

# WHAT ARE DAMAGES FOR?

by

## *Honourable Mr Justice Lewison*

Kim Lewison practised at the property Bar for some 27 years between 1975 and 2003. He took silk in 1991. He has been the nominal Chairman of the Property Bar Association; Chairman of the Anglo-American Real Property Institute and joint head of Falcon Chambers.

He was appointed as a Judge of the Chancery Division in 2003. Since then he has

- declined to construe the phrase “shizzle my nizzle”;
- discovered what a patent looks like;
- examined the love life of the playwright Anthony Shaffer;
- been introduced to the music of Bob Marley and the Wailers;
- found out how much money northern businessmen keep in cash under their baths;
- spent several court days considering bubbles;
- made the acquaintance of the Performing and Captive Animals Defence League;
- infuriated Welsh Rugby fans by interfering with the corporate governance of the Neath-Swansea Ospreys;
- and much more besides.

He keeps a nodding familiarity with the law of Landlord and Tenant by editing Woodfall; and he continues to produce editions of his book on the Interpretation of Contracts (last ranked at 897,969 in the best selling books on Amazon).

## ROYAL COURTS OF JUSTICE

Strand  
London WC2A 2LL

Tel: 020 7947 6000 (switchboard)  
Email: [mrjustice.lewison@judiciary.gsi.gov.uk](mailto:mrjustice.lewison@judiciary.gsi.gov.uk)

# WHAT ARE DAMAGES FOR?

*A paper presented to the annual conference  
of the Property Litigation Association 11 April 2008*

*Sir Kim Lewison*

1. What are damages for? The basic answer is that they are designed to compensate the claimant and not to punish the wrongdoer. Nor are damages designed to strip gains from a wrongdoer. I could compile an anthology of judicial comments to that effect; but here are a few. First Lord Hoffmann <sup>1</sup>:

“... the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance. A remedy which enables him to secure, in money terms, more than the performance due to him is unjust.”

2. Second, Lord Bridge <sup>2</sup>:

“damages for breach of contract must reflect, as accurately as the circumstances allow, the loss which the claimant has sustained because he did not get what he bargained for. There is no question of punishing the contract breaker.”

3. Third Lord Shaw in a tort case<sup>3</sup>:

“In the case of damages in general, there is one principle which does underlie the assessment. It is what may be called that of restoration. The idea is to restore the person who has sustained injury and loss to the condition in which he would have been had he not so sustained it.”

4. As long ago as 1880 Lord Blackburn encapsulated the essential function of damages <sup>4</sup>:

“I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”

5. In the case of a tort the principle is applied so as to work out in what position the claimant would have been if the tort had not been committed. In the case of a breach of contract, the principle is applied so as to work out in what position

---

<sup>1</sup> *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1

<sup>2</sup> *Ruxley Electronics and Construction Ltd v. Forsyth*

<sup>3</sup> *Watson Laidlaw & Co Ltd v Pott Cassells and Williamson* (1914) 31 RPC 104

<sup>4</sup> *Livingstone v The Rawyards Coal Company* (1880) 5 App.Cas. 25

the claimant would have been if the contract had been performed.<sup>5</sup> This is not the full picture of course.

6. I have already made the point that the object of damages is to compensate the claimant and not to punish the defendant. There is of course one major exception to this principle: namely exemplary damages. Exemplary damages were given a new lease of life in 2002<sup>6</sup> when the old cause of action test was swept away. Exemplary damages may now be awarded in any case in which there have been oppressive, arbitrary or unconstitutional acts of government servants; or wrongful conduct calculated to yield a benefit in excess of the compensation likely to be paid to the claimant.<sup>7</sup> The word "calculated" is not used to denote some precise balancing process. The situation contemplated is where someone faces up to the possibility of having to pay damages for doing something which may be held to have been wrong but where nevertheless he deliberately carries out his plan because he thinks that it will work out satisfactorily for him.<sup>8</sup> It has been said that exemplary damages fill a moral gap, and it has always been the principal moral objection to them that by handing the penal sum to whoever happens to be the claimant the law hands them a windfall.
7. Although exemplary damages are more usually awarded in cases of wrongful arrest or detention and in defamation cases, cases of wrongful eviction have always fallen into the category of case in which exemplary damages may be awarded. Indeed in one of the leading cases in the House of Lords *Rachmanism* was specifically given as a paradigm example. Other property cases in which exemplary damages have been awarded are more rare. But in *Design Progression Ltd v Thurloe Properties Ltd*<sup>9</sup> Peter Smith J awarded exemplary damages against a landlord who was in breach of his statutory duty under the Landlord and Tenant Act 1988 to give consent to an assignment, in circumstances where his unreasonable refusal of consent was designed to capture the premium value of the lease for itself. The judge awarded £25,000 by way of exemplary damages, even though the landlord's scheme failed.

---

<sup>5</sup> *Robinson v. Harman* (1848) 1 Exch. 850

<sup>6</sup> *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122

<sup>7</sup> *Rookes v. Barnard* [1964] AC 1129

<sup>8</sup> *Cassell & Co Ltd v. Broome* [1972] AC 1027

<sup>9</sup> [2005] 1 WLR 1

8. The *Design Progression* case so far stands alone. But in one remarkable case the Court of Appeal upheld an award of exemplary damages where the case was crying out for an amendment of the pleadings to claim compensatory damages alone.<sup>10</sup> Mr Jordan was sued by eight major book retailers including Borders for their losses of thousands of new books stolen from them by shoplifters and sold by him from his market stalls. The Master assessed damages in the sum of £100,000. He first assessed compensatory damages. This was the difference in value between the retail value of the recovered books when stolen, and their retail value when recovered. No award of compensatory damages was made in relation to books that had been stolen and sold by Mr Jordan (and hence not recovered). The Master found as a fact that Mr Jordan had made more profit from selling stolen books than the compensatory damages that the claimants had claimed. Since the claimants had limited their claim to the recovered books only, this was not surprising. He then quantified the exemplary damages by averaging the recommended retail price of the lost books at £10.00, and assuming that for each such book Mr Jordan was paying 60% of recommended retail price (£6) and selling it at 80% (£8). On that basis his estimated turnover of 700 books a week was yielding him, at £2 profit per book, £1,400 a week or £72,800 a year. The Master accepted Mr Jordan's evidence that he ran his "racket" for three years; and gave him credit for certain expenses (e.g. rent of a lock-up garage). After making certain further adjustments the Master arrived at round figures of £20,000 as the net proceeds of crime in the first year, £30,000 in the second and £50,000 in the third. The total, £100,000, became the amount of exemplary damages. The exemplary damages were calculated on exactly the same basis as the compensatory damages. However, although the master and the Court of Appeal had great difficulty in characterising these damages as exemplary, the claimants resolutely refused to amend their pleadings to claim these extra compensatory damages. Why they refused to do so is a mystery. Perhaps they were afraid of an adverse costs order. Or perhaps they had simply not properly identified the measure of damages to which they were entitled as the result of the commission of the tort of conversion against them. The Court of Appeal simply (and in my view wrongly) attached the label of exemplary damages to a measure of damages which is the standard measure of compensatory damages

---

<sup>10</sup> *Borders (UK) Ltd v Metropolitan Police Commissioner* [2005] EWCA Civ 197

for the tort of conversion. Identification of the proper measure of damages as a rule of substantive law is of the utmost importance. The blurring of the line between compensatory damages and exemplary damages as in the *Borders* case can only serve as an encouragement to sloppy thinking. One learned article goes so far as to say that in order to come to terms with *Borders* “one must abandon most of what one knows about legal reasoning.”<sup>11</sup>

9. The broad principle of putting the claimant into the position in which he would have been but for the wrong committed against him has been refined over the past century or more. In 1986 Mr Forsyth decided that he wanted to build a swimming pool.<sup>12</sup> The deep end was to be 7 feet six inches deep. In fact when it was built the deep end was no more than 6 feet deep. The pool was perfectly safe for diving; and a pool with a maximum depth of 6 feet was no less valuable than a pool with a depth of 7 feet six inches. But the only way of putting Mr Forsyth in the position in which he would have been if the contract had been performed would have been to build a new pool at a cost of over £20,000. That would have been a thoroughly unreasonable thing to do. The trial judge awarded Mr Forsyth £2,500 for loss of amenity instead. Mr Forsyth argued that there were only two permissible measures of damages for failure of performance in a contract to carry out building works. One was the cost of cure. The other was the loss in value of the completed product. Since there was no loss in value of the completed product, the only remaining measure, in order to avoid the unacceptable result that the builder might get away scot free, was the cost of cure. The House of Lords held<sup>13</sup> that the cost of cure should not be awarded where the cost of cure would be out of all proportion to the benefit to be obtained. A majority of the Law Lords said that in a non-commercial context (such a contract to build a recreational facility) the law should recognise that a loss of pleasure was a real loss, capable of being compensated by a modest award, and that, therefore the trial judge had been entitled to award Mr Forsyth the damages for loss of amenity. So here we have the endorsement of the principle that damages must be reasonable as between claimant and defendant. But equally we have the endorsement of the principle that one can suffer a loss without being out of pocket.

---

<sup>11</sup> Campbell and Devenny “*Damages at the Borders of Legal Reasoning*” [2006] CLJ 208

<sup>12</sup> *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344

<sup>13</sup> *Ruxley Electronics and Construction Ltd v. Forsyth* [1996] A.C. 344

10. This brings us to the next refinement: the case of the claimant whose rights have been infringed but who cannot demonstrate any identifiable financial loss. As Lord Nicholls explained in *A-G v Blake*<sup>14</sup>:

“Damages are measured by the plaintiff's loss, not the defendant's gain. But the common law, pragmatic as ever, has long recognised that there are many commonplace situations where a strict application of this principle would not do justice between the parties. Then compensation for the wrong done to the plaintiff is measured by a different yardstick. A trespasser who enters another's land may cause the landowner no financial loss. In such a case damages are measured by the benefit received by the trespasser, namely, by his use of the land. The same principle is applied where the wrong consists of use of another's land for depositing waste, or by using a path across the land or using passages in an underground mine. In this type of case the damages recoverable will be, in short, the price a reasonable person would pay for the right of user.”

11. Damages assessed on this basis have been conveniently labelled “user damages”.

12. The idea that restitution might be the true rationale of user damages surfaced in a claim for mesne profits<sup>15</sup>. Flight Sergeant Ashman served with the RAF. He and his wife and children were accommodated in married quarters for which he was charged a quartering charge of £95 per month. That was less than the market rental value of the accommodation, which was of the order of £500 per month; and less than the cost of equivalent local authority accommodation which was £105 per month. Flight Sergeant Ashman left the matrimonial home, leaving his wife in possession. The MoD sued her for mesne profits. Mesne profits are only a fancy name for damages for trespass. The MoD did not lead evidence on what they would have done with the property if Mrs Ashman had not been in occupation. Hoffmann LJ said:

“A person entitled to possession of land can make a claim against a person who has been in occupation without his consent on two alternative bases. The first is for the loss which he has suffered in consequence of the defendant's trespass. This is the normal measure of damages in the law of tort. The second is the value of the benefit which the occupier has received. This is a claim for restitution. The two bases of claim are mutually exclusive and the plaintiff must elect before judgment which of them he wishes to pursue.....

---

<sup>14</sup> *A-G v Blake* [2001] 1 AC 268

<sup>15</sup> *Ministry of Defence v Ashman* [1993] 2 EGLR 102, 105

It is true that in the earlier cases it has not been expressly stated that a claim for mesne profit for trespass can be a claim for restitution. Nowadays I do not see why we should not call a spade a spade. In this case the Ministry of Defence elected for the restitutionary remedy. It adduced no evidence of what it would have done with the house if the Ashmans had vacated. In my judgment, such matters are irrelevant to a restitution claim. All that matters is the value of benefit which the defendant has received.”

13. Lord Nicholls referred to this in *Blake* but, in my view, without marked enthusiasm. He said:

Recently there has been a move towards applying the label of restitution to awards of this character: see, for instance, *Ministry of Defence v Ashman*<sup>16</sup> and *Ministry of Defence v Thompson*<sup>17</sup>. However that may be, these awards cannot be regarded as conforming to the strictly compensatory measure of damage for the injured person's loss unless loss is given a strained and artificial meaning. The reality is that the injured person's rights were invaded but, in financial terms, he suffered no loss. Nevertheless the common law has found a means to award him a sensibly calculated amount of money. Such awards are probably best regarded as an exception to the general rule.”

14. Although user damages first came to the fore in tort cases, they have been awarded in contract cases too. First in the field was the well-known *Wrotham Park* case<sup>18</sup> where developers had built houses in breach of a restrictive covenant, but with no measurable diminution in value of the land which had the benefit of the covenant. Brightman J awarded damages in lieu of an injunction. He said:

“As I have said, the general rule would be to measure damages by reference to that sum which would place the plaintiffs in the same position as if the covenant had not been broken. The defendant Parkside and the individual purchasers could have avoided breaking the covenant in two ways. One course would have been not to develop the allotment site. The other course would have been for Parkside to have sought from the plaintiffs a relaxation of the covenant. On the facts of this particular case the plaintiffs, rightly conscious of their obligations towards existing residents, would clearly not have granted any relaxation, but for present purposes I must assume that they would have been induced to do so. In my judgment a just substitute for a mandatory injunction would be such a sum of money as might reasonably have been demanded by the plaintiffs from Parkside as a quid pro quo for relaxing the covenant.”

---

<sup>16</sup> [1993] 2 EGLR 102, 105

<sup>17</sup> [1993] 2 EGLR 107

<sup>18</sup> *Wrotham Park Estate Co v Parkside Homes* [1974] 1 WLR 798

15. Although he had evidence that a landowner would ordinarily demand a third of the development value as the price of relaxing the covenant (presumably on a *Stokes v Cambridge* basis) he awarded 5 per cent of the anticipated profit. How is this kind of award to fit into the scheme of things? Is it compensatory or restitutionary?

16. In *Jaggard v Sawyer*<sup>19</sup> damages were awarded in lieu of an injunction restraining trespass. Commenting on *Wrotham Park* Bingham LJ said:

“I cannot, however, accept that Brightman J's assessment of damages in *Wrotham Park* was based on other than compensatory principles. The defendants had committed a breach of covenant, the effects of which continued. The judge was not willing to order the defendants to undo the continuing effects of that breach. He had therefore to assess the damages necessary to compensate the plaintiffs for this continuing invasion of their right. He paid attention to the profits earned by the defendants, as it seems to me, not in order to strip the defendants of their unjust gains, but because of the obvious relationship between the profits earned by the defendants and the sum which the defendants would reasonably have been willing to pay to secure release from the covenant.”

17. In the same case Millett LJ said:

“It is plain from his judgment in the *Wrotham Park* case that Brightman J's approach was compensatory, not restitutionary. He sought to measure the damages by reference to what the plaintiff had lost, not by reference to what the defendant had gained. He did not award the plaintiff the profit which the defendant had made by the breach, but the amount which he judged the plaintiff might have obtained as the price of giving its consent. The amount of the profit which the defendant expected to make was a relevant factor in that assessment, but that was all.”

18. In *Blake* Lord Nicholls also commented on the correct analysis of this type of case. He said:

“The measure of damages awarded in this type of case is often analysed as damages for loss of a bargaining opportunity or, which comes to the same, the price payable for the compulsory acquisition of a right. This analysis is correct.”

19. The approval of this analysis indicates that these damages are still compensatory; and that the loss of a bargaining opportunity counts as a loss.

---

<sup>19</sup> [1995] 1 WLR 269

Likewise as Potter LJ explained in the trespass case of *Severn Trent Water Ltd v Barnes*<sup>20</sup>:

“It is of course the position that in cases of trespass of this kind there is no right to a share in, or account of, profits in any conventional sense. The only relevance of the Defendant's profits is that they are likely to be a helpful reference point for the court when seeking to fix upon a fair price for a notional licence.”

20. In some cases, however, a more flexible view has been taken. In *Experience Hendrix LLP v PPX Enterprises Inc*<sup>21</sup> the Court of Appeal considered the question of compensation for breach of a settlement agreement. Under the terms of the agreement the defendant was entitled to licence certain recordings by Jimi Hendrix at agreed royalty rates. In fact the defendant licensed other recordings. At the opening of the trial counsel for the claimant made it clear:

“that he had no evidence, and he said that he did not imagine that he could ever possibly get any evidence, to show or quantify any financial loss suffered by the [Claimant] as a result of PPX's breaches. So it was accepted that, if this was the only available measure, then no (or perhaps strictly only a nominal) award of damages could be made.”

21. Thus the question for the Court of Appeal was:

“whether the court can and should order the recovery of any damages or an account of profits in circumstances where the Appellant has not proved that it has suffered any financial loss.”

22. Mance LJ said that *Attorney General v Blake* marked “a new start in this area”.

He analysed the speech of Lord Nicholls and concluded:

“Whether the adoption of a standard measure of damages represents a departure from a compensatory approach depends upon what one understands by compensation and whether the term is only apt in circumstances where an injured party's financial position, viewed subjectively, is being precisely restored. The law frequently introduces objective measures (eg the available market rules in sale of goods) or limitations (eg remoteness). The former may increase or limit a claimant's ability to recover loss actually suffered . . . In a case such as the *Wrotham Park* case the law gives effect to the instinctive reaction that, whether or not the Appellant would have been better off if the wrong had not been committed, the wrongdoer ought not to gain an advantage for free, and should make some reasonable recompense. In such a context it is natural to pay regard to any profit made by the wrongdoer (although a wrongdoer surely cannot always rely on avoiding having to make reasonable recompense by showing that

---

<sup>20</sup> [2004] 2 EGLR 95

<sup>21</sup> [2003] 1 All ER (Comm) 830

despite his wrong he failed, perhaps simply due to his own incompetence, to make any profit). The law can in such cases act either by ordering payment over of a percentage of any profit or, in some cases, by taking the cost which the wrongdoer would have had to incur to obtain (if feasible) equivalent benefit from another source.”

23. In *WWF World Wide Fund for Nature v World Wrestling Federation Inc*<sup>22</sup> the Court of Appeal again considered the award of damages on the basis applied in *Wrotham Park*. Chadwick LJ concluded that damages awarded on that basis were not “gains-based” but were compensatory. However, he went further, and held that an order for an account of profits is also a facet of compensatory damages. He said:

“When the court makes an award of damages on the *Wrotham Park* basis it does so because it is satisfied that that is a just response to circumstances in which the compensation which is the claimant's due cannot be measured (or cannot be measured solely) by reference to identifiable financial loss. Lord Nicholls' analysis in *A-G v Blake* demonstrates that there are exceptional cases in which the just response to circumstances in which the compensation which is the claimant's due cannot be measured by reference to identifiable financial loss is an order which deprives the wrongdoer of all the fruits of his wrong. The circumstances in which an award of damages on the *Wrotham Park* basis may be an appropriate response, and those in which the appropriate response is an account of profits, may differ in degree. But the underlying feature, in both cases, is that the court recognises the need to compensate the claimant in circumstances where he cannot demonstrate identifiable financial loss. To label an award of damages on the *Wrotham Park* basis as a 'compensatory' remedy and an order for an account of profits as a 'gains-based' remedy does not assist an understanding of the principles on which the court acts. The two remedies should, I think, each be seen as a flexible response to the need to compensate the claimant for the wrong which has been done to him.”

24. The theme that I think runs through all these cases is that a gains based remedy will only be awarded where the claimant cannot demonstrate any identifiable financial loss. It is the instinctive reaction that a wrongdoer should not gain an advantage for free that brings the gains based remedy into play. But where a wrongdoer is not gaining an advantage for free, but is gaining his advantage at the expense of compensating the injured party for financial loss that he actually suffered, there is no reason for the courts to adopt anything other than the orthodox compensatory approach to damages.

---

<sup>22</sup> [2008] 1 WLR 445

25. So we have to ask: what counts as a loss? Property and commercial lawyers tend to think of loss in financial terms: how much worse off in money is the claimant as the result of the wrong done to him. But the common law has always taken a much broader view of what counts as a loss. To give just two obvious examples: pain and suffering in personal injury cases and damage to one's reputation in defamation cases both count as loss in the eyes of the common law even though no financial loss is identifiable. Likewise Mr Forsyth's loss of pleasure in swimming in his pool was a real loss, even though no financial loss could be identified.
26. You might ask whether any of this actually matters. I think it does. In *WWF* you will also note that Chadwick LJ explained the award of user damages on the basis that the court is satisfied that that is a just response to circumstances in which the compensation which is the claimant's due cannot be measured (or cannot be measured solely) by reference to identifiable financial loss. But there is an unanswered question here: what is due to the claimant as compensation? Until you have asked and answered that question you cannot compare the identifiable financial loss (if any) that he has established with what is his due compensation.
27. So it is all very well to say that a gains-based award is a flexible response to a wrong, but you have to identify the wrong and the legal consequences to which it gives rise. As Lord Hoffmann pointed out in *SAAMCO* <sup>23</sup>:
- “Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation.”
28. In other words, the extent and nature of the compensation to which an injured claimant is entitled is governed by an external and prescriptive rule of law, and not by simply what the court thinks would be just result. The insistence by some academics on the restitutionary nature of the award blurs the distinctions between different causes of actions and the different losses for which claimants are entitled to be compensated. A better analysis would be to concentrate on the legal right which has been infringed and the legal remedy prescribed for that infringement. It is, of course, the case that the same set of facts may give rise to different and alternative causes of action. The overlap between professional

---

<sup>23</sup> *South Australia Asset Management Corp v York Montague* [1997] AC 191

negligence and breach of the implied terms of a retainer is an obvious example. Different causes of action give rise to different consequences both in terms of the recoverable damages and, often, in terms of applicable limitation periods. It has always been the case that where a claimant has multiple causes of action, he is entitled to choose between them. But his choice is made between recognised paradigms with recognised consequences, which does not rest on the instinctive reaction of judges.

29. If the correct analysis is that what the claimant whose property rights have been infringed has lost is a bargaining opportunity, as Lord Nicholls suggests, then that is what he is entitled to be compensated for. One objection to this analysis, made by Mance LJ in *Hendrix*, and enthusiastically supported in *McGregor on Damages*<sup>24</sup>, is that the characterisation of the loss as a loss of bargaining opportunity is artificial, because in most cases the claimant would not willingly have bargained away his right.<sup>25</sup> To my mind this is a false point. No rational person would bargain away the use of his limbs, but that does not prevent the law from regarding the loss of a limb as a real loss. For the same reason I am not convinced that user damages are an exception to the usual rule. Once the nature of the compensatable loss has been identified, the assessment of the compensation will then be capable of being conducted, with the aid of expert evidence, on a more or less objective basis. In the recent case of *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd*<sup>26</sup> the court had to assess damages for infringement of a right to light. The deputy judge, Mr Gabriel Moss QC, summarised the relevant principles as follows:

“(1) the overall principle is that the court must attempt to find what would be a “fair” result of a hypothetical negotiation between the parties;

(2) the context, including the nature and seriousness of the breach, must be kept in mind;

(3) the right to prevent a development (or part) gives the owner of the right a significant bargaining position;

(4) the owner of the right with such a bargaining position will normally be expected to receive some part of the likely profit from the development (or relevant part);

---

<sup>24</sup> Para 12-010

<sup>25</sup> A variation on this theme is advanced in *Rotherham “Wrotham Park Damages and accounts of profits: compensation or restitution”* [2008] LMCLQ 25

<sup>26</sup> [2007] 1 EGLR 26

(5) if there is no evidence of the likely size of the profit, the court can do its best by awarding a suitable multiple of the damages for loss of amenity;

(6) if there is evidence of the likely size of the profit, the court should normally award a sum that takes into account a fair percentage of the profit;

(7) the size of the award should not, in any event, be so large that the development (or relevant part) would not have taken place had such a sum been payable;

(8) after arriving at a figure that takes into consideration all the above and any other relevant factors, the court needs to consider whether the “deal feels right”.

30. In *Inverugie Investments Ltd v Hackett*<sup>27</sup> a leaseholder of a hotel sued his landlord for trespass. The landlord had ejected the leaseholder from the hotel and had run it himself for some fifteen years. However, he had run it at a loss. So a restitutionary claim would not have helped him. The Privy Council awarded him the rental value of the hotel. Lord Lloyd said:

“The plaintiff may not have suffered any *actual* loss by being deprived of the use of his property. But under the user principle he is entitled to recover a reasonable rent for the wrongful use of his property by the trespasser. Similarly, the trespasser may not have derived any *actual* benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed. The principle need not be characterised as exclusively compensatory, or exclusively restitutionary; it combines elements of both.”

31. If the principle is neither compensatory or restitutionary, what is it? One approach is to say that the awards seek neither to compensate the claimant for the actual consequences of the wrong nor deprive the defendant of the fruits of his conduct. Their aim is to vindicate the claimant’s right to possession: the damages represent the intrinsic value of this right, rather than the amount of any loss or gain consequential on its infringement.<sup>28</sup> The problem with this approach, to my mind, is that it brings into our law yet another variety of damages, namely substantial vindictory damages. Vindictory damages have made their appearance in cases of infringement of constitutional rights, but they have not so far strayed (at least in name) into private law. The case of mesne profits, or the case of infringement of restrictive covenants or ancient lights,

---

<sup>27</sup> [1995] 3 All ER 841

<sup>28</sup> Pearce, D. and Halson, R. (2007) Oxford Journal of Legal Studies “*Damages for breach of contract: compensation, restitution, and vindication.*”

would, in my view be better dealt with as a rule, not of damages, but of liability for the particular wrong.

32. Since Lord Nicholls is said to be the source of the sea change in the law's approach to remedies, let me remind you of what he said in *Stoke-on-Trent City Council v W & J Wass Ltd*<sup>29</sup>. The case concerned the unlawful holding of a market, in breach of the claimant's statutory right. But the claimant had suffered no loss. Was it entitled to no more than nominal damages, or was it entitled to the fee that the defendant would have paid for the right to hold a rival market? Having pointed out that no such claim had been made before, even though markets had existed for centuries, Nicholls LJ continued:

"The common law, however, is constantly being developed and adapted as social conditions change, and novelty by itself is not an answer to the present claim. Indeed, for some time I was attracted by the analogy between infringement of a patent and infringement of a market right. The argument is to the following effect. The owner of a market right has a legal monopoly in respect of the holding of a market within a certain area. If, for the purpose of assessment of damages on the user principle, infringement of a patent is to be regarded as the invasion and abstraction by the infringer of the property which consists of the monopoly of the patented articles granted to the patentee, ...so also is the disturbance of a market right to be regarded as the invasion and abstraction of the property which consists of the monopoly of the holding of a market in the place in question. In other words, if the infringement of a patent is to be regarded as the wrongful user of the property comprised in the patent, then by parity of reasoning the disturbance of a market right may properly be regarded as the wrongful user of the property comprised in the market right. If, in the one instance, damages may be awarded on the user principle in a suitable case, so may they be in the other instance.

I have, however, concluded that the analogy is unsound and that the application of the user principle in the case of the disturbance of a market right would not accord with the basic principles applicable to that cause of action. A market right confers a monopoly, as does a patent, but the protection which the law affords to the owner of a market right is limited to protecting him against being disturbed in the enjoyment of his right. If an unauthorised market is held without disturbing the lawful market, the owner of the lawful market has no remedy, either for damages or otherwise. In such an event there is no place for an award of damages to be assessed on the user principle. Thus, for example, if and so long as the owner of the market right is currently not exercising or seeking to exercise his right, and is not holding a

---

<sup>29</sup> [1988] 3 All ER 394

market at all, he has no cause of action against a person holding an unauthorised market, for in such a case he is not being disturbed in the enjoyment of his market right.”

33. In other words, the reason why the claimant did not recover damages on the user principle was because his cause of action did not entitle him to be compensated for that kind of loss. His only cause of action was for disturbance, and he was not disturbed. Thus the claimant recovered only nominal damages, which are the traditional way in which the common law has marked the vindication of a private right. As Lord Steyn remarked in *Blake*:

“in law classification is important. Asking the right questions in the right order reduces the risk of wrong decisions.”

34. I venture to suggest that in the current debate about what kind of damages are recoverable the courts have, on occasions, been asking themselves the wrong question. The right question, which needs to be asked before the question of damages arises, is: for what is the claimant entitled to be compensated? The kind of loss for which the claimant is entitled to be compensated is a rule of substantive law and liability. There is, to be sure, a law of restitution, but it is its own system requiring proof of its own set of facts, and admitting of its own defences (such as change of position defences). This is part of the substantive law of restitution. Restitution is analogous to property: it concerns wealth or advantage which ought to be returned or transferred by the defendant to the plaintiff. It is a form of specific implement. Its clearest form is an order for the return or transfer of property which belongs in law or in equity to the claimant. It is fuzzy thinking that allows principles of restitution to invade the provinces of contract and tort under the guise of fashioning just remedies.

35. When the Law Commission considered the availability of what it called “restitutionary damages” in tort it concluded that there was no consensus among commentators as to which torts should trigger restitution; and that incremental judicial development would therefore seem especially appropriate. When it turned to the question whether “restitutionary damages” should be available in contract it concluded that there were four difficulties. First, many breaches of contract are made for commercial reasons and it is difficult to draw the line between ‘innocent’ breach, for which there would be only compensation, and ‘cynical’ breach, in which there would also be the option of restitution in the way suggested by some commentators. This would lead to greater uncertainty in the assessment of damages in commercial and consumer

disputes. Secondly, in seeking restitution the plaintiff might be evading the requirements of the duty to mitigate. Thirdly, a restitutionary award is in reality a monetized form of specific performance but not all contracts are specifically enforceable. Fourthly, there may be difficulties of attribution. The making of a profit in excess of that which the plaintiff might have made had the contract been performed may require skill and initiative which should not be taken from the defendant save in exceptional cases.

36. Its conclusion therefore was that the development of the law in this area should also be left to the courts. I interpret these conclusions, perhaps cynically, as putting the problem onto the shelf marked “too difficult”. That is a pity. There are serious policy and economic arguments for and against the availability of a gains based remedy across the board; and in my view these arguments need to be ventilated so that deliberate policy choices need to be made and not, as in *Blake*, as a response to apparently hard cases. We all know where hard cases take the law. Since the end of the last war physicists have been searching for the theory of everything to explain the way the universe works. The latest attempt is string theory. It makes no falsifiable predictions; but it works, as long as you accept that there are twelve (or in some versions seventeen) dimensions, as opposed to the usual four that we recognise. It is elegant and rational; and completely at variance with common sense. Lawyers are sometimes the same. In the early years of this century we found that we were all turning into human rights lawyers. Human rights were the answer to almost any legal problem. The current flavour is restitution. The agenda of restitution has largely been driven by hugely influential academic lawyers. The thrust of the agenda is to construct a logical scheme which makes all legal obligations the same and plays down the differences between them. All remedies are to be available for all wrongs. It is what the distinguished American judge Judge Posner calls top down reasoning:

“In top-down reasoning, the judge or other legal analyst invents or adopts a theory about an area of law—perhaps about all law—and uses it to organise, criticise, accept or reject, explain or explain away, distinguish or amplify the existing decisions to make them conform to the theory and generate an outcome in each new case as it arises that will be consistent with the theory and with the canonical cases, that is, the cases accepted as authoritative within the theory. The theory need not be, perhaps never can be, drawn “from” law; it surely need not be articulated in lawyers' jargon.”

37. Logic is attractive. But one must beware of succumbing to what Lord Goff called the temptation of elegance. As Oliver Wendell Holmes famously said: the life blood of the common law is not logic but experience. If the general flavour of restitution is allowed to spread through the common law like Japanese knotweed, the danger is that it will drive out everything else. And that would mean a substantive change in the English legal system by accident.