Canadian Social Science *Vol.5 No.4 2009*
ISSN 1712-8056 *08/31/2009*
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Is the Law of Contract Seriously Defective if the Court is Unable to award Restitutionary Damages for Breach of Contract?

EST-CE QUE LE DROIT DES CONTRATS EST DÉFECTUEUX SI LE TRIBUNAL EST DANS L'IMPOSSIBILITÉ D'ACCORDER LA RESTITUTION DES DOMMAGES ET INTÉRÊTS POUR LA RUPTURE DE CONTRAT?

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Abstract: It is commonly believed that the general rule is that damages for breach of contract are compensatory not restitutionary.[2] So, the damages are measured by the loss to the plaintiff not by the gain to the defendant.[3] However, there are many academic writings which have advocated that restitutionary damages should be available as general default rule in breach of contract, because it is able to provide adequate remedy to plaintiff when compensatory damages are inadequate. The *A-G vs. Blake*[4] is the remarkable case which embodied by *Hendrix*[5] case, posits the general restitutionary remedy. *Blake* has challenged the traditional approach of damages and signaled a trend of establishing restitutionary damages. The proponents of this point always purport 'the interests of justice' for plaintiff,[6] however, they misunderstand the purpose of law of contract which is to balance the interests between claimant and defendant so that to maximize the social profits.[7] Accordingly, the restitutionary damages are an objection to efficient breach in economic view because the restitution

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[2] *Tito v. Waddell* (No. 2), [1977] 1 Ch. 106, 332 (Ch. App.)
[3] Margaret Halliwell. (1999). Profits from Wrongdoing: Private and Public Law Perspectives. *M.L.R.* 62(2), pp271-280.
[4] *A-G v Blake (Jonathan Cape Ltd Third Party)* [1997] Ch84 (ChD)
[5] *Experience Hendrix LLC v PPX Enterprises Inc, Edward Chalpin*[2003] EWCA Civ323(CA)
[6] D Campbell and J Devenney. (2006). *'Damages at the borders of Legal Reasoning'* Cambridge Law Review , 209
[7] D Harris, D Campbell and Roger Halson. *Remedies in Contract and Tort*, 2nd edn, Cambridge, Cambridge University Press, 2002. Ch 1, pp 11-21.
* Received 13 July 2009; accepted 7 August 2009.

and account of profit (disgorgement) will deprive the defendant's incentive to maximize profits and the claimant's desire to minimize loss. So, the virtue of damages for breach of contract would be diminished if the general restitution relief is established.

Key words: Restitutionary damages; Compensatory damages; Freedom of contract' Efficient breach

Résumé: Il est indéniable que pour la rupture de contrat, on applique en général l'indemnisation des dommages et intérêts plutôt que la restitution des dommages et intérêts. Ainsi, les dommages sont évalués par la perte pour la partie demanderesse plutôt que par le gain de la partie défenderesse. Toutefois, certaines thèses ont plaidé pour que la restitution des dommages et intérêts soit appliquée en tant que la règle générale, car elle peut fournir une compensation adéquate au demandeur lorsque des l'indemnisation des dommages et intérêts ne sont pas suffisantes. Le cas de l'AG contre Blake a imposé la restitution des dommages et intérêts en tant que la règle de secours pour la rupture de contrat.Le cas de Blake a contesté l'approche traditionnelle de dommages et intérêts et a montré une tendance de l'établissement de la règle de la restitution des dommages et intérêts. Les partisans de ce point prétend protéger «l'intérêt de la justice» pour le demandeur, toutefois, ils se méprennent sur l'objectif du droit des contrats qui est d'équilibrer les intérêts entre le demandeur et le défendeur de façon à maximiser les bénéfices sociaux. Par conséquent, la restitution des dommages et intérêts est une objection à l'efficacité de la violation du point de vue économique, parce que la restitution des dommages et intérêts et le renoncement à tous les profits (les remboursements)après la rupture priveront le défendeur de l'incitation à maximiser les profits et le demandeur de la volonté de minimiser les pertes. Ainsi, l'objectif de l'indemnisation des dommages et intérêts pour rupture de contrat serait distordu si le système de la restitution des dommages et intérêts est établi.

Mots-Clés: la restitution des dommages et interest; l'indemnisation des dommages et intérêts; la règle de secours pour la rupture de contrat; la liberté du contrat

1. INTRODUCTION

In common law, the general rule is that damages for breach of contract are compensatory not restitutionary.[8] So, the damages are measured by the loss to the plaintiff not by the gain to the defendant.[9] However, there are academic writings advocated that restitutionary damages should be available as general default rule, because it is able to provide adequate remedy to plaintiff when compensatory damages are inadequate. The *A-G vs. Blake*[10] is the remarkable case posits the general restitutionary remedy. *Blake* has challenged the traditional approach of damages and signaled a trend of establishing restitutionary damages. The proponents of this purport 'the interests of justice' for plaintiff,[11] however, they misunderstand the purpose of law of contract which is to maximize the social profits.[12] Accordingly,

[8] *Tito v. Waddell* (No. 2), [1977] 1 Ch. 106, 332 (Ch. App.)

[9] Margaret Halliwell, '(1999]. Profits from Wrongdoing: Private and Public Law Perspectives. *M.L.R. 62(2)*, 271-280.

[10] *A-G v Blake (Jonathan Cape Ltd Third Party)* [1997] Ch84 (ChD)

[11] D Campbell , J Devenney. (2006).*Damages at the borders of Legal Reasoning*. *Cambridge Law Review*, 209

[12] D Harris, D Campbell and Roger Halson. (2002). *Remedies in Contract and Tort（2nd edn）*, Cambridge: Cambridge University Press. Ch 1, 11-21.

the restitutionary damages are an objection to efficient breach in economic view because the restitution and account of profit (disgorgement) will deprive the defendant's incentive to maximize profits and the claimant's desire to minimize loss. So, the virtue of damages for breach of contract would be diminished if the general restitution relief is established.

In this essay, the restitutionary damages are not denied totally. Indeed, it is available in some particular cases, but always be exception of common law remedies according to efficient breach. The arguments of this essay are based on analyzing the irrationality of restitutioanry damages to be the general default rule for and the law of contract is not defective without awarding restitutionary damages to claimant. Part II argues that whether the alleged 'justice' in restitution cases really reasonable – efficient breach should be encouraged. Part III analyses why freedom of contract is always prior. Part IV criticizes the rationality of compensatory damages and restitutionary damages. Part V discusses the reason why compensatory damages act as default rule with the exception of restitutionary damages.

2. IS THE 'JUSTICE' IN RESTITUTION REASONABLE? --THE WRONGDOING IN MORALITY IS NOT EVEN WRONG IN ECONOMY.

This essay is just based on restitution for wrongdoing because for restitution of subtraction there is no dispute.

In *Blake* [13]*case*, the Court of Appeal has succumbed to the 'temptation to do justice' by further extending to claimants a disgorgement remedy.[14] The essence of the 'justice' is reversing the gains from wrongdoing.[15] To safeguard the contracts, the defenders believe that all breaches are wrong, and no one should get benefit from the wrongdoing.[16] This principal constitutes the basis of restitutioanry damages.

Obviously, the concept of wrongdoing put too much attention on the protection of claimant's interests. This is absolutely correct in achieving justice and fairness in morality. And it is supported by the Court of Appeal in *Blake* which focuses on the 'moral caliber of the defendant's conduct.'[17]

Nevertheless, the standard to tell right from wrong varies in different circumstances. Especially in capitalist economy, the only desire of commercial parties is to maximize surplus value.[18] So, it is reasonable for a party choosing to repudiate the current contract because of a more profitable opportunity, providing that the promise has been fully compensated. In addition, sometimes, the promisor might come across considerable difficulties to perform the contract. It is very natural for the promisor to break to avoid loss. Above two issues are the essence of efficient breach which means that the breaker has incentive not only to maximize profits but also minimize losses.[19] It is the justice in economic view, and the efficient breach can maximize the social interests in all. However, if the court just focus on critics of 'wrongdoing' against efficient breach, the social waste will be produced.[20]

Morality is subjective concept, particularly in commercial exchange activities. Focusing on the 'wrongdoing' in morality, the outcome is suspicious. Its start point is to protect claimants' interests and all contract breakers are presumed to be guilty.[21] Obviously, defendant is stand in an unfair position where the defendant is presumed to be 'wrongful'. It is inconsistent with one most important thing: the equality of promisor and promisee. To maintain the equality, the court must realize the nature of

[13] Supra note 3.
[14] Supra note 5, pp208
[15] Supra note 6, pp262-268.
[16] *Halifax Bldg. Soc'y v. Thomas*,[1995] a All E.R. 673,682(C.A.)
[17] Supra note 3.
[18] Supra note 6, pp5.
[19] Ibid, pp 11-13, 264-265.
[20] Ibid, pp 222-226.
[21] Ibid, pp 266.

competition is rigorous and it should not to vest too much protection on the claimant. On the other hand, even in morality, not all wrong is done by defendant. The court should keep eyes on the situation when the uncompensated loss is caused by claimant's own conduct, such as neglect and so on.

Coming back to the basic rule comes out of *Robinson v. Harman*[22], the purpose of damages is to put the claimant in the position as if the contract had been performed. What the claimant wants is expectation interests and reliance interests. Therefore, if the claimant has been fully compensated, there is no wrong, and it is an efficient breach.

Moreover, some exceptional situation in which the court will not resist even exists wrongdoing should be discussed. Just like what has been talked above, when damages for breach of contract are adequate, the court has excellent reasons not even to prevent the wrongs; and in the case of disclosure of confidential business information, the court do not do everything in its power to prevent wrongs,[23] because its interruption may lead to further disclosure of this information.

In sum, because the law of contract is based on capitalist economy, so the justice should be in terms of economy. And the law supports the efficient breach, according to that there is no moral right or wrong.

3. WHY FREEDOM OF CONTRACT IS ALWAYS PRIOR?

The contract is the evidence of agreement between parties. The clauses of the contract are up to the decision of parties, and the aim of contract is to provide remedies in the situation of breach.[24] In other words, when entering into a contract, every party has his own expectation which will be realized when the contract has been performed. For the realization of their own expectation, the parties might change the contents of contract, even break it, providing the innocent party can be fully compensated with the rule of *Robinson v. Harman*[25]. As Professor Harris stated, 'a contract is but a legal institution guiding exchange and not an essential component of that exchange.'[26] Obviously, the freedom of contract should always be respected.

However, the function of restitutionary damages is opposite to the principle of freedom of contract, because it resists the incentive of defendant to break the contract. So, if the general rule of remedies is based on restitution, it will lead to the argument of performance interest. In the view of economy, this foundation is noneffective.

3.1 'Expectation profit' not 'performance interest'

Professor Friedmann holds that, 'the essence of contract is performance…the performance interest……is the only pure contractual interest.'[27] Just as what have talked about in Part II, this is the attitude towards 'justice' in morality, which leads to Lord Nicholls conclusion in *Blake case*, 'a useful general guide for awarding restitutionary damages is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving his profit.'[28]

However, if coming back to the capitalist economy basis, it is clearly that Professor Friedmann has confused the ultimate purpose of the law. In the capitalist economy system, the only reason for a commercial party making a contract is to obtain surplus value.[29] So, the contract is just a tool to facilitate

[22] [1848] 1 Exch 850 at 855
[23] Supra note 5, pp 218
[24] D Campbell, Lecture 1 Note
[25] [1843-60] All ER 383.
[26] Supra note 6, pp282. See also D Harris, *'Incentives to Perform, or Break, Contracts'* [1992] 45 (2) Current Legal Problems 29.
[27] D Friedmann, '*The Performance Interest in Contract Damages*' [1995] 111 Law Quarterly Review 628, p629.
[28] [2001] 1 AC 268(H.L.), 285.
[29] Supra note 6, pp5.

the outcome. Parties act according to the contract for expectation interests. If the court insists the performance *per se* of the contract, the purpose of contract will be distorted to just require the compliance by both parties. It will be inconsistent with the principle of efficient breach which is encouraged by the law. Through efficient breach claimant's expectation interest is fulfilled as the contract has been duly performed. So that what should be insisted is the fulfillment of expectation interest not performance interest.

The appropriate apprehension of contract is addressed by Oliver Holmes, 'the nature of a duty to perform a contractual obligation in common law is nothing more than a prediction that you must pay damages if you do not keep it, and nothing else.'[30] However, restitutionary damages force the performance of defendant, so it is contrary to the nature of contract.

3.2 The central issue of contract: freedom

It is commonly believed that the relationship of contract is realized in the distinction between 'primary' (the parties' obligations under the exchange) and 'secondary' (to provide a remedy for failure to perform his primary obligation) obligations.[31] And from this point the function of the law of remedies for breach of contract is not to enforce contracts but to regulate the occasions of breach; that is to say, to provide a framework which allow breach in wealth maximizing circumstances. It is a presentation of freedom of contract—efficient breach. The contract law must balance the interests between claimant and defendant,[32] so that the function of the law is the regulation of the terms on which breach may legitimately be made.[33] This argument is especially relevant where primary obligation becomes an undue hardship to the breaker or the promisee suffered no loss. If the doctrine *pacta sunt servanda* is regarded as supreme, the freedom of deciding whether to perform a contract could be infringed. So, the social interest might be wasted.

The common law tradition…reflects a conviction that individual liberty reigns supreme.'[34] Parties of contract have the right to choose way for remedy (either restitutioanry or compensatory), the court should respect parties' intention. However, that is what the restitutionary argument does not do.[35] In theory, the only default rule inhibiting promisor and promisee is the one negotiated by them. For example, in *Wrotham Park Estate Co Ltd v. Parkside Homes Ltd*,[36] the defendant built more houses by breach of a restrictive covenant which development of the land had to conform with a lay-out plan approved by the vendor or claimant, his successor in title. The court in this case felt that 'justice not have been done' by an award of nominal damages because there is no loss to claimant in terms of compensatory damages.[37] So that, the court gave claimant damages estimated at the price defendant would have had to pay to obtain a release from the covenant (hypothetical release damages). In the view of freedom of contract, the court in *Wrotham Park* case does not see that contract is not to provide armchair to the right outcome but is to give effect to what the parties intend to be.[38] Obviously, the claimant of that case might reluctant to give release to defendant, so the decision of court is opposite to claimant's intention in this situation. In Mr D Campbell's opinion, one cannot reach such a conclusion if he does respect the intentions of parties.[39] In fact, the hypothetical damages are a substitution for the negotiations which did really take place, without realizing that it is rewriting the contract without any respect to the intentions of parties.[40] So far, the compensatory damages act as the general default rule, so, it is wrong that the claimant obtains a price by a quantification rules other than the compensatory

[30] O.W. Holmes, '*The Path of the Law*' (1987) 10 HARV. L. REV.457,462.
[31] Supra note 6, pp7.
[32] Ibid, pp272-282.
[33] Ibid, pp10.
[34] Supra note 25, pp 164.
[35] D Campbell, '*The Extinguishing of Contract*' (2004) 67 Modern Law Review pp828.
[36] [1974] 1 WLR 798.
[37] Supra note 6, pp256.
[38] Supra note 31, pp828.
[39] Ibid, pp828.
[40] Ibid, pp826.

damages.[41]

Though there is the tendency of establishing restitutional default rule after *The Blake case*, the appropriate judgment by the diminution in value still playing a big role in the argument. In *Surrey County Council v. Bredero Homes Ltd*,[42] on very similar facts, the Court of Appeal just gave claimant nominal damages yielded by the diminution in value measure. The reason of this judgment is that claimant has waited too long time before bringing an action to make a mandatory injunction available, so that the claimant just got damages at common law. It seems like the claimant did not want to bring the breach to an end when he was aware of that. The restitutionary damages had not been awarded because the courts paid attention to the intention of the claimants, so that the judgments are in respect of freedom of contract, not just force the 'justice' in morality.

The 'good slice'—a part of defendant's profit by breach of contract, which had been awarded in several cases is not reasonable, and in terms of freedom of contract this slice should not be given.[43]This kind of thing is caused by the acceptance of the restitutionary argument, which must undermine freedom of contract because it just desire to correct abstract wrongs instead of following the principles which agreed by parties.[44]

3.3 The essence of restitutionary damages—claimant's windfall

It is no denying that the first rule of contract law is set by *Robinson v. Harman*[45] which is to put the claimant in the position as the contract has been performed. Meanwhile, the second rule which the court should also take care is giving remedy to claimant at the least cost to the defendant.[46]

The restitutionary damages are inconsistent with the second rule. And the whole argument is built on the basis of capitalist economy which is pursuing the surplus value, so that the efficient breach is warmly encouraged. When the contract breaker decided to break this contract, he undertook both risks of compensating the innocent party and the failure of the new contract. For example, in an efficient breach where the goods are not unique, the seller finds another opportunity through which he can get much more profit than the original contract. And by the profit the seller earns from the new contract the buyer can be fully compensated. There is no denying that the seller has done diligence to find and proceed with a much more profitable opportunity and take the risks. So, if the second contract is profitable, the seller has the right to keep the extra profits. It is unfair to ask the seller to take more risks than that, however, that is what the restitutionary damages do. The hypothetical release damages and account of profits would resist the defendant's intention to break, and leave the claimant with windfall from the defendant's endeavour.

In the view of damages, if the defendant has adequately compensated the claimant, why the claimant should extract more? The best example is the case of *City of New Orleans v. Firemen's Charitable Association*,[47] which is a 'skimped performance' case. In this case, the plaintiff had discovered that the defendant had not provided full firefighting service, however, he has suffered no loss. Although the court there ruled that no more than nominal damages were required, the Court of Appeal expressed the view that this was an appropriate case for disgorgement damages for 'skimped performance'.[48] However, this case was not even breached although was grave injustice in the view of the proponents of restitution.[49] The claimant got all the expectation interest and had no suffering. Therefore, if the court awarded the restitution to claimant, the diligence of the defendant to limit the cost of performance would be wasted,

[41] Ibid,pp827.
[42] [1993] 1 WLR 1361, CA.
[43] Supra note 31, pp827.
[44] Ibid, pp827.
[45] [1843-60] All ER 383.
[46] D Campbell, Lecture 7 note.
[47] [1891] 9 So 486 (Sup Ct Louisiana).
[48] James Edelman, '*Restitutionary Damages and Disgorgement Damages for Breach of Contract*' [2000] R.L.R. 2, 129-151.
[49] Supra note 31, pp828.

meanwhile, the claimant got the windfall without any loss.

Mr. D Campbell also gave a very good example[50] in his article where a hypothetical case is set up. In this case, the contract price is 1 m pounds, when breach the market price is the same to the contract price. However, the cost for the seller to perform this contract rises up to 1.5 m pounds. Fairly, everyone will choose to break in the situation. If the claimant is awarded more than nominal damages, the purpose of the defendant to break the contract is disappointed. In deed, the claimant really is compensated by nominal damages because he did not suffer a substantial loss, the defendant's saving of 500,000 pounds is reasonable in terms of economy. He has to compensate the normal expectation loss but do not have to pay a sum in addition to this. Otherwise, the claimant will get windfall opposite to the principle of contract law.

In the end, the purpose of Lord Cairns Act which is used by Lord Goff and Brightman J to support the restitutionary argument should be discussed. In essence, an important reason why this Act was passed is to prevent the claimants getting a lot of money by what was called 'ransom'.[51] This statement assisted by the definition that 'the money saved is the profit gained'[52] leads to the discussion about claimant's obligation. According to the principle of freedom of contract, it is the parties who are under the liability to negotiate for the security terms to take care of issues involved in the performance of contract. If, after the contract was concluded, the claimant found that there is a missing security term, it is the claimant's obligation to negotiate with defendant to rewrite this term.[53] And this kind of security terms may add the risk to defendant, so he might ask higher contract price or even refuse it. Therefore, if the court takes the restitutioanry damages as a general default rule, it is clear that the claimant evades the obligation and save a mount of money to rewrite the contract, leaving himself with windfall.

4. WHY RESTITUTIONARY DAMAGES CANNOT BE THE DEFAULT RULE IN GENERAL?

When choosing the way of remedy, the court should always keep in mind not only the first rule but also the second rule of contract law, which is to compensate the claimant at the least cost to defendant. In other words, it is the requirement of mitigation.[54]

Under the traditional compensatory damages rule, the mitigation rule goes through the whole process of breach of contract.[55] In a contract of sale of goods, the promisee always has the chance to minimize the loss from breach unless the goods are unique. The mitigation rule as well as the efficient breach theory requires the claimant to try his best to minimize the loss after learning of it. Nevertheless, the effect of restitutionary damages just goes opposite to the mitigation rule. Such as *Blake case*, in which the buyer does not need to mitigate but easily claim the seller's profits from the publishing contract. Also in *The W. Park case*, the claimant got the hypothetical release damages without mitigation. So, the general restitution relief would undermine the efficiency of mitigation rule. From the economic perspective the compensatory damages are more suitable to be the general remedy for breach of contract.

Possibly, the mitigation rule itself is not persuadable enough of the irrationality of general restitutional relief. To clarify this, problems involved in the awarding of restitutionary damages in practice will be brought in discussion below.

[50] Supra note 43, pp616.
[51] Ibid, pp830.
[52] Mindy Chen-Wishart, '*Restitutionary damages for breach of contract*' [1998] L.Q.R. 114(Jul). 363-370.
[53] Supra note 31, pp826.
[54] Supra note 6, pp109.
[55] D Campbell, Lecture 12 note.

4.1 The exceptional essence of restitutionary damages makes uncertainty.

In *Blake case*, Lord Nicholls has stated that 'the restitutionary damages would only be a limited and exceptional case and would not induce uncertainty.'[56] However, he was anxious to avoid defining exceptional circumstances, and just said, 'no fixed rules can be prescribed, the court will have regard to all the circumstances…'[57] This statement is so uncertain because the hardship to identify the exceptional situation in practice.

If the claimant wants to sue for restitutionary damages, he must construct his claim in terms of either 'skimped performance' or 'the defendant has obtained his profit by doing the very thing which he contracted not to do', which are clarified by the Court of Appeal in *Blake case*.[58] However, all of these are not satisfactory reasons to depart from compensatory damages, and all these arguments have been declined in House of Lords.[59] Analysis of the problem following.

For the 'skimped performance' which is exemplified by the case *City of New Orleans v. Firemen's Charitable Association*[60] where the defendant fails to provide the full services for which he has charged the plaintiff. As there is no loss occurred, there are several questions to ask before award the restitutionary damages: what is the precise scope of 'skimped performance'? How is it distinguishable from defective performance?[61] It is really uncertain in the restitution argument.

For the second limitation of the restitution relief, as in *Blake case* itself. There is an argument that all breaches of contract involve the defendant doing something he had contracted not to do. However, if this interpretation is acceptable, it leads to the restitution generally available for breach of contract, contrary to the intention of Court of Appeal to put the restitutionary damages on the exceptional basis.

It is clear that as *Blake* affirms damages for breach of contract are normally compensatory[62] and restitutionary to take place only in 'exceptional circumstances'[63], the practice of restitutional relief leads to uncertainty.

4.2 Which is the appropriate measure of qualification?

Even though the restitutionary damages are awarded, there is contentious when quantify the damages.

For the disgorgement cases, though there are strict limits on the method for quantifying gains—to those 'occasioned directly by the breach', the dispute still exist. This method is effective and reasonable in *Blake case*, where the defendant profited by breaking the restrictive covenant. However, in *Teacher v. Calder*[64] where the defendant removed his 15,000 pounds from a particular venture in breach of contract but only profited by the additional step of investing that sum in a distillery, the restitution is unavailable. Tough it is unfair to leave claimant uncompensated in Teacher case from the perspective of restitutional relief, the court has to make the decision in terms of compensatory damages according to the remoteness. By the comparing of these two cases, the method of qualification appears so ridiculous in itself.

The situation is more complex in cases of cost of release. What is the appropriate proportion to disgorge for hypothetical release ? Why the defendant had to disgorge all the profits in *Blake case*, however, only 5 percent of the profit was in *W. Park case*? If the restitutionary damages aim to reverse the 'wrongdoing', why the hypothetical release cases just make defendants disgorge part of the profit not the whole profit? Mr. D Campbell stated, 'to turn from an expectation claim to an account is to jump out of the frying pan into the fire; but if one turns away from an expectation claim to hypothetical release, the

[56] [2001] 1 AC 268 (H.L.) 285F.
[57] Ibid.
[58] Supra note 43, pp610.
[59] Ibid, pp610.
[60] [1891] 9 So 486 (Sup Ct Louisiana).
[61] Supra note 50.
[62] [2001] 1 AC 268,282B (H.L.).
[63] Ibid, 285G.
[64] [1899] A.C. 451.

case is even worse.'[65] In *The W. Park case*, Brightman J. just made the decision with 'great moderation', and he said, 'I will award the reasonable sum to claimant.' But, what is the reasonable amount is not clear. In most of hypothetical release cases, no evidence of the defendants' profits has been available, so that the restitutionary damages have been the purest guesswork.[66] In sum, the essence of hypothetical release after *W. Park case* is complete arbitrariness made by moderation.[67]

4.3 It is the defendant who takes the burden of account.

When the claimant is awarded of restitutionary damages, his obligation in quantifying damages for loss of expectation interest has been transferred to defendant's liability to account of profits following breach. This theory is produced by *Hendrix case*[68] which unified restitutionary remedies for breach into a sliding scale on the same footing.[69]

Discussion should be concentrated on the point that in *Hendrix case*, the claimant wants to get the assistance from the court to secure the information involved in the account.[70] The implication is that the claimant does not believe an account provided by the defendant.[71] It is reasonable that one does not believe the other who breaks the trust. This problem has been discussed in D Harris's writing, 'when the action is constructed in restitution, the claimant has to prove there are gains from defendant's wrongful conduct, and this will come across proof problems similar to those in the expectation claim, with the more serious complication that the evidence must be sought from the defendant, who will not wish to provide it.'[72]

The reason of the claimant to choose restitutionary remedies rather than compensatory damages is that he cannot prove there is loss of expectation or reliance interest. However, when come into the restitutionary claim, the claimant has to face with the problem of proof. And because the defendant is reluctant to provide the evidence of profits, the result of account by him is lack of creditability to the claimant. Obviously, it is inconsistent with the intention of claimant. So, the restitutionary remedy is ridiculous in itself.

There might be some opponents of restitution argument advocate that parties could put this kind of remedy as a term into the contract according to the freedom of contract. In this situation, the court should pay enough attention to both parties' intention. Under the restitutionary remedy, the promisor faces higher commercial risks and uncertainty, so that the promisor may be reluctant to enter a contract. On the other hand, if the promisee insists on putting this term into contract through negotiation, the promisor will ask for higher contract price because he takes much more risks. So, the higher transaction cost may cause the promisee think about the balance of expectation profit and contract price then leads the contract to an end. Therefore, the notion to put the restitution relief clause into the contract causes uncertainty too.

No one should take more risk than what he agreed to. If parties have not put the restitutionary damages as the method of remedy into the contract, the appropriate way to provide remedy is following the rule of *Robinson v. Harman*[73] which is to award compensatory damages. The reason of this decision is that the principle of efficient breach requires parties to be competent in stipulating contracts. So, if the damages just nominal or even do not exist, the claimant has to take the risk of his failure to stipulate. On the assumption that, the court award restitutioanry damages to claimant in this situation, not only the freedom of contract but also the aim of efficient breach has been distorted.

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[65] Supra note 43, pp 624.
[66] Ibid.
[67] Supra note 6, pp 268-272, 491-494.
[68] *Experience Hendrix LLC v. PPX Enterprises Inc, Edward Chalpin* [2003] EWCA Civ 323.
[69] Supra note 43, pp623.
[70] Ibid.
[71] Ibid.
[72] Supra note 6, pp 571.
[73] [1843-60] All ER 383.

6. RESTITUTIONARY DAMAGES, THE EXCEPTION OF THE DEFAULT RULE OF COMPENSATORY DAMAGES.

Just as what has been stated at the beginning, there could be restitution cases, however, they always be exceptional.

The most marked one is Blake case. Blake is really exceptional because it is a national security case. So far, there is just one previous case in recent English litigation can be compared with it, The Spycatcher case74, in which the similar restitutionary damages were awarded. So, almost every case after Blake will be distinguishable from this basis.75 Meanwhile, in Blake case the defendant was akin to a fiduciary, it was a private law interest based on signing the Official Secrets Act as a condition of obtaining employment with the security services.76 So, Lord Nicholls awarded the restitutionary damages by analogying the breach of contractual obligation not to disclose official information to fiduciary obligation, because the account of profits is a standard remedy for breach of fiduciary.77 However, it is unreasonable to impose the fiduciary duties on common law duties simply to extend the remedy.78 Because remedy for fiduciary duty is a separated system, so it can just be used in some particular cases not generally.

As The Blake case is the origin of awarding restitutionary damages, its own feature presents the exceptional essence of this kind of remedy. And the decision of the Court of Appeal in Surrey Country Council v. Bredero Homes Ltd79 reinforces the orthodox English doctrine that damages for breach of contract are based on loss to the plaintiff and not on gain to the defendant.80 So, the conclusion is that the default rule should be compensatory damages, and the general restitutionary alternative is inferior.81

It is not to say the compensatory remedy works perfectly well, and the questions about the 'uncompensated loss' when the claimant cannot connect his interest with the duly performance of the contract arises. However, the 'uncompensated loss' are not the defect of the law of contract. The compensatory damages provide sufficient security to claimants in the economic view. In some circumstances, the compensatory damages may not work, leaving the claimant with 'uncompensated loss' which is caused by defendant's wrongful conduct. In deed, this is attributed to the contract itself, not the law of contract. The contract is the evidence of agreement between parties, so, the parties should keep eyes on the possible situations in the performance. It is the parties who take the obligation to negotiate the relevant clauses to protect their own interests. 'A competent party has an opportunity to put different kinds of security terms into contract at the time of negotiation rather than at the time of the breach.'82 It is sound if parties negotiate to put a default rule of account of profits with specifying disgorgement in terms. Through this clause, the problem of quantification in the restitution cases has been solved. Otherwise, the claimant has to take the risk of 'uncompensated loss' when no compensatory damages can be awarded.

In sum, if the restitutionary damages become available in general, there will be a tendency to discourage economic activity.83 So, the restitutional remedy just can be exceptional remedy. This is the normal risk of the trade in the capitalist economy market, and care should be taken to include all security terms in the contract by parties. The law of contract has already provided sufficient protection to claimant with the purpose to balance the interests between claimant and defendant. Therefore, the law of

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[74] Supra note 43, pp621.
[75] Ibid, pp618.
[76] *A-G v. Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268 (HL).
[77] Martin Graham. (2004). Restitutionary damages: the anvil struck. *L.Q.R. 120(Jan)*, 26-30.
[78] S. Worthington, (1999). Reconsidering Disgorgement for Wrongs. *62 M.L.R*, 218;
S.Worthington & R. Goode. Commercial Law: Confining the Remedial Boundaries (D. Hayton ,ed). *Law's Future(s) (Oxford 2000)*. Ch.15.
[79] [1993] 1 WLR 1361 (CA).
[80] Peter Birks. (1993). Profits of breach of contract. *L.Q.R. 109(Oct)*, 518-521.
[81] Supra note 43, pp629.
[82] Supra note 31, pp824.
[83] *Surrey County Council v. Bredero Homes Ltd.* [1993] 1 W.L.R. 1361.1370. (C.A.).

contract is not defective even the court cannot award the restitutionary damages to the claimant.

6. CONCLUSION.

The whole essay is in the economic view. And, because the English contract law does not value contracts rights so highly,[84] the court intends to keep restitutionary damages exceptional. It means that 'neither all inadequately protected claimants should get restitutionary damages, nor all defendants should disgorge their gains.'[85]

The further reasons for the consideration not to award restitutionary damages in general are that if it is available as the default rule, the contractual compensatory remedy and the balance of several values – the avoidance of social waste, undue hardship to the defendant, windfall to claimant, freedom of contract, would be undermined. It is inconsistent with the nature of the market which is to maximize the social interests.

The core of the debate is between the better protection of the claimant's right while not discourage the defendant from finding more profitable opportunity—efficient breach.[86] If just following the authority of *Blake case*, the only result is that the claimant be better served without concerning this harmonious.

On the basis of capitalist economy market, the commercial parties have to be rivalrous to survive. The law is just assistance of the market's own regulation. So, the general remedy of compensatory damages has solved the problem of balancing with the competent parties. It allows parties choose to break or perform the contract under the efficiency theory. Therefore, the law of contract is not defective, even if the court unable to award the restitutionay damages to the claimant.

REFERENCES

Andrews Burrows. (2004). *Remedies for Torts and Breach of Contract (3rd edn)*, Oxford: Oxford University Press.

D Campbell. (2004). The Extinguishing of Contract. *Modern Law Review*, 67.

D Campbell and P Wylie. (2003). Ain't No Telling (Which Circumstances are Exceptional. *Cambridge Law Journal*.

D Campbell, J Devenney, (2006). Damages at the borders of Legal Reasoning. *Cambridge Law Review*, 209.

D Friedmann. (1995). The Performance Interest in Contract Damages. *111 Law Quarterly Review 628.*

D Harris. (1992). Incentives to Perform, or Break, Contracts. *Current Legal Problems, 45 (2)*, 29.

D Harris, D Campbell, Roger Halson. (2002). *Remedies in Contract and Tort. (2nd ed).* Cambridge: Cambridge University Press.

James Edelman.(2002). *Gain-based damages*. Hart Publishing Oregon, pp162-163.

James Edelman.(2003). Restitutionary Damages and Disgorgement Damages for Breach of Contract. *R.L.R, 2*, 129-151.

Margaret Halliwell. (1999). Profits from Wrongdoing: Private and Public Law Perspectives *M.L.R. 62(2)*, 271-280.

[84] *Co-operative Insurance Society Ltd v. Argyll Stores Ltd* [1997] 2 W.L.R. 898.
[85] Supra note 50.
[86] Ibid.

Martin Graham. (2004). Restitutionary damages: the anvil struck. *L.Q.R. 120(Jan),* 26-30

Mindy Chen-Wishart. (1998). Restitutionary damages for breach of contract. *L.Q.R.,114(Jul).* 363-370.

O.W. Holmes, (1987) . The Path of the Law. *10 HARV. L. REV*.457,462

Peter Birks. (1993). Profits of breach of contract. *L.Q.R. 109(Oct),* 518-521.

S. Worthington. (1999). *Reconsidering Disgorgement for Wrongs*. *62 M.L.R.* 218

S.Worthington, and R. Goode. *(Oxford 2000).* Commercial Law: Confining the Remedial Boundaries. in D. Hayton (ed.), *Law's Future(s).* Ch.15

Editor: Catherine Schrader