintiff would have charged to allow the breach the contract. *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*[17] is a case in point.

In the second line of cases, led by *Attorney-General v Blake*,[18] the courts recognised a gain-based award in which the defendant was ordered to disgorge all the profits acquired through the breach by awarding an account of profits to the plaintiff. Although it is not yet clear what circumstances will warrant the availability of a gain-based remedy for breach of contract in English law, what is clear, as indicated above, is that this remedy will be awarded in exceptional circumstances.[19]

Disgorgement of Profits through a Hypothetical Fee Award

Wrotham Park Estate Co Ltd v Parkside Homes Ltd

For a long time, the *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*[20] case has been a solitary beacon advancing the cause for a disgorgement remedy as an alternative measure for contractual damages in English law.[21] In this case, Parkside Homes (a development company) built houses on a piece of land in breach of a restrictive covenant with Wrotham Park Estate. In terms of the agreement, Parkside Homes could build houses on the land only if Wrotham Park Estate approved the development. This did not happen. In an action for breach of contract against Parkside and parties who bought the houses, Wrotham Park Estate asked for a mandatory injunction for the demolition of the houses. At the time of trial, the houses were already completed and occupied by the purchasers. The court refused a mandatory order on the ground that it would be a 'waste

16 Sirko Harder, *Measuring Damages in Law of Obligations, The Search for Harmonised Principles* (Hart Publishing 2010) 1; Eltjo Schrage, 'Liability to Disgorge Profits upon Breach of Contract or a Delict' (2013) 34(1) Obiter 17–28; David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 2001) 7.

17 *Wrotham Park* (n 13) 798.

18 *Blake* (n 3) 268.

19 See the following post-*Blake* (n 3) cases on how a gain-based remedy for breach of contract is rarely awarded: *AB Corp v CD Co (The Sine Nomine)* [2002] 1 Lloyd's Rep 805; *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2008] 1 WLR 445 (CA); *WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2006] EWHC 184 (Ch), [2008] 1 WLR 445 (CA); *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch).

20 [1974] 1 WLR 794.

21 This was stated in *Blake* (n 3) 283.

of much needed houses to direct that they be pulled down.'[22] However, Brightman J awarded equitable damages in lieu of a specific performance under the Chancery Amendment Act of 1858 against Parkside. Although the value of the Wrotham Park Estate was not negatively affected by the new houses, Brightman J felt that the defendants should not be allowed to retain the 'fruits of their wrongdoing'.[23] Therefore, the defendants were held liable to pay such an amount 'as might reasonably have been demanded by the [Estate] from Parkside as a quid pro quo for relaxing the covenant.'[24]

However, the UK Supreme Court provided some clarity on the basis that will justify the availability of Wrotham park damages.[25] The Supreme Court rejected the trial judge and the Court of Appeal's consideration that it is just to assess the damages on the basis of the Wrotham Park decision. The relevant circumstances considered by the both the trial judge and the Supreme Court included the difficulty in quantifying the claimant's financial loss, the deliberate nature of the defendants' breach, and the claimant's legitimate interest in preventing the defendants' profit-making activities.[26] The Supreme Court confirmed that the Wrotham Park damages could be available only in instances where a claimant's loss can be appropriately measured financially with reference to the right infringed by the breach of contract. In other words, the right is treated as an asset with a monetary value.[27]

Furthermore, a gain-based remedy, with the effects of stripping profits acquired through breach, was again awarded in *Experience Hendrix LLC v PPR Enterprises Inc*.[28] In this case, the estate of Jimmy Hendrix and PPX Entertainment settled a copyright dispute by agreeing that PPX was entitled to certain masters or actual sounds of some of his songs listed in schedule A of their agreement. In terms of their agreement, PPX was not allowed to grant new licences for those sounds in the recording that were not listed in schedule A. In breach of this contract, however, PPX had granted new licences for those sounds in Jimi Hendrix's songs that were not listed in the schedule. In an action for contractual damages arising from this breach, the court followed the *Wrotham Park* approach, and awarded damages in the amount that Jimmy Hendrix's estate might have demanded in return for allowing the infringing licences.

22 *Blake* (n 3) 811.
23 *Blake* (n 3) 812.
24 *Blake* (n 3) 815.
25 *Morris-Garner* (n 13) 20.
26 *One Step (Support) v Morris-Garner* [2014] EWHC 2213 (QB), [2015] IRLR 215; [2016] EWCA Civ 180.
27 *Morris-Garner* (n 13) 20.
28 *Experience Hendrix* (n 19) 46.

This was also seen in *Lane v O'Brien Homes Ltd*,[29] where the defendants built more houses than allowed in terms of a collateral agreement with their neighbours. The plaintiff applied for a disgorgement remedy against the defendant's profits for building the additional houses. The same approach used in the *Wrotham Park* case was adopted here, and a hypothetical fee award was granted against the defendant. It should be noted that none of the counsel in this case specifically argued for a hypothetical fee award, but claimed only a disgorgement remedy,[30] which would suggest that these damages were fast becoming an accepted exception to the general measure of contractual damages.

It may be assumed that a party to a contract may, under certain circumstances, be forced to a disgorgement of the profits they acquired through their act of breach of contract when a hypothetical fee award is granted against them. An order that required the disgorgement of profits in the law of contract through a hypothetical fee award continued to be given following the *Wrotham* case, predominantly in breaches of restrictive covenants.[31]

Although hypothetical fee awards may have been granted in a number of cases as an accepted exception to the general measure of contractual damages, courts have not yet determined the exact circumstances under which this order will be available. Virgo suggests that they should be available only when compensatory damages are inadequate and where contractual breaches relate, in some way, to a property right.[32] It remains to be seen whether this suggestion will be accepted by the courts.

Disgorgement of Profits by Awarding an Account of Profits

Attorney-General v Blake

The ruling in *Attorney-General v Blake*[33] is arguably the most important judgment recognising the disgorgement of profits acquired through breach of contract. It is still an important reference source in any discussion dealing with the disgorgement of profits in English law. The judgment in this case is ground-breaking because it was the first time that an English court recognised a general remedy sanctioning the disgorgement of all profits generated through breach of contract. The facts of the case are briefly as follows: a former secret agent published information in his autobiography that he had acquired while he was still working for the Secrete Intelligent Services (SIS). Blake was an SIS informant between 1944 and 1961. He signed an Official Secret Act declaration with SIS at the beginning of his employment in which he agreed not to divulge any

29 *Lane v O'Brien Homes Ltd* [2004] EWHC 303.
30 *Lane* (n 29) 321.
31 See *Jaggard v Sawyer* [1995] 1 WLR 269 (CA).
32 Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, Oxford University Press 2015) 492.
33 *Blake* (n 3) 268. Also see cf *Morris-Garner* (n 13) 20.

official information acquired by him because of his employment, either through the press or in any other form, including in book form. The provisions of the agreement were applicable to Blake even after his employment had ceased. Following the discovery by the SIS that he was a double agent, Blake was charged and convicted for his crime. However, Blake escaped from custody and found refuge in Moscow, where he entered into a contract with a publishing company to publish his autobiography. In his autobiography, Blake disclosed information pertaining to his time and activities as an agent for the SIS. At the time of publication, the information relating to his activities as an agent was no longer confidential, and its disclosure was no longer damaging to the state. The agreement between Blake and the publishing company stipulated that the company would pay Blake a sum of money upon delivery of the manuscript, as an advance for royalties. Following the autobiography's publication, the Crown commenced proceedings against Blake to prevent him from recovering the outstanding money from the publishing company. The Crown contended that by writing the book and authorising its publication, Blake had acted in breach of his fiduciary duty which he owed to the Crown. The Court of Appeal rejected this argument, holding that the fiduciary duty did not extend to the prohibition of profiting from the disclosure of information that was no longer confidential.[34] The Court of Appeal upheld these findings, but allowed the Crown's appeal on an alternative public-law ground, granting an order prohibiting Blake from receiving the proceeds of his transgression.[35]

Blake appealed to the House of Lords against the decision of the Appeals Court. This is where a claim for an account of profit against Blake's gains as a result of the breach of his contractual undertaking with his former employer was considered. The Attorney-General advanced the argument that a profit-stripping remedy should be awarded to enable the Crown to recover the profit arising from his breach of contract, as he had earned his profit by doing the very thing he promised not to do. In his leading speech, Lord Nicholls drew together cases in which profit-stripping remedies were awarded, for example, where gain-based relief was awarded for proprietary torts and breach of fiduciary duty. He concluded that there was no compelling reason why an account of profit should not also be awarded for breach of contract.[36] He further acknowledged, with approval, efforts to recognise a disgorgement remedy in the form of a hypothetical fee awarded in the *Wrotham Park* case.[37] Lord Nicholls was of the opinion that an account of profit against Blake was appropriate, more so because Blake's undertaking

34 *Attorney-General v Blake* [1998] 1 Ch 439 (CA) 456.

35 *Blake* (n 3) 285.

36 ibid. For further analysis of this case see Andrew Burrow, *The Law of Restitution* (Oxford University Press 2010) 487; Edelman (n 12) 149–190.

37 *Blake* (n 3) 285.

of secrecy was similar to a fiduciary obligation.[38] He came to the following conclusion after a comprehensive review of authorities:

> There seems to be no reason, in principle, why the court must in all circumstances rule out an account of profit as a remedy for breach of contract … When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract.[39]

Although the disgorgement remedy in the form of an account of profits was openly recognised in the *Blake* case as a remedy for breach of contract, it was clear that its availability would be extremely limited. According to Lord Nicholls, this remedy may be allowed only if two requirements are met:[40] first, the claimant has a legitimate interest in the performance of the contract and, second, the standard remedies for breach of contract are inadequate to protect the performance interest.[41] Lord Nicholls argued that it would only be in exceptional circumstances that an account of profit would be available in cases of breach of contract to protect the performance interest, because he believed that contractual remedies such as specific performance and damages provide adequate protection for this interest. Lord Nicholls insisted that no fixed rules should be prescribed for the availability of this remedy, but that if contractual damages prove to be inadequate to compensate the plaintiff, courts should consider allowing an account of profit.[42] He stated that an account of profit should also be awarded where 'the plaintiff had a legitimate interest in preventing the defendant's profit-making activity.'[43] Furthermore, Lord Nicholls identified three factors that he believed did not justify an account of profit for breach of contract:

> The fact that the breach was cynical and deliberate; the fact that the breach enabled the defendant to enter into a more profitable contract elsewhere; and the fact that by entering into a new and more profitable contract the defendant put it out of his power to perform his contract with the plaintiff.[44]

38 *Blake* (n 3) 286–287.
39 ibid.
40 *Blake* (n 3) 285.
41 His Lordship referred to the remedies of damages, specific performance and injunction.
42 Lord Steyn reached a similar conclusion in holding that 'exceptions to the general principle that there is no remedy of disgorgement of profit against a [breaching party] are best hammered out on the anvil of concrete cases': *Blake* (n 3) 297.
43 *Blake* (n 3) 285.
44 *Blake* (n 3) 286.

However, Lord Nicholls did not specify the exact circumstances that would justify the availability of this remedy in future,[45] except to say that all the

> [c]ircumstances surrounding the breach, the consequences of the breach and the circumstances in which relief is being sought should be taken into account before this remedy can be awarded.[46]

The lack of clarity regarding which circumstances will be exceptional enough to warrant an account of profit for breach of contract means that an open-ended discretion is left to the judiciary to determine the availability of this remedy.

Concluding observation

Although the position with regard to the nature of gain-based damages awarded in *Blake* and similar cases may be questioned, developments in *Blake* indicate that such damages can and will have some role to play in appropriate circumstances where there is a breach of contract. Although the traditional assessment of contractual damages will remain,[47] the stance against gain-based remedies for breach of contract has changed. The House of Lords' decision in the *Blake* case has not only been ground-breaking, but has also, without a doubt, ignited more interest in the law of contract, particularly in the assessment of contractual damages. In *Experience Hendrix LLC v PPX Enterprise Inc*,[48] Lord Nicholls' ruling was accepted and hailed as a ground-breaking decision that marked a fresh approach in the awarding of damages for breach of contract when it allowed gain-based remedies, despite the gains or profits in question not being at the expense of the plaintiff.[49] It signalled a radical shift towards an unconventional approach to contractual damages for breach of contract.

Rationale for the Disgorgement of Profits

Disgorgement of profits and the performance interest

It seems that the gain-based remedy was introduced or recognised for breach of contract in *Blake* in order specifically to improve the protection of the performance interest.[50] A

45 *Blake* (n 3) 285.
46 ibid.
47 *Morris-Garner* (n 13).
48 In *Experience Hendrix* (n 19) 323. The same sentiments were echoed by P Smith J in *WWE-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2006] EWHC 184 (Ch) 162, [2008] 1 WLR 445 (CA).
49 *Experience Hendrix* (n 19) 830, 836.
50 David Campbell and Donald Harris, 'In Defence of Breach: A Critique of Restitution and the Performance Interest' (2002) 22 Legal Studies 208.

close reading of the speech by Lord Nicholls in *Blake* can leave no doubt that this was central to his reason for recognising a disgorgement relief:

> An award of damages, assessed by reference to financial loss, is not always adequate as a remedy for a breach of contract. The law recognises that a party to a contract may have an interest in the performance of a contract which is not readily measurable in terms of money. On breach the innocent party suffers a loss. They fail to obtain the benefits promised by the other party to the contract. To them the loss may be important as financially measurable loss, or more so. An award of damages, assessed by reference to financial loss, will not recompense them properly. For them a financially assessed measure of damages is inadequate.[51]

Lord Nicholls acknowledged that the existing remedies for breach of contract are not always fit to achieve the purpose of safeguarding the performance interest in the contract. This was central to the conviction that gain-based damages are justified for breach of contract. In this respect, the introduction of gain-based relief indicates a greater willingness to protect the performance interest in the contract.

However, it has been argued that since compensatory damages are the primary remedy for breach contract, disgorgement damages are not ideal, because they do not seek to compensate the loss suffered.[52] In fact, disgorgement damages are known to be a remedy that seeks to take away profits or benefits acquired through a civil wrong, in this case a breach of contract.[53] On the other hand, the objective of compensatory damages is to compensate actual patrimonial loss suffered due to breach of contract. Therefore, if compensatory damages are intended to compensate contracting parties, disgorgement damages, by their very nature, do not fit in with this rationale. Therefore, it is difficult to fit the disgorgement remedy into a compensatory rationale.

In fact, Lord Hubhouse cautioned, in his dissenting judgment in *Attorney-General v Blake*,[54] that recognition of non-compensatory damages for breach of contract would be far-reaching and disruptive to the law of contract.[55] He therefore discouraged courts from extending disgorgement remedies for breaches of contract, because this could have a disruptive effect on the compensatory rationale of contractual damages.[56]

51 *Blake* (n 3) 282 and 285.
52 Charlie Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligations' (2006) 26 (1) Oxford Journal of Legal Studies 41.
53 *Attorney-General v Blake* [2000] 4 All ER 385 at 408; Edelman (n 12) 248.
54 *Blake* (n 53).
55 *Blake* (n 53) 411.
56 ibid.

Furthermore, it has been argued that a promisor in a contractual agreement has and should have an option to choose whether or not to perform.[57] This is taken from a famous statement by Justice Oliver Holmes, who is considered to be the grandfather of the efficient breach theory, when he stated that '[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it.'[58] Economics and law scholars in the United States took Holmes' views and developed the concept we know today as the 'efficient breach theory'. In terms of this theory, a party should be allowed to break their contract if their profit from breach will exceed their profit from performance in terms of the contract. The same should be allowed if the profit will also exceed the expected profit to the other party from the completion of the contract.[59] Therefore, parties in a contractual relationship can breach if doing so will be Pareto efficient.[60]

Pareto efficiency is an economic concept used to determine whether the allocation of resources in a society is economically efficient. This is to ensure that no person is better off than others are, and that no individual is worse off. It has been argued that the efficiency breach is complete if the promisor who breaches their contract is financially better off and the promisee who did not get the expected performance receives adequate compensation for the loss suffered because of the breach.[61]

Based on the analysis above, it is evident that the common law is correct to focus on expectation or compensatory damages as a primary remedy for breach of contract. Restitutionary damages for breach of contract will be in direct conflict with the efficient breach theory, since it seeks to remove the incentive for the promisor to breach their contract and enter into a more efficient contract.[62] In an effort to guard against a disgorgement remedy, Posner J argued from the Bench that the law of contract should not develop in a way that deters efficient breach of contract.[63]

South African Law

A disgorgement remedy for breach of contract has not yet gained recognition in the measured South Africa law of contract. Furthermore, it is worth noting that South

57 Joseph Perillo, 'Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference' (2000) 68 Fordham Law Review 1085.

58 Oliver Wendell Holmes Jnr, 'The Path of the Law' (1897) 10 Harvard Law Review 462.

59 Richard Posner, *Economic Analysis of Law* (8th edn, Walters Kluwer 2011) 149–158.

60 Donald Harris, David Campbell and Roger Halson, *Remedies in Contract and Tort* (Hart Publishing 2002) 10.

61 Thomas Ulen, 'The Efficiency of Specific Performance: Towards a Unified Theory of Contract Remedies' (1984) 83 Michigan Law Review 345.

62 Sidney DeLong, 'The Efficiency of a Disgorgement as a Remedy for Breach of Contract' (1989) 22 Indiana Law Review 737.

63 *Patton v Mid-Continent System*, 841 F 2d 742, (USCA 7th Cir, 1988).

African courts are yet to be confronted with circumstances under law of contract where they have to make a pronouncement on this issue. However, there is little doubt that the South African law of contract—or South African courts, for that matter—will at some point have to deal with this issue in future as the circumstances that gave rise to the recognition of a gain-based remedy in English law are not only specific to England but could also arise in South Africa. For example, in South Africa there are instances where there is the potential for parties to generate profits from their breach of contract, with little or no loss being suffered by the other party as a consequence. An example of this would be instances where an independent contractor is contracted to build a specific number of houses for third parties as beneficiaries, but the independent contractor uses sub-standard materials or shoddy materials to build those houses. This has the potential to save the contractor expenses as a result (particularly if the agreed contract price has been fixed), with little or no loss or damage to the other contracting party because the required houses have been built. It should be noted at this stage that a disgorgement remedy was previously argued for in South African courts on the basis of law of delict but was refused.[64] As stated above, the disgorgement of profits recognised for breach of contract is primarily meant to take away the benefits acquired by the defendant due to their breach of contract—as would no doubt have happened in the example cited above. This remedy is not necessarily designed to compensate the innocent party for the actual loss suffered due to breach of contract, as normal contractual damages do. As is well known, the primary objective served by contractual damages is to protect the performance interest of the parties to a contract. This article seeks to investigate how South African law of contract, considering the developments in English law, deal with ill-gotten gains acquired through breach.

Proposal on Solution to Dealing with Improper Profits in South African Private Law

Although it is true that the South African law of contract does not recognise a remedy that seeks to take away the defendant's profits acquired through breach of contract, a comparative study suggests that it might be desirable to obtain a disgorgement of profits arising out such a breach, particularly in instances where the normal compensatory damages based on loss suffered are inappropriate or inadequate. For example, in some cases, there could be a breach of confidentiality or one party's performance could have fallen short of their undertaking.[65] While Seligson AJ holds that the remedy of account of profits is contrary to the basic principles of our law of delict, he recognised that it is unsatisfactory that there is no remedy available to deal with improper profits. He holds that:

64 *Montres Rolex SA v Kleynhans* 1985 (1) SA 55 (C) 68.

65 For English law see *Blake* (n 3) 268.

> All this is not to say that the policy of preventing the unjust enrichment of the infringer at the expense of the trade mark proprietor has nothing to commend it. On the contrary, it would be an inequitable result if the deliberate infringer is able to retain the profits made from the unlawful use of the plaintiff's trade mark in circumstances where such profits do not represent the plaintiff's actual loss.[66]

He suggests that there should be an innovative way of developing of our law to deal with the situation where an infringer generates profits or benefits through his infringement. Since this case was heart, there has been some academic debate analysing the problem related to ill-gotten profits. Furthermore, Van der Walt and Midgley believe that it is desirable for private law in South Africa to have an appropriate set of remedies that reverse profits obtained through the invasion of the rights of others, including by breach of contract, because this will contribute to its ability to fulfil its role of dispensing corrective justice.[67] Furthermore, Coleman argues that

> [c]orrective or compensatory justice is concerned with the category of wrongful gains and losses. Rectification, in this view, is a matter of justice when it is necessary to protect a distribution of holdings (or entitlements) from distortions that arise from unjust enrichments and wrongful losses. The principle of corrective justice requires the annulments of both wrongful gains and losses.[68]

Dagan believes that although it is desirable to strip the defendant of their improper profits, it is still important make sure that there is 'correlativity between the defendant's liability and the plaintiffs entitlement, as well as between the plaintiff's entitlement and the remedy.'[69] He argues that the basic principle of correlativity in corrective justice is that the defendant should not be forced to disgorge more profits than what they have acquired, but at the same time the plaintiff should not receive more than they should to correct the infringement. As a result, Dagan believes that in cases of unauthorised publication of private or classified information for gain, it will be appropriate to order the breaching party to pay the aggrieved party the whole profit that emanated from that publication. Furthermore, Visser takes the view that anything less than this amount might effectively mean that the publisher could give itself the licence to exploit the publicity value of the celebrity at a discount rate.[70] However, Dagan believes that it would not be appropriate to order full disgorgement of profits, for example, in instances where it is likely that permission to publish that information would have been given if

66 *Montres Rolex SA* (n 64) 68.
67 Johannes van der Walt and Rob Midgley, *Principles of Delict* (LexisNexis 2016) para 143.
68 Jules Coleman, *Markets, Morals and the Law* (Oxford University Press 2010) 185.
69 Hanoch Dagan, 'The Distributive Foundation of Corrective Justice' (1999) 98 Michigan Law Review 143.
70 Daniel Visser, *Unjustified Enrichment* (Juta 2008) 683.

it had been requested.[71] He believes that a reasonable licence fee (fair market value) would restore the balance between the parties.

Furthermore, Coleman believes that the concept of corrective justice lies at the heart of the law of unjustified enrichment, even though the law of unjustified enrichment is not entirely rationalised in terms of the concept of corrective justice.[72] Therefore, it is argued that courts should fashion the remedy within the South African law so as to take away improper profits whenever this is identified.[73] This means that whenever a court identifies an instance where a gain is unjustified but the law of enrichment is not applicable because the gains are not at the expense of another, a remedy should be developed to deal with this situation. Both Visser and Du Plessis believe that it is not good enough simply to identify that which must be corrected without also creating a remedy, where none exists.[74]

Van Zyl, remarking on this issue, is of the opinion that, where a remedy to strip ill-gotten profits due to the invasion of someone's rights, including breach of contract, the law of delict is a more promising branch of the law to be developed than unjustified enrichment.[75] He believes that there is a need for a remedy to enable a plaintiff to claim benefits unjustly acquired by a defendant, without the plaintiff having been impoverished or having otherwise suffered damages as result of such invasion.[76] Furthermore, Visser holds that the law of delict could indeed be the natural home of a disgorgement remedy to take away ill-gotten profits in South Africa because this branch of private law has proved itself to be adaptable to the changing circumstances of the day.[77] The law of delict appears to be the area where our law is most likely to come up with an appropriate response to the problem of improper profits. However, he acknowledges and identifies two challenges that will have to be overcome in order to achieve the disgorgement of profits under the law of delict. First, for the law of delict to be used as a vehicle to erase improper profits, including those acquired due to breach of contract, the law will have to abandon one of its most basic objectives, which is that delictual claims are aimed at making good on any harm suffered by a plaintiff.[78] Second, the law of delict will have also overcome or abandon its investigation into fault on the part of the defendant in cases of the disgorgement of profits because fault is not

71 Dagan (n 69) 138, 152.
72 Coleman (n 68) 185.
73 Ewoud Hondius and André Janssen (eds), *Disgorgement of Profits: Gain-Based Remedies throughout the World* (Springer 2015) 350.
74 ibid. Visser (n 70); Jacques du Plessis, *The South African Law of Unjustified Enrichment* (Juta 2012) 47.
75 Deon van Zyl, 'Negotiorum Gestio and Wrong' (2000) Acta Juridica 334.
76 ibid.
77 See Visser (n 70) 64.
78 Van der Walt and Midgley (n 67) para 143.

generally required in claims of this nature.[79] Visser believes that these challenges could be overcome, considering that the law of delict is adaptable to changing circumstances.

Contrary to these views, Du Plessis proposes that the law of unjustified enrichment could be the branch of South African law to achieve the disgorgement of profits for breach of contract. He believes that, to achieve this, the law of enrichment will have to be adapted by relaxing the general assessment of enrichment liability to allow the reversal of improperly acquired benefits by taking from another or by invading the rights of others.[80] However, this development could be slow because, unlike the law of delict, the law of unjustified enrichment in South Africa has proved itself slow at adapting to new challenges, and it has happened only in small steps. Evidence of this is found in the reluctance and the slow pace of recognising a general enrichment action in South Africa, where it is proposed only indirectly in *McCarthy Retail v Shortdistance Carriers*.[81]

However, Du Plessis has not lost all hope in the law of unjustified enrichment's being the vehicle to achieve the disgorgement of improper profits, including those acquired through breach of contract. He argues that it is ironical to suggest that gain-based remedies should and would find home in the law of delict and not in the law of unjustified enrichment, considering that the very business of the law of unjustified enrichment is to strip away benefits unjustifiably retained.[82] Du Plessis argues that it is a fact that the double-ceiling rule is a longstanding one in the assessment of unjustified enrichment and that this rule could provide some difficulty in achieving the disgorgement of profits acquired through breach of contract. This is so because at present the law requires both the defendant to have been enriched and the plaintiff to have been impoverished, the measure of enrichment across the board being viewed as a matter of either the defendant's enrichment or the plaintiff's impoverishment, whichever is the lesser. However, he argues that this rule could be relaxed to accommodate profits not conferred by the claimant and that relaxing this rule would not tamper with the fundamental principles of this area of law. He argues that relaxing the double-ceiling rule would require appropriate rules to be adapted to determine the quantum of the enrichment in these cases.[83] Du Plessis's suggestions on how to deal with improper profits acquired through breach of contract are discussed below.

79 Du Plessis (n 74) 47.
80 Du Plessis (n 74) 45; Visser (n 70) 116.
81 *McCarthy Retail v Shortdistance Carriers* 2001 (3) SA 482 (SCA).
82 Du Plessis (n 74) 47.
83 Du Plessis (n 74) 39.

Proposals on the Way Forward in South African Law

Within contractual remedies

The issue of the way in which the South African law of contract deals with ill-gotten profits acquired through breach of contract remains a grey area of our law. In fact, one finds hardly any discussion of this issue in the majority of the textbooks on contract. Moreover, South African courts are yet to be faced with a claim for disgorgement of profits based on the law of contract. However, as seen above, one could argue that the South African law of contract is well vested with some form of disgorgement of benefits based on the *restitutio in integrum* in instances where a contract is cancelled[84] as well as under contractual damages. For parties to claim restitution, though, they must themself be able to restore any benefits they may have acquired under the contract.[85] Furthermore, benefits claimable under this remedy are limited to those conferred or acquired under the contract.[86] This will present an obstacle to any effort to use this remedy to claim disgorgement of profits because the profits are acquired through breach of contract.

The possibility of claiming these ill-gotten profits under contractual damages in South African law will also face some challenges. The major obstacle to claiming disgorgement of profits under contractual damages successfully would certainly be the fact that contractual damages are limited to patrimonial loss. Therefore, it is impossible to compensate a party who has been deprived of bargain in contract but has not suffered actual patrimonial loss. If this were possible, awarding such a claim for non-patrimonial loss would indirectly force the party in breach to disgorge any profits they may have generated through their breach. Therefore, as it currently stands, South African law would not assist the owner in similar circumstances to those in *Ruxley Electronics and Construction Ltd v Forsyth*,[87] where the builder profited by building a shallower swimming pool than that agreed to in the contract but the owner could not prove financial loss as a consequence. Furthermore, South African law will not assist the state in circumstances similar to those in *Attorney-General v Blake*,[88] where a former employee, in contravention of his contract of employment, generated profits by disclosing confidential information in a book he wrote and published. Currently, the South African law would not be able to assist the state in these circumstances because the information was no longer classified or confidential at the time of the claim.

84 Leopoldt van Huyssteen, GF Lubbe and MFB Reinecke, *Contract: General Principles* (5th edn, Juta 2016) 117.
85 Visser (n 70) 107–108.
86 Van Huyssteen, Lubbe and Reinecke (n 84) 119–120.
87 [1996] AC 344 (HL).
88 [2001] 1 AC 268 (HL).

Although there is no support for the disgorgement of profit through contractual remedies in South Africa, Du Plessis suggested three possibilities for awarding a disgorgement remedy in these cases, particularly because it may discourage future breaches with the intention to profit for breach of contract in South Africa, namely: (1) the further development of contractual remedies, (2) extending the scope of application of an *actio quanti minoris* and (3) developing further the law of unjustified enrichment to cater for this remedy.[89] Unfortunately, due to space constraints, the last possibility will not be discussed in this article.

The first possibility is to develop further the existing contractual remedies by allowing claims under contractual damages to compensate non-patrimonial loss. In the past, there was some support among a few South African judges to compensate non-patrimonial loss under contractual damages.[90] If this possibility were to be resuscitated with successful approval, it would mean that a monetary value could be placed on the plaintiff's non-patrimonial interest in the performance of the contract and be awarded as contractual damages.[91] A similar stance was confirmed in the UK Supreme Court,[92] which would mean that in circumstances where the defendant saved costs by building a shallow swimming pool, as was the case in *Forsyth v Ruxley Electronics and Construction, Ltd*,[93] a monetary value maybe placed on the loss of amenities suffered by the plaintiff for not receiving the swimming pool built as envisaged and contracted. However, Du Plessis acknowledges that this possibility could very well create significant difficulties in terms of quantification.[94]

The second possibility is to extend the scope of application of an *actio quanti minoris*. This contractual remedy is generally used in contracts of sale where the purchaser is allowed to claim part of the purchase price if the seller made a misrepresentation relating to the material facts of the sale or the latent defects in the object sold.[95] Another approach proposed is that the courts should recognise or extend the scope of an account of profits awarded in English law for the disgorgement of profits.[96] This remedy will generally require the defendant to account for and disgorge the profits generated through breach of contract.

Besides the proposals outlined above to deal with profits acquired through breach, the prevailing contractual remedies in South Africa provide no support for the disgorgement

89 Du Plessis (n 74) 368–371.
90 See *Jackie v Meyer* 1945 AD 354.
91 Du Plessis (n 74) 370.
92 *Morris-Garner* (n 13).
93 *Forsyth v Ruxley Electronics and Construction, Ltd* [1995] 3 All ER 268.
94 *Forsyth* (n 93) 370.
95 cf *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A).
96 See *Blake* (n 3) 268.

of profits acquired through breach of contract. However, there are further views in South Africa which suggest that these ill-gotten gains may possibly be disgorged under the law of unjustified enrichment.[97] This possibility, together with the disgorgement of profits remedies recognised in other fields of South African law are discussed below.

Based on the Law of Unjustified Enrichment

It appears as if the solution to remedying the ill-gotten gains acquired through breach of contract in South Africa cannot be found in the law of contract. As a result, some commentators have suggested that perhaps the solution can be found in the law of unjustified enrichment.[98] It has been argued that the law of unjustified enrichment in South Africa recognises a limited enrichment claim through *condictio sine causa* in cases where there is an infringement of property right. Visser agrees that the law of unjustified enrichment should be used as a vehicle through which disgorgement of benefits acquired through breach is achieved.[99] But although the law of enrichment could be used as a vehicle for recognising the disgorgement of profits acquired through breach of contract, it is acknowledged fact that further development of this law will have to take place if disgorgement of profits can be fully achieved through this route.

For an enrichment claim to succeed, four general requirements must be met: the plaintiff must have been impoverished, the defendant must have been enriched, the defendant's enrichment must be at the expense of the plaintiff's impoverishment, and the enrichment must be *sine causa*.[100] Considering the application of a remedy awarded for the disgorgement of profits in both English and American law, any similar claim under the South African law of unjustified enrichment would face some difficulties. It is argued that the impoverishment requirement in the law of unjustified enrichment will present a serious challenge to any effort to recognise a disgorgement of profits acquired through breach of contract under the law of unjustified enrichment.[101]

Visser suggests that if the law of unjustified enrichment is to be used to achieve disgorgement of profits, the courts will have to recognise that the impoverishment requirement will have to be abandoned specifically for this objective to be met.[102] The

97 Du Plessis (n 74) 371; Visser (n 70) 130–136.

98 Visser (n 70) 652–654; Du Plessis (n 74) 371

99 Visser (n 70) 130. See John Blackie, 'Enrichment, Wrongs and Invasion of Rights in Scots Law' (1997) Acta Juridica 280, for the view that supports that law of delict should in fact be the vehicle used to achieve disgorgement.

100 Visser (n 70) 157–192.

101 cf Hondius and Janssen (n 73) 359; John Blackie and Ian Farlam, 'Enrichment by Act of the Party Enriched' in Reinhard Zimmerman, Daniel Visser and Kenneth Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Juta 2004) 496–497.

102 Visser (n 70) 131–132.

requirement will have to be relaxed because in most instances where there is profiteering through breach of contract, the plaintiff suffers no actual loss as a result of the defendant's gain.[103] Consequently, it is proposed that the law of unjustified enrichment should be developed or expanded to exclude the impoverishment requirement in order to include enrichment through invasion of right in South African law. Visser acknowledges that the double-cap principle in claims of enrichment will certainly make it impossible to recognise an enrichment claim based on invasion of right. Therefore, he proposes that, if the law of unjustified enrichment is used as a vehicle to claim disgorgement of profits, the best solution would be not to make impoverishment an absolute requirement for a claim based on invasion of right.[104] He proposes that the fact that English law does not have impoverishment as a requirement in similar claims[105] is a compelling indication that a similar approach would be a viable solution to deal with ill-gotten profits.[106] This development, Visser insists, will allow the disgorgement of profits acquired through breach of contract—especially considering that South African law already recognises enrichment liability without the impoverishment requirement in other areas of the law.[107]

Furthermore, whereas Blackie and Farlam agree that the central challenge to the disgorgement of profits achieved under the law of unjustified enrichment would certainly be the impoverishment requirement, they propose a more positive approach. For them the solution lies in the relaxation rather than abolishment of this requirement in the context of enrichment by the act of the party enriched.[108] They suggest that the solution to the challenge posed by the double-cap principle may very well lie in the enrichment remedy called *condictio furtiva*. Under this remedy, the double-cap rule does not apply: its purpose is generally to reclaim the plaintiff's property that was stolen. The remedy is available to the plaintiff only to be instituted against the thief for the highest value of the thing or property. The thief or defendant is liable to compensate the owner of the property even in instances where the property was damaged through no fault of their own.[109] Therefore, the double-cap rule usually applied in enrichment claims does not apply to a claim under this remedy.[110] Although this remedy suffered

103 See *Blake* (n 3) at 268.
104 Visser (n 70) 131.
105 cf *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, 1278–1279.
106 Visser (n 70) 131.
107 cf Michael Blackman in Willem Joubert (ed), *The Law of South Africa* Vol 4 (Butterworths 1995) para 134.
108 Blackie and Farlam (n 101) 496–497.
109 cf Jean Sonnekus, *Unjustified Enrichment in South African Law* (LexisNexis 2008) 148.
110 Sonnekus (n 109) 147–150.

from disuse in the past, it has since reappeared in *First National Bank of Southern Africa v East Coast Design CC*.[111]

Despite the above proposal, though recognising the disgorgement of profits under an enrichment claim based on an invasion of rights may face another challenge. It is a fact that for any enrichment claim to succeed, the enrichment has to be *sine causa*. This may be difficult to prove considering that in most instances where there is profiteering through breach there is a valid contract between the parties. Commentators who suggest that the law of unjustified enrichment might be a vehicle for achieving the disgorgement of profits acknowledge this challenge, and, furthermore, acknowledge that further development of the law of unjustified enrichment will have to take place if this is to be achieved.[112]

However, Visser suggests that the best way to deal with the abovementioned challenge is perhaps to borrow best practices already developed elsewhere in other jurisdictions, such as English law.[113] In principle, the guidelines developed in English law seem to be guided by public policy questions, but the starting point is based on the notion of attribution of gain.[114] In terms of these guidelines, the question courts should ask themselves is whether it is 'reasonable for the law to determine that the gain which has resulted from the commission of this wrong should accrue to the claimant rather than the defendant.'[115] He believes that for South African courts to arrive at an answer to this question, they may have to consider the policy and equity factors which normally trigger a disgorgement remedy in English law.[116]

If the abovementioned stumbling blocks are successfully cleared, a new measure of enrichment based on the invasion of rights with the intention of accommodating the disgorgement of profits may be developed. This is because the general double-cap measure will not be available because the impoverishment requirement would fall away, as proposed above. But a new guideline would have to be found to guide the courts to arrive at the correct assessment of these claims. This is well acknowledged by the commentators who advocate the disgorgement of profits under the law of unjustified enrichment.[117]

111 2000 (4) SA 137.
112 Du Plessis (n 74) 371; Visser (n 70) 696–697.
113 See Virgo (n 32) 432–435 for guidelines developed in English law; cf *Morris-Garner* (n 26).
114 cf *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, 1278–1279.
115 Visser (n 70) 133.
116 ibid.
117 Visser (n 70) 133–136.

According to Visser,[118] the theory developed by Dagan may prove helpful in this regard. Dagan's theory is based not necessarily on the general measure for enrichment, but on one that is flexible and adaptable to a specific need to protect a particular interest. According to Dagan's theory, each legal system will have to determine a specific enrichment measure in a specific situation guided by the type of interest being infringed, and on how strongly that legal system wants to protect that interest.[119] And the decision to protect a specific interest will have to be informed by the socio-economic values of that jurisdiction. Dagan cites the example of the United States' essential respect for liberty in relation to the use of private property and concludes that this may persuade that legal system to adopt an enrichment measure which protects the individual's control over their property. According to Visser, the Dagan's theory may prove very useful in developing an appropriate measure for the disgorgement of profits in South Africa. He suggests that in developing this enrichment measure, the courts will have to be informed by the values appropriate to South Africa.[120]

Recommendations

This study recommends that, despite the abovementioned obstacles, South African law will have to overcome these obstacles if it wishes to recognise the disgorgement of profits for breach of contract. It will be beneficial for South African law to recognise such a remedy because the profits gained in these circumstances are ill-gotten. As happened in the context of English law, there is nothing that renders South Africa immune to experiencing opportunistic breach of contract. The following hypothetical example of skimped performance illustrates the current position regarding profits acquired through breach of contract: Assume that party A contracts with party B that B must build a certain number of houses in line with an agreed specified standard and quality. However, in contravention of their agreement, A buys and uses substandard materials to build the required houses, and in the process generates profits as a result of saved expenditure on the building materials used. A might not have a claim against B as A cannot prove patrimonial loss on their part because the required number of houses have been built. It is in the quality of party B's performance that the breach of contract lies. This will result in B being allowed to keep the saved expense on the materials used even though those savings were acquired due to breach of contact. This situation may, if not changed or challenged, have negative effects on the performance interest of A. However, if a disgorgement remedy is recognised for breach of contract, these types of breach may be deterred. Deterrence of improper profiteering as a result of breach of

118 ibid.
119 Dagan (n 69) 138.
120 Visser (n 70) 133–134.

contract may see the performance of contractual obligations being better protected as contracting parties will know that they will not benefit from such a breach.

Furthermore, this study recommends that the best way to recognise the disgorgement of profits for breach of contract could be, among other measures, to develop and recognise a remedy under the law of unjustified enrichment for the invasion of someone's rights, because these breaches normally infringe the plaintiff's right to have the contract fully performed. This will, as indicated above, not only deter opportunistic breaches of contract, but will also go a long way towards protecting the performance interest of contracting parties in circumstances similar to those discussed in this article.

Conclusion

The recognition of a disgorgement remedy for breach of contract in the *Attorney-General v Blake* case was ground-breaking as it indicated that the profits acquired as a result of breach of contract can no longer be ignored when contractual damages are awarded. Although the ruling in this case did not change the traditional assessment of contractual damages as we know it today, it certainly introduced an important exception when contractual damages are assessed. A disgorgement remedy for breach of contract has not yet gained recognition in South African law. The obstacles to future development of such a disgorgement remedy within in the South African law of contract were highlighted above. It appears as if the major challenge in South African law to recognise a similar remedy under the law of contract would be the fact that monetary claims in cases of breach of contract are limited to only patrimonial loss.

Nevertheless, it should be noted that in South African law the possibility of recognising such a remedy has not yet been considered by our courts. However, even if this possibility is considered and it is accepted that it is desirable to order or develop a remedy to force parties to disgorge ill-gotten profits acquired through breach of contract, it remains unclear where, within the law of obligation, such a development is or should be located. However, some authors propose that the best approach is to use the law of unjustified enrichment as a vehicle for recognising or developing such a remedy. At this stage, this is merely proposal and the position still remains that South African law does not recognise a gain-based remedy for breach of contract. One cannot deny the fact that South Africans are not immune to acts of opportunistic breach of contract, with ill-gotten profiteering being the end-results. However, the question is how and where can such a remedy be developed? It is my proposal that it is highly desirable for South African law to develop a remedy that will deal effectively with this type of breach. The law of unjustified enrichment appears to be a natural arm of the law of obligations to deal with these types of profit, since it is founded firmly on the principle of equity and fairness. The law of unjustified enrichment applies in instances where someone is unjustifiably enriched and it seeks to force the enriched party to give up that enrichment.

The law of unjustified enrichment should be developed further, first, by relaxing the requirement that the defendant's enrichment must have been at the expense of the plaintiff (at the expense of requirement) and, second, by relaxing the application of the impoverishment requirements, as already advocated by Du Plessis.[121] But in this instance the measure of determining impoverishment should be expanded to include non-patrimonial loss.[122]

The developments outlined above will surely make it possible to develop a disgorgement remedy within the law of unjustified enrichment liability. If these developments are implemented, it will then be easier to recognise or develop a disgorgement remedy within the law of unjustified enrichment that will deal with ill-gotten profits such as those generated through the breach of contract. The rationale for the proposed developments is based on the following facts deduced from the developments in the case of *Attorney-General v Blake*;[123] that usually these profits under consideration cannot be linked to the plaintiff as they are generated purely by breach of contract on the part of the defendant, and also the breach of contract under discussion normally does not cause patrimonial loss to the plaintiff.[124] Therefore, if the 'at the expense of requirement' is relaxed by not making it a requirement in circumstances similar to those in the *Blake*[125] and the measure of determining impoverishment is expanded on as proposed above, the development or recognition of a disgorgement remedy within the law unjustified enrichment will be possible because the plaintiff will probably meet all the remaining requirements for an unjustified enrichment liability.

Using the facts in the case of *Blake*[126] as an example, the remaining requirements of enrichment liability referred to below will probably be met in instances where the developments of the law of unjustified enrichment liability propose are implemented, as follows: first, the plaintiff (which is the state in this case) will be able to prove that the defendant (Blake in this case) was enriched from the proceeds of the book. Second, the plaintiff will be able to prove that it was impoverished as it would find it difficult to have informers willing to work with it as they would probably fear that their information might be published in future. Third, the enrichment by the defendant is unjustified as it resulted from a breach of contract. With the above general requirements met, this would pave the way for the development of a disgorgement remedy within the law of

121 Jacques du Plessis 'The Relevance of the Plaintiff's Impoverishment in Awarding Claims Based on Unjustified Enrichment' (2009) Stellenbosch Law Review 494 at 495.

122 The defendant's enrichment is assessed in economic terms, therefore it appears as if a similar approach is followed when measuring the plaintiff's impoverishment. See Du Plessis (n 74) 43–44.

123 *Blake* (n 3).

124 This is because there is no transfer of asserts from one party to another. See *Blake* (n 3).

125 ibid.

126 ibid.

unjustified enrichment liability that would deal effectively with any ill-gotten profits generated through breach of contract without disrupting the principles of the law of contract.

References

Barnett K, *Accounting for Profits for Breach of Contract – Theory and Practice* (Hart Publishing 2012).

Beale H (ed), *Chitty on Contracts* (Sweet & Maxwell 2004).

Blackie J and Farlam I, 'Enrichment by Act of the Party Enriched' in Zimmerman R, Visser D and Reid K (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Juta 2004).

Blackie J, 'Enrichment, Wrongs and Invasion of Rights in Scots Law' (1997) Acta Juridica 284.

Blackman MS in Joubert WA (ed), *The Law of South Africa Vol 4 Part 1* (Butterworths 1995).

Burrow A, *The Law of Restitution* (Oxford University Press 2010).

Campbell D and Harris D, 'In Defence of Breach: A Critique of Restitution and the Performance Interest' (2002) 22 Legal Studies 208 <https://doi.org/10.1111/j.1748-121X.2002.tb00190.x>

Cartwright J, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Bloomsbury Publishing 2016).

Coleman J, *Markets, Morals and the Law* (Oxford University Press 2010).

Collins P, 'Liability for Profits in Breach of Contract: Revisiting *Attorney-General v Blake*' (LLM Dissertation, University of Melbourne 2015).

Coote B, 'The Performance Interest, *Panatown* and the Problem of Loss' (2001) 117 Law Quarterly Review 81.

Cunnington R, 'The Measure and Availability of Gain-based Damages for Breach of Contract' in Djokongir Saidov and Ralph Cunnington, (eds) *Contract Damages: Domestic and International Perspectives* (Hart Publishing 2008) <https://doi.org/10.1111/j.1468-2230.2008.00706.x>

Dagan H, 'The Distributive Foundation of Corrective Justice' (1999) 98 Michigan Law Review 138 <https://doi.org/10.2307/1290197>

DeLong S, 'The Efficiency of a Disgorgement as a Remedy for Breach of Contract' (1989) 22 Indiana Law Review 737.

Du Plessis J, 'The Relevance of the Plaintiff's Impoverishment in Awarding Claims Based on Unjustified Enrichment' (2009) Stellenbosch Law Review 494.

Edelman J, *Gain-Based Damages – Contract, Torts, Equity and Intellectual Property* (Hart Publishing 2002).

Edelman J, Colton S and Varuhas J (eds), *McGregor on Damages* (20th edn, Sweet & Maxwell 2019).

Harder S, *Measuring Damages in Law of Obligations, The Search for Harmonised Principles* (Hart Publishing 2010).

Harris D, Campbell D and Halson R, *Remedies in Contract and Tort* (2nd edn, Reed Elsevier (UK) 2002).

Holmes OW, 'The Path of the Law' (1897) 10 Harvard Law Review 457 <https://doi.org/10.2307/1322028>

Hondius E and Janssen A (eds), Disgorgement of Profits: Gain-Based Remedies throughout the World (Springer 2015) <https://doi.org/10.1007/978-3-319-18759-4>

Ibbetson D, *A Historical Introduction to the Law of Obligations* (Oxford University Press 2001) <https://doi.org/10.1093/acprof:oso/9780198764113.001.0001>

Kramer A, *Law of Contract Damages* (Hart Publishing 2014).

O'Sullivan J, 'Loss and Gain at the Greater Depth: The Implications of the *Ruxley* Decision' in Rose F (ed), *Failure of Contracts – Contractual, Restitutionary and Proprietary Consequences* (Hart Publishing 1997).

O'Sullivan J, 'Reflections on the Role of Restitutionary Damages to Protect Contractual Expectations' in David Johnston and Reinhart Zimmermann (eds) *Comparative Law of Unjustified Enrichment* (Cambridge University Press 2002) <https://doi.org/10.1017/CBO9780511495519.013>

Perillo J, 'Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference' (2000) 68 Fordham Law Review 1085 <https://doi.org/10.2139/ssrn.241263>

Posner R, *Economic Analysis of Law* (8th edn, Walters Kluwer 2011).

Potgieter J, Steynberg L and Floyd T, *Visser &Potgieter: Law of Damages* (Juta 2012).

Rose F (ed), *Failure of Contracts – Contractual, Restitutionary and Proprietary Consequences* (Hart Publishing 1997).

Saidov D and Cunnington R (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing 2008).

Schrage E, 'Liability to Disgorge Profits upon Breach of Contract or a Delict' (2013) 34(1) Obiter 17.

Sonnekus J, *Unjustified Enrichment in South African Law* (LexisNexis 2008).

Ulen T, 'The Efficiency of Specific Performance: Towards a Unified Theory of Contract Remedies' (1984) 83 Michigan Law Review 345 <https://doi.org/10.2307/1288569>

Van der Walt J and Midgley R, *Principles of Delict* (LexisNexis 2016).

Van Huyssteen L, Lubbe GF and Reinecke MFB, *Contract: General Principles* (5th edn, Juta 2016).

Van Zyl D, '*Negotiorum Gestio* and Wrong' (2000) Acta Juridica 329.

Virgo G, *The Principles of the Law of Restitution* (3rd edn, Oxford University Press 2015) <https://doi.org/10.1093/acprof:oso/9780198726388.001.0001>

Visser D, *Unjustified Enrichment* (Juta 2008).

Webb C, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligations' (2006) 26 (1) Oxford Journal of Legal Studies 41 <https://doi.org/10.1093/ojls/gqi044>

Winterton D, *Money Awards in Contract Law* (Hart Publishing 2015).

Cases

AB Corp v CD Co (The Sine Nomine) [2002] 1 Lloyd's Rep 805.

Attorney-General v Blake [1998] 1 Ch 439 (CA).

Attorney-General v Blake [2001] 1 AC 268 (HL).

Erlanger v New Sombrero Phosphate Co (1878) 3 App Cas 1218.

Esso Petroleum Co Ltd v Niad [2001] EWHC 458 (Ch).

Experience Hendrix LLC v PPX Enterprises Inc [2003] EWCA Civ 323.

Experience Hendrix LLC v PPX Enterprises Inc [2008] 1 WLR 445 (CA).

Forsyth v Ruxley Electronics and Construction, Ltd [1995] 3 All ER 268.

Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A).

Jaggard v Sawyer [1995] 1 WLR 269 (CA).

Lane v O'Brien Homes Ltd [2004] EWHC 303.

Luxe Holding Ltd v Midland Resources Holding Ltd [2010] EWHC 1908 (Ch).

McCarthy Retail v Shortdistance Carriers 2001 (3) SA 482 (SCA).

Montres Rolex SA v Kleynhans 1985 (1) SA 55 (C).

Morris-Garner v One Step (Support) Ltd [2018] UKSC 20.

One Step (Support) v Morris-Garner [2014] EWHC 2213 (QB).

Patton v Mid-Continent System, 841 F 2d 742, (USCA 7th Cir, 1988).

Phame (Pty) Ltd v Paizes 1973 (3) SA 397 (A).

Photo Production Ltd V Securicor Ltd [1980] AC 827 (HL).

Robinson v Harman (1848) 1 Ex Rep 850.

Sonia (Pty) Ltd v Wheeler 1958 (1) SA 555 (A).

Vercoe v Rutland Fund Management Ltd [2010] EWHC 424 (Ch).

Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD.

Wrotham Park Estate Co v Parkside Homes Ltd [1974] 1 WLR 798 Ch.

WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc [2006] EWHC 184 (Ch).

WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc [2008] 1 WLR 445 (CA).