

Damages Measured By the Benefit to the Defendant

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INTRODUCTION

The generalized formulations for damages in tort and contract law are framed in conventional compensatory terms. In these formulations, the conception of “compensation” is either (in tort) restorative—put the plaintiff in the position that the plaintiff would have been in if the tort had not been committed; or (in contract) predictive—put the plaintiff in the position that the plaintiff would have been in if the contract had been performed. In both cases, the objective can be described as putting the plaintiff in the position she would have been in, but for the wrong. Neither of these generalized formulations is premised on a benefit that the defendant has derived from the breach.

In the common law (that is to say, the merged rules of law and equity) there are several ways in which the law ignores the position of the defendant when determining the appropriate remedy, including measuring damages. For example, the defendant might have been more injured by his negligence or breach of contract than the plaintiff, but the law will not concern itself with this fact.

What might be seen as the matching converse principle is that the law typically does not, when assessing damages, concern itself with how much the defendant has benefited from a tort or, especially, a breach of contract. The topic of a damages assessment is the plaintiff’s loss from the breach of his rights, not the defendant’s gain.

There are times, however, when ignoring a defendant’s gain—especially where the plaintiff cannot show a loss in the conventional sense and thus would be without a remedy, or an adequate remedy—offends our sense of justice. As a result, the common law has developed a variety of ways of reflecting the fact of a defendant’s gain in the calculation of an award of damages or, as will be explored further below, by granting the plaintiff access to the defendant’s gain through an order for specific relief: an injunction or specific performance.

I. WHERE DAMAGES ARE MEASURED BY THE DEFENDANT'S GAIN

The case law does not articulate a unifying principle that governs the various instances in which an award of damages will reflect a benefit by the defendant. However, it is submitted that most instances in which damages are said to be measured by the benefit to the defendant can be put in three categories:

1. money awards that correct an unjust enrichment;
2. money awards that do in fact compensate the plaintiff for a loss despite apparent reliance on the benefit received by the defendant; and
3. money awards, such as some awards of punitive damages, that are premised on a benefit to the defendant but are based on a policy consideration (general deterrence) that is beyond the relationship between the particular plaintiff and defendant before the court.

It is submitted that some instances in the third category can be better justified as a subset of the second category.

The most obvious category of cases in which the award to the plaintiff reflects a gain by the defendant is the first category listed above, the law of restitution. Given that, in the law of restitution, the gain by the defendant at the expense of the plaintiff is already a central element of liability, this paper will not focus on that distinct ground of liability, but on instances in the law of tort and contract—where damages are normally reflective only of the loss to the plaintiff—where damages are said (as an exception to the general rule) to be measured by the gain achieved by the defendant from the breach.

There is room for discussion, within the topic of this paper but requiring more analysis than the scope of this paper permits, as to whether a damages award that transfers to the plaintiff a benefit that the defendant has received in breach of a duty in tort or contract is necessarily and exclusively either “restitutionary” or “compensatory.” The term “restitutionary damages” was said by Lord Nichols in *Attorney General v. Blake* to be an “unhappy expression.”¹

¹ [2001] 1 AC 268 (H.L.), at p. 284.

However, one can understand why, where the defendant has derived a benefit by infringing the plaintiff's rights and in consequence the court makes an award that transfers that benefit to the plaintiff, the expression "restitutionary damages" is often used. Where the relationship between the parties is governed by a contract or by a duty in tort law, there is room for (and has been) debate about whether damages that cause a defendant to disgorge some or all of a profit from the wrong are best seen as compensatory or restitutionary.

Without purporting to resolve that debate here, this author argues that, in most tort and contract cases in which damages are measured by the full benefit to the defendant, the proper rationale is that a right held by the plaintiff has been breached—the plaintiff's right to prohibit absolutely the defendant's conduct without the plaintiff's permission—for which the plaintiff can only be fairly compensated by an award of damages so measured.

It is proposed that a way of describing a unifying principle that accounts for most of these cases is this: where the law decides to protect a right in the strongest of terms—with what has been characterized as a "property rule" (whether the right concerns real property or not)²—damages will be measured by, or the plaintiff will be put in a position to obtain access to, some or all of the benefit or potential benefit to the defendant.

Though real property is the common example of (and reason for the name of) a 'property rule,' there arguably is nothing unique about real property that attracts the higher level of protection. We have decided that real property carries a bundle of rights that works best—and indeed perhaps only makes sense of what we mean by real property—when one of the rights is the absolute right to exclude others. When possible, this right is protected by an order of exclusion, rather than compensation for intrusion. There are similar rights, such as the right not to be assaulted, that the courts would protect absolutely with specific remedies; that is, with "property rules."

There are other rights, such as the right to have delivered to you a commonly available car that you have contracted to buy, that are protected at a lower level with "liability rules": the promisor can breach, provided that she compensates the promisee for any loss from the breach.

² Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral* (1972), 85 *Harvard Law Review* 1089.

There has been debate about whether various rights have been put in the correct category, and even whether the distinction between the remedies available for the two types of rights is appropriate, but as a general proposition, this is what the common law does.

As noted, when the law recognizes a right as being protected by a property rule, it grants specific relief as the default remedy: an injunction to prevent, or unwind, a tort, or specific performance of a contract. Critical to this analysis is that when this happens, the plaintiff can prohibit the breach if it has not yet occurred or force the defendant to repair the breach if it has occurred, and the plaintiff is thus in a position to negotiate with the defendant to obtain some or all of the profit that the defendant would realize, or has realized, from the breach.

Accordingly, it is submitted that where the common law would have protected a right with a property rule (specific relief) but is forced or feels it appropriate to assess damages in lieu because the breach has already occurred or the equities argue against specific relief, damages should be measured by the benefit to the defendant. As noted, this proposition explains many of the situations in which an award of damages is measured by the benefit to the defendant from the breach.

II. DAMAGES FOR LOST OPPORTUNITY TO BARGAIN

The innocuous trespass has long been a subject of discussion in remedies cases, typically where an injunction is sought to enjoin, or damages are sought in response to, a trespass that appears to be causing, or to have caused, little or no financial loss to—indeed perhaps having no apparent effect at all on—the owner of the land. If the injunction is sought in a timely way, it will be granted for the very reason that the plaintiff in this situation would be entitled to only nominal damages, such damages being seen as an inadequate way to protect the absolute right of exclusion that accompanies real property rights.³

The “way-leave” cases involved situations in which defendant mining companies—typically coal mining companies—saved money (or perhaps made money they could not have made at all) by tunneling under the plaintiff’s land to get access to their coal deposits, or access to coal under the plaintiff’s land from which the plaintiff could not itself have

³ *John Trenberth Ltd. v National Westminster Bank Ltd.*, (1979) 39 P & CR 104.

profited. When the underground trespass was discovered and the plaintiff sued, the defendant could quite convincingly argue that the plaintiff was no worse for a trespass that occurred perhaps hundreds of feet below his land. However, the courts ordered damages based on the fee that the defendant would have paid to tunnel under, or mine, the plaintiff's property.

These cases went relatively unremarked until they, and similar cases, were cited by Brightman J. in support of a similar result in an above-ground case (*Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd.*,⁴ discussed below) and called in aid of a general principle for such cases by Waddams and Sharpe in their seminal article about various situations in which the defendant was ordered to pay damages apparently based on the defendant's gain rather than the plaintiff's loss.⁵ As happens when a seminal insight moves into general acceptance, the position was articulated some twelve years later in *Jaggard v. Sawyer*, as if it had always been understood:

If the plaintiff has the right to prevent some act being done without his consent, and the defendant does the act without seeking that consent, the plaintiff has suffered a loss in that the defendant has taken without paying for it something for which the plaintiff could have required payment, namely, the right to do the act. The court therefore makes the defendant pay what he ought to have paid the plaintiff, for that is what the plaintiff has lost.⁶

This issue has arisen in a cluster of restrictive covenant and trespass cases in England and Canada over the past forty years. For example, in *Wrotham Park*, the defendant built homes on its property in breach of a restrictive covenant given to the plaintiff. The restrictive covenant had obliged the defendant to obtain the plaintiff's permission before developing the property, but the defendant did not seek this permission. The Court found that the plaintiff's property had not diminished in value as a result of the defendant's breach of the covenant. Yet the defendant had made a profit from a development that the plaintiff had the right to prohibit. The Court declined a mandatory injunction requiring the demolition of the houses because of the social and economic

⁴ [1974] 1 WLR 798 (Ch).

⁵ "Damages for lost opportunity to bargain" (1982), *Oxford Journal of Legal Studies* 290.

⁶ [1994] EWCA Civ 1.

waste that this would involve. The Court awarded damages based on the fee that the defendant would have paid to get permission from the plaintiff to develop the land.

The essence of the argument of *Waddams and Sharpe*, in corraling several categories of cases—including the way-leave, restrictive covenant and trespass cases—within a common principle was that, despite the fact that the plaintiff's property had not diminished in value as a result of the defendant's breach, the plaintiff suffered a loss: the loss of the opportunity to bargain with the defendant for the permission mandated by the right in question. Presumably, the defendant would have been willing to pay the plaintiff some part of its profit from the use of the plaintiff's property, or property rights.

Almost certainly, if such a discussion between the plaintiff and the defendant had taken place and no agreement had been reached, and had the defendant stated its intention to proceed regardless of the denial of permission, the plaintiff could have obtained an injunction preventing the development. In the event of such an injunction, a further negotiation likely would take place. The granting of the injunction would have empowered the plaintiff to obtain all of the potential profit less only the amount that would make the venture worth the defendant's effort (as economists sometimes say, "all but the last dollar").

In this type of situation, but where the defendant has proceeded without negotiating for permission to use the plaintiff's property rights, and a court decides to use the "lost opportunity to bargain" approach, there are two possible ways to assess the plaintiff's damages. One is to try to replicate the bargain that would have been struck between a willing buyer and seller, as if there were a market for the rights in question. In this situation, the damages award does not require the defendant to pay the plaintiff the entire profit from the breach, but only that part of it that would have been given up in a commercial negotiation between motivated and cooperating parties. Where there is a market for the subject matter of the breach, this approach will correctly reflect the loss to the plaintiff. Where there is not a market for the subject matter of the breach, it is submitted that this approach, though often taken by the courts, will not properly compensate the plaintiff.

The second approach is also to replicate a bargain between the plaintiff and the defendant, but to recognize (where this is the case) that specific property rights are in issue and so, by definition, there is no market for them. Thus the hypothetical bargain should assume that the

plaintiff would have been able to exploit its lawful monopoly by extracting from the defendants the entire profit (or at least “all but the last dollar”) from the breach. In theory, a rational defendant would have been willing to give up all but this last dollar—or whatever amount leaves the undertaking still worthwhile—to have the plaintiff’s permission to use the property. This approach is supported by the important fact that it is the defendant’s wrong-doing that prevents the court from knowing what bargain would have been struck.⁷

However, *Wrotham Park* and a number of similar restrictive covenant, trespass and intellectual property cases have taken the first approach and have tried to replicate the bargain that the parties would have struck in an active market. It is submitted that this approach fails on at least three grounds.

First, it provides relatively little disincentive to the defendant to respect the plaintiff’s rights: the worst-case scenario (and often not a probable scenario) for the defendant is that (a) it gets caught; and (b) it gets caught by a plaintiff willing to engage in litigation. If this happens, and a damages award or a settlement based on a reasonable fee are the only potential consequences, the defendant must pay what it would have paid in the first place. Why not chance the breach?

Second, the “assumed market” approach fails to give the plaintiff the benefit of the doubt that a plaintiff in this situation (a very strong bargaining position, having an absolute right to prevent the breach) should have: that it would have struck the best possible bargain. It is the defendant’s breach that prevents the court from knowing if the plaintiff would have been successful in this regard.

Third, attempting to reconstruct a market-based bargain in a context where there was no market will often be a very inexact inquiry in which the plaintiff is at risk of under-compensation. This is a risk to which, for the second reason mentioned, the plaintiff should not be

⁷ The evolution of the two approaches – fee vs. entire profit – may derive from the historical split, in what we now call the common law, between the courts of law and the courts of equity. Lord Nichols, in the course of his reasons in *Attorney General v. Blake* [2001] 1 AC 268 (H.L.), at p. 280, called it “an accident of history” that for certain causes of action, a court of law would award a fee and a court of equity would require the payment of the entire profit. Yet it is submitted that this was not an accident, and that it is understandable that courts of equity, which dealt primarily with specific relief such as injunctions, would require complete disgorgement of the profit that is, in the sense discussed here, the financial equivalent of the injunction that the court of equity would have granted, had such relief been available.

exposed. Several real property cases are illustrative of the variability when courts attempt to recreate a hypothetical bargain in a situation where there is no market. In *Wrotham Park*, the court concluded that the defendant would have given 5% of a £50,000 profit on building 14 homes in breach of a restrictive covenant; in *Bracewell v. Appleby*, the Court concluded that the defendant, to obtain the right to pass over the plaintiffs' land, would have paid 40% of a £5,000 profit on building one home.⁸ In *Jaggard*, the Court concluded that the defendant, again to obtain the right to pass over the plaintiff's land, would have paid 28% of a £22,000 profit on a single house.

Though, as is to be expected, the Courts in each case purported to find reasons for the level of damages, the assessments do not provide much guidance. The process is, as noted, a very inexact inquiry, and such inquiries expose plaintiffs to the risk of under-recovery. On the other hand, if the defendant is obliged to pay its full profit in damages to the plaintiff, he is not likely to be in a materially-worse position than if he had been enjoined from the outset, as he ought to have been, in which case he would have been forced to negotiate with the plaintiff.

However, in *Jaggard*, the last in this line of cases,⁹ which contained the particularly explicit articulation of the lost-opportunity rationale for attaching defendants' benefits cited earlier in this paper, the Court of Appeal implicitly rejected the approach of divesting the defendant of its entire profit:

The basis of computation is not, it will be observed, in any way directly related to wasted expenditure or other loss that the defendant is escaping by reason of an injunction being refused.¹⁰

This passage is telling, because if an injunction were issued, the plaintiff would be able to have access to all or virtually all of the defendant's potential profit or avoided loss. It is submitted that, contrary to this comment in *Jaggard*, damages in lieu of such an injunction should

⁸ [1975] 2 WLR 282.

⁹ Which includes *Surrey County Council v. Bredero Homes Ltd.*, [1993] 1 WLR 1361, where nominal damages were awarded by the Court of Appeal in a rejection of the *Wrotham Park* lost-opportunity approach. *Surrey* was not followed in *Jaggard* and its correctness was expressly doubted by the House of Lords in obiter in *Attorney General v. Blake*, *supra* note 10.

¹⁰ *Supra* note 6.

reflect this fact, unless (as there were in *Jaggard*) there are equities to the contrary.

Bracewell, one of this cluster of cases, is a messy case with complex equities, but it highlights the balancing of equities when damages for lost opportunity to bargain are given in lieu of an injunction. The plaintiffs successfully asserted that the defendant required a right of way across their land (a private road in a small cul de sac) to access a second lot that the defendant had acquired behind his own house in the cul de sac. The plaintiffs did not want another house in their little cul de sac and they had put the defendant on notice to this effect. The plaintiffs told the defendant that they would not allow him to use their private road to access his second lot. Tempers and personalities took control and in the midst of the dispute the defendant proceeded to build a house on the additional lot.

The Court, which was unimpressed by all parties' behaviour in the dispute, measured damages at the price that the Court believed the defendant would have been willing to pay and the defendants "ought" to have been willing to accept: each plaintiff received £400, being 1/5 of the £2,000 in total that the Court determined all five landowners on the cul de sac "ought to have accepted."¹¹

The result of the case is that the defendant, over the plaintiffs' objections, was effectively granted an easement over the plaintiffs' lands on paying a market-based fee. When the Crown or statutory utilities granted rights by legislation do this, it is called expropriation, and the right to expropriate is limited to public entities pursuing objectives in the public interest.

While there is ample room to debate the circumstances in which a plaintiff is being extortionate and those in which a court is allowing a defendant to expropriate the plaintiff's rights, it is submitted that much turns on the purposiveness of the defendant's conduct with knowledge of the plaintiff's rights. In *Bracewell*, the Court (surprisingly, to this author) considered the defendant's right to use the plaintiffs' road to turn on a fine point of law that might have confused the defendant. The Court was much influenced by the plaintiffs' delay in bringing the matter to court (after the defendant had built his house).

¹¹ *Supra* note 8.

A similar case of competing equities arose in the remarkably similar *Jaggard* case where, again, the defendant added a lot to a cul de sac served by a private road. In this case too, the equities were mixed, for though the Court's assessment of damages amounted to licensing the trespass of a defendant who had been put on notice by the plaintiff, the Court found that the defendant had been confused by conflicting advice (that the road was public) from the municipality.

In *Jaggard*, the Court commented—and the same point is seen in other cases where injunctions are denied—that the same result would not obtain if the defendant had proceeded knowing that he was committing a trespass (or would have to commit a trespass in order to use his land) and hoping to achieve a *fait accompli* before litigation could prevent him.¹² Implicit in this comment, which is also made expressly in a number of injunction cases, is the statement that in a case where a defendant acts deliberately or attempts to “steal a march” on the court with a *fait accompli*, and if an injunction (typically a mandatory injunction to reverse the breach) could be effective, such an injunction would issue despite the burden on the defendant.

The effect of such an injunction before the defendant has committed his resources to the breach would be to allow the plaintiff to bargain for virtually all of the defendant's potential profits. After the defendant has committed his resources, the plaintiff with an injunction would be in an even stronger position and could negotiate for more than the defendant's profits, for the defendant then has an investment to protect. Where a defendant has proceeded deliberately in the face of the plaintiff's rights, and it is too late for an injunction to be effective, the damages award, it is submitted, should at least reflect the result that the plaintiff could have achieved (capturing all of the defendant's proposed profits) if the injunction had preceded the defendant's investment in the breach. This is the approach that best reflects the law's assessment that the plaintiff's right was protected by a property rule.

¹² One sees the same (atypical in the common law) concern for the defendant's motives in the law pertaining to mandatory injunctions generally, where the court will weigh a grave impact on the defendant from an injunction if the defendant acted without knowledge of his breach, but will ignore that impact if he proceeded knowingly.

III. DAMAGES AS A GENERAL DETERRENT

Punitive damages are another area where one sees the law turning its attention to gains made by the defendant. When a defendant calculates that it can be in a financially superior position by committing a tort, punitive damages may be the method used to eliminate the benefit achieved by the defendant, and transfer that benefit to the plaintiff.¹³

Punitive damages, however, are not normally reflective of the relationship or dealings between the plaintiff and the defendant *per se*. They are awarded by the court as a matter of policy in order to discourage the conduct that accompanied the breach in question. While it is true that this could include circumstances in which the defendant calculated that a tort or breach of contract, together with a resulting compensatory damages award, would leave the defendant in a financially superior net position relative to compliance with its obligations, it could also include cases where the defendant was not financially better off, or at least not by the amount of the award of punitive damages, but behaved in such a reprehensible manner (such as endangering life to save money) that the court considers it appropriate to send a message to the defendant and others who might behave the same way in the future.

Assuming that the plaintiff is adequately compensated for all losses associated with the breach in the compensatory damages award, a further punitive damages award is a windfall to the plaintiff, albeit a windfall considered necessary in order to express the court's disapproval of the defendant's conduct.

It is submitted that a preferable approach to capturing gains from calculated breaches of the defendant's rights in egregious situations (that might otherwise attract punitive damages) could be to characterize the plaintiff as having a right worthy of protection with a property rule. It is submitted that this categorization is not as arbitrary as it might at first appear. This is because it is difficult to conceive of many cases in which the court would order punitive damages for offensive behaviour that was calculated to injure the plaintiff at a net profit to the defendant, where the court would not have granted an injunction to prevent the breach, if the plaintiff had got to court in time. The plaintiffs' rights in such situations thus would have been protected by a property rule—and the resulting

¹³ *Rookes v. Barnard*, [1964] A.C. 1129 (HL), though Canadian law is not as limited in awarding punitive damages to the extent that the House of Lords limited such damages in this case.

specific relief. Specific relief would have given the plaintiff access, through negotiation, to the defendant's potential profits.

Again, punitive damages are often difficult to reconcile with private law disputes, and on the present law they can be assessed independently of the defendant's actual benefit even when the defendant's anticipation of a profit is the basis for the award. The concept of a lost opportunity to bargain does not fit well with all of the circumstances in which Canadian courts award punitive damages, but it does fit with many, and provides an approach that is more consistent with private law than the "fine" paid by a defendant as a result of a punitive damages award.

A money award requiring a defendant to pay his profits to the plaintiff for whom he was a fiduciary serves a function similar to that of punitive damages. It discourages conduct that is both offensive to the conscience of the court and that, if not discouraged, could result in other breaches that harm the class of vulnerable persons that are protected by the fiduciary duty.

The (compensatory) argument made previously regarding damages that are now awarded on a punitive basis can be made for damages for breach of a fiduciary duty, which normally result in a defendant being required to disgorge its entire profit from the breach.

If a defendant proposed to breach a fiduciary duty, such as using confidential information in breach of the duty, and if time permitted the plaintiff to get to court before the information was used (and other equities being equal), the court would almost certainly grant an injunction preventing the proposed breach of the fiduciary duty. If the information was of less value to the plaintiff than the defendant (such that a "normal" damages award measured by the plaintiff's conventional loss was less attractive to the plaintiff), the plaintiff could obtain the injunction and then agree not to enforce it if the defendant shared the potential profits.

If the defendant has profited from use of the confidential information *before* the plaintiff can obtain injunctive relief, the court should protect the plaintiff's rights by awarding the plaintiff the entire gain realized by the defendant. Because specific relief would have been available to restrain the defendant, and for the same reasons that the court should do this in real property situations (as previously discussed), the court should assume that the bargain that would have been struck would have been the most favourable possible for the plaintiff: all of the defendant's gain.

With respect to another damages-as-deterrent category, the disgorgement of profits made by a trustee, the analysis becomes somewhat more tenuous, in that the relationship of trustee and beneficiary does not invite the notion of a hypothetical bargain. Nonetheless, it is not unreasonable to presume (for the purposes of a damages award) that the beneficiary of a trust, if made aware that the trustee planned to make a profit with property held in trust, could and would have insisted that the profit be made for the benefit of the trust rather than the trustee. Again, damages measured by the entire profit to the trustee would produce, on a compensatory rather than a deterrent basis, the required deterrent effect.

These damages-as-deterrent categories, where a defendant is required to disgorge a profit, are inherently problematic. The civil courts, in disputes between private parties, are being called in aid of a public law or policy objective, or in any case an objective beyond the relationship between the particular litigants in question. It is submitted that disgorgement in these cases can often be more appropriately characterized as a proper private law remedy when viewed in the compensatory context previously described.

IV. ACCOUNTING FOR PROFITS

The approach advocated here is also evident—and persuasive in support of the lost-opportunity approach to assessing damages at the level of the entire profit earned by the defendant where the plaintiff's rights are protected by a property rule—in the category of awards gathered under the heading of an “accounting for profits,” such as intellectual property cases. In such cases, a very common award for a successful plaintiff is an accounting for profits for past breaches and an injunction going forward. It is submitted that the accounting for profits is given—without the plaintiff having to prove a loss in the conventional sense—because the plaintiff has suffered the loss of the opportunity to bargain for the defendant's gain, a gain that the plaintiff would have had if the defendant had been caught, so to speak, in time for the plaintiff to obtain an injunction.

In this category of cases, the marrying of the accounting for (all) past profits with the injunction going forward is exemplary of the logical connection between specific relief and damages measured by the entire benefit to the defendant.

In *Attorney General v. Blake*, the defendant (a British intelligence agent who defected to the Soviet Union) was beyond the reach of the Court, but his publisher was required to pay the plaintiff (the Crown) the entire outstanding balance that the publisher had agreed to pay the defendant for his autobiography, a book that would have violated a promise that the defendant made at the commencement of his employment not to disclose state secrets.¹⁴ The remedy for this breach of contract was characterized as an accounting for profits.

Lord Nichols, in a lengthy if sometimes uneven canvass of the law in this area, made the connection between specific relief and (what he did not like to call) restitutionary damages, but rejected the characterization of such damages as being compensation for a financially measurable loss.

At one point in his decision he expressly endorsed the “lost opportunity to bargain” compensatory characterization of the approach taken in *Bracewell and Jaggard* when damages are given in lieu of an injunction.¹⁵ Later in his judgment, he stated:

In the same way as a plaintiff’s interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff’s interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract.¹⁶

That passage seems to indicate that Lord Nichols endorsed the approach described in this paper. Yet in the following paragraph of the decision he stated:

Even when awarding damages, the law does not adhere slavishly to the concept of compensation for financially measurable loss. When the circumstances require, damages are measured by reference to the benefit obtained by the wrongdoer.¹⁷

The latter statement indicates that, in his view, damages measured by the defendant’s entire profit can be appropriate, but they are not compensatory, or at least are not in compensation of a “financially measurable loss.” However, it is submitted that a financially measurable

¹⁴ *Supra* note 10.

¹⁵ *Ibid.* at p. 281.

¹⁶ *Ibid.* at p. 285.

¹⁷ *Ibid.*

loss is indeed implicit in the concept of a lost opportunity to bargain with a right that would be protected by specific relief.

V. A FICTION?

As this analysis is applied to various areas of the law, the question arises (and has been debated in the law and legal literature) as to whether or not the “lost opportunity to bargain” is a “legal fiction,” and if so, for some reason inappropriate for being one.

There is no doubt that the approach, whether the market-based “fee” or the entire profit is awarded, might be characterized as counter-factual. Even if the evidence were convincing, the plaintiff cannot insist on more than the defendant’s profit by satisfying the court that she would have insisted on a higher price (or would not have bargained at all) for permission to release her rights, and the defendant (again, even if the evidence were convincing) cannot argue that the plaintiff would have settled for less than either the reasonable fee or, depending on the measure used, the entire profit.

Nonetheless, it is submitted that the approach is balanced and is not unlike certain other widely-accepted (if sometimes imprecise among competing equities) rules pertaining to the measurement of damages that might be characterized as counter-factual, such as the liability of a defendant for damages that the defendant could convince the court he did not foresee, but were (objectively speaking) reasonably foreseeable. Fairness to one party requires that the other not be entitled to rely on evidence that rebuts the presumption in question.

CONCLUSION

In the lost-opportunity analysis, where the court is put to the task of assessing damages because the preferred remedy—an injunction or specific performance—is unavailable, the assessment of damages measured by the entire benefit realized by the defendant can be seen as compensatory. It provides a balance that is achieved by protecting the plaintiff from under-compensation in a situation that has been muddied by the defendant’s breach, and ensuring that the defendant is not better-off for having breached the plaintiff’s rights. Where competing equities argue against the availability of an injunction, as in *Bracewell* and

Jaggard, there is a reason not to protect the right with a property rule, and the reasonable fee approach is appropriate. Absent such competing equities, the determination that a right should be protected with a property rule should result in an assessment of compensatory damages reflecting the entire gain by the defendant.