

CONTRACTUAL PERFORMANCE, CORRECTIVE JUSTICE, AND DISGORGEMENT FOR BREACH OF CONTRACT

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This paper is about the remedy of disgorgement for breach of contract. In it I argue for two conclusions. I first argue that, prima facie at least, disgorgement damages for breach of contract present something of a puzzle. But second, I argue that if we pay close attention to the notion of *contractual performance*, this puzzle can be resolved in a way that is consistent with principles of corrective justice. In particular, I suggest that even if a contract gives the promisee a right to only the promisor's performance of the contract, such a right can sometimes entail the acquisition by the promisee of certain rights of ownership. And in situations in which such rights are acquired, the disappointed promisee is entitled to the gains realized by the promisor in breach of contract by reason of the fact that such gains are something to which the promisee has an antecedent right.

I. INTRODUCTION

My topic is the remedy of disgorgement for breach of contract. I have two goals. First, I argue that, prima facie at least, disgorgement damages for breach of contract present something of a puzzle. But second, I argue that if we pay close attention to the notion of *contractual performance*, this puzzle can be resolved in a way that is consistent with principles of corrective justice. In particular, I suggest that even if a contract gives the promisee a right to only the promisor's performance of the contract, such a right can sometimes entail the acquisition by the promisee of certain rights of ownership. And in situations where such rights are acquired, a disappointed promisee is entitled to any gains realized by the promisor in breach of contract by

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reason of the fact that such gains are something to which the promisee has an antecedent normative entitlement.

The argument of the paper proceeds as follows. I begin by describing the puzzle raised by the remedy of disgorgement for breach of contract in more detail. Next I consider an argument for the conclusion that disgorgement for breach of contract is inconsistent with principles of corrective justice. I then argue that this objection can be overcome if attention is paid to different meanings of the phrase “contractual performance.” I conclude by applying the analysis that emerges from this discussion to some recent cases concerning the remedy of disgorgement for breach of contract.

Let me be plain: my primary interest in what follows is in seeing whether, and if so how, disgorgement damages for breach of contract fit with principles of corrective justice. Thus my question is whether somebody who is attracted to principles of corrective justice can also hold that in certain circumstances a promisor who has breached her contract can be required by way of remedy to disgorge gains that are directly linked to that breach. Let me also be plain that the argument of the present paper is best viewed as a conditional one: I am arguing that *if* a certain view about the nature of contractual performance is accepted, *then* disgorgement damages for certain breaches of contract ought to be available to a disappointed promisee as a matter of right. This might be considered a narrow inquiry. But as I will try to show, the debate over the availability and scope of disgorgement damages for breach of contract touches on deep issues about what is acquired at contract formation and about how best to understand the nature of that acquisition. It therefore engages basic issues about contract law.

II. THE PUZZLE

Before turning to the puzzle raised by disgorgement damages for breach of contract, let me define some terms. In what follows, I call any remedy that awards to a plaintiff a sum of money that is measured by reference to gains realized by the defendant a *gain-based remedy*.¹ Consequently, both restitution and disgorgement—I distinguish between the two below—count as gain-based remedies.

Second, by *restitution* I mean a gain-based remedy that looks to both the defendant’s gain as well as the plaintiff’s loss. Thus, in cases where restitution is appropriate, a defendant is made to give something *back* to the plaintiff.

1. I use “gain” and “benefit” interchangeably in what follows; similarly for “harm” and “loss.” Moreover, when I suppose in what follows that two people have entered into a contract, I assume unless otherwise indicated that the contract is a valid one and that all the usual indicia of contract formation are present: consideration has been provided, there has been offer and acceptance, the parties are *ad idem*, and so on.

This giving back may be intended to rectify, for example, the defendant's unjust enrichment at the plaintiff's expense.

Third, by *disgorgement* I have in mind a gain-based remedy that looks only to a defendant's gain, although that gain must be directly traceable to some particular action taken by that defendant, such as the breaching of a contract with the plaintiff.² I do not mean to deny that in cases of disgorgement the defendant is made to give something up nor that this something is then given to the plaintiff.³ However, since the plaintiff in such a case is not obviously being compensated for any loss suffered by him or her, the remedy is not properly restitutionary in nature. In restitution, the defendant must give something *back* to the plaintiff; in disgorgement, the defendant is merely required to give something *up*. I suggest below that restitution and disgorgement thus defined cannot always be so easily distinguished in cases of breach of contract, at least not from the perspective of corrective justice; but at this point I propose to work with this familiar terminology.

I turn now to the puzzle raised by disgorgement damages for theories of contract law that are based on principles of corrective justice. I begin with an overview of corrective justice, with which I assume a certain amount of familiarity.

Briefly, theories of corrective justice find their genesis in Aristotle's *Nicomachean Ethics*.⁴ There Aristotle said that corrective justice is concerned solely with "rectification in transactions" between individuals.⁵ According to Aristotle:

it does not matter if a decent person has taken from a base person, or a base person from a decent person. . . . Rather, the law looks only at differences in the harm [inflicted], and treats the people involved as equals, when one does injustice while the other suffers it, and one has done the harm while the other has suffered it.⁶

I am glossing over a number of important issues here: what it means to do injustice, what it means to suffer harm, and what it means to look to differences in the harm inflicted. What I am focusing on instead is the remedial aspect of corrective justice, according to which "the remedy corrects the

2. Here I follow, among others, M. McInnes, *Disgorgement for Breach of Contract: The Search for a Principled Relationship in UNJUST ENRICHMENT AND THE LAW OF CONTRACT* 225 (E.J.H. Schrage ed., 2001); M. McInnes, *Gain-Based Relief for Breach of Contract: Attorney General v. Blake*, 35 CAN. BUS. L.J. 72 (2001); L. Smith *The Province of the Law of Restitution*, 71 CAN. BAR REV. 672 (1992); and J. EDELMAN, GAIN-BASED DAMAGES: CONTRACT, TORT, EQUITY AND INTELLECTUAL PROPERTY (2002).

3. Indeed, some have taken this to mean that disgorgement is a form of restitution. See P. Birks, *The Law of Restitution at the End of an Epoch*, 28 U.W. AUSTL. L. REV. 13 (1999), at 22. For criticism of this suggestion, see McInnes, *Disgorgement*, *supra* note 2. I return to this issue below.

4. ARISTOTLE, *NICOMACHEAN ETHICS* (T. Irwin trans., Hackett, 1985).

5. *Id.* at 1131a.

6. *Id.* at 1132a (brackets in original translation).

injustice suffered by the plaintiff at the defendant's hand."⁷ I do not propose to consider in any detail exactly what the plaintiff loses, or what the defendant gains, in correctively unjust transactions. These are hard questions, and I have no very good suggestions about how best to answer them.⁸ The important thing to keep in mind for present purposes is that according to corrective justice, wrongs and remedies are correlatively structured: what the defendant gives up by way of remedy must be the very thing that makes the plaintiff whole and so must be the very thing that rectifies the wrong the plaintiff has suffered at the defendant's hand.⁹

The law of contract damages, however, presents problems for this basic remedial idea. According to the standard rule, the goal of damages for breach of contract is to put the complaining party in the position she would have been in had the contract been performed. As Lord Atkinson said in *Wertheim v. Chicoutimi Pulp Co.*:

it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed. . . . That is a ruling principle. It is a just principle.¹⁰

Or as Justice Estey remarked in *Asamera Oil Corp. Ltd. v. Sea Oil and General Corp. et al.*:

The calculation of damages relating to a breach of contract is, of course, governed by well-established principles of common law. Losses recoverable in an action arising out of the non-performance of a contractual obligation are limited to those which will put the injured party in the same position as he would have been in had the wrongdoer performed what he promised.¹¹

Or again, as Section 1–305(a) of the Uniform Commercial Code states, “The remedies provided by [the Uniform Commercial Code] must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed [the contract].”¹²

7. E.J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI-KENT L. REV. 55 (2003), at 55.

8. For what seems to me to be a promising account, see E.J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 DUKE L.J. 277 (1994). For criticism, see K. Simons, *Justification in Private Law*, 81 CORNELL L. REV. 698 (1995). For an interesting analysis of private law remedies that focuses primarily on means rather than on losses or gains, see A. Ripstein, *As If It Had Never Happened*, 48 WM. & MARY L. REV. 1957 (2007).

9. See Weinrib, *supra* note 8; and E.J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349 (2002).

10. *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301 (P.C.). See also *Robinson v. Harman* (1848) 1 Exch. 850, 154 E.R. 363; and *Tito v. Waddell* (No. 2) [1977] Ch. 106.

11. *Asamera Oil Corp. Ltd. v. Sea Oil & Gen. Corp. et al.*, [1979] 1 S.C.R. 633 at 645.

12. See also RESTATEMENT (SECOND) OF CONTRACTS §344(1) (a) (1981).

Damages awarded according to this principle have come to be known as *expectation damages*, and the interest they protect the *expectation interest*.¹³

As scholars have noted, however, expectation damages are curious. For example, in “The Reliance Interest in Contract Damages”¹⁴ Lon Fuller and William Perdue famously argue that the expectation principle cannot be justified by principles internal to the law of contract but must instead be found in considerations having to do with policy and efficiency. As they put it there:

one frequently finds the “normal” rule of contract damages (which awards to the promisee the value of the expectancy, “the lost profit”) treated as a mere corollary of a more fundamental principle, that the purpose of granting damages is to make “compensation” for the injury. Yet in this case we “compensate” the plaintiff by giving him something he never had. This seems on the face of things a queer kind of “compensation.”¹⁵

Fuller and Perdue purport to identify a puzzle. The puzzle is this: if contract damages are designed to compensate the promisee for her loss, then expectation damages appear to be anomalous. This is because they seem to give to the plaintiff something she never had, and in so doing, impose on the defendant a positive duty to ameliorate the plaintiff’s position, which as a positive duty is not typical of private law.¹⁶ Thus, on a natural reading of Fuller and Perdue, the problem with expectation damages is that they remedy without compensating. Now, I do not mean to suggest that we ought to accept this analysis of the nature of expectation damages; as I argue below, it seems to me that there is a way of understanding expectation damages that is entirely consistent with the idea that they are compensatory in nature. What I do want to point out, however, is that for reasons similar to those that have led some to question the coherence of expectation damages, theorists attracted to accounts of private law based on principles of corrective justice may find disgorgement damages for breach of contract puzzling as well.¹⁷

Disgorgement damages are sometimes available as a remedy for breach of contract.¹⁸ Although a general principle is difficult to state precisely, the

13. The term was coined by Lon Fuller & William Perdue in their classic paper, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936). Daniel Friedmann argues that it would probably be more appropriate to call damages awarded according to this principle *performance damages* and the interest thereby protected the *performance interest*; see D. Friedmann, *The Performance Interest in Contract Damages*, 111 LAW Q. REV. 628 (1995).

14. Fuller and Perdue’s article has been the target of much comment. For some recent discussion, see the papers published in *Symposium: Fuller and Perdue*, 1 ISSUES IN LEGAL SCHOLARSHIP (2001), <http://www.bepress.com/ils/2001.html>. See also Friedmann, *supra* note 13.

15. Fuller & Perdue, *supra* note 13, at 54.

16. See P. Benson, *Contract*, in COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY (Dennis Patterson ed., 1996), for development of this point.

17. Similar remarks can be made about exemplary or punitive damages.

18. The cases are, admittedly, sparse. *But see* British Motor Trade Ass’n v. Gilbert, [1951] 2 All E.R. 641; Hickey & Co., Ltd. v. Roche Stores (Dublin) Ltd., [1993] H. Ct. (1976) (Ir.); C.A.

Draft Restatement (Third) of Restitution and Unjust Enrichment §39(1) (Tentative Draft No. 4, 2005) suggests that:

If a breach of contract is both material and opportunistic, the injured promisee has a claim in restitution to the profit realized by the defaulting promisor as a result of the breach. Liability in restitution with disgorgement of profit is an alternative to liability for contract damages measured by injury to the promisee.¹⁹

What the *Restatement* calls “liability in restitution with disgorgement of profit” I am simply calling “disgorgement.”²⁰ I return to the issue of what might justify such awards below.

Disgorgement damages require the promisor to give to the promisee an amount equal to the gain realized by the promisor as a result of her breach of contract. Superficially, disgorgement looks similar to restitution: both strip the promisor of a gain and both award that gain to the promisee who has suffered a loss. But as I indicate above, this cannot be quite right. This is because restitution requires the promisor to give back to the promisee something to which the promisee has (or had) some sort of antecedent right or claim.²¹ But in disgorgement, it seems that the promisee has no right to the promisor’s gain, although the law is sometimes prepared to award to the promisee the value of the promisor’s gain.

In general, a plaintiff will be awarded damages only if she has suffered a loss. But damages based on disgorgement seem to constitute an exception

20/82, *Adras Bldg. Material v. Harlow & Jones* 42(1) P.D. 221 [1988], translated in 2 R.L.R. 235 (1995); and *Attorney General v. Blake*, [2000] 3 W.L.R. 625 (H.L.), for discussion of the principle.

19. For some discussion of this principle, see J. Dawson, *Restitution or Damages?* 20 OHIO ST. L.J. 175 (1959); E.A. Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339 (1985); D. Friedmann, *Restitution of Profits Gained by Party in Breach of Contract*, 104 LAW Q. REV. 383 (1988); G. Jones, *The Recovery of Benefits Gains from a Breach of Contract*, 99 LAW Q. REV. 443 (1983); A. Kull, *Disgorgement for Breach, the ‘Restitution Interest,’ and the Restatement of Contracts*, 79 TEX. L. REV. 2021 (2001); and L. Smith, *Disgorgement of the Profits of Breach of Contract: Property, Contract and ‘Efficient Breach,’* 24 CAN. BUS. L.J. 121 (1994).

20. Although again, as I suggest below, the distinction between the two sorts of remedy may not be so clear.

21. This claim is controversial. Dennis Klimchuk, for example, argues that in the paradigmatic case of unjust enrichment—mistaken payment—a claim for restitution arises notwithstanding the fact that title has passed from plaintiff to defendant. As a result, Klimchuk concludes, the claim cannot take the form of somebody asking for something that belongs to him or her. See D. Klimchuk, *Unjust Enrichment and Corrective Justice*, in UNDERSTANDING UNJUST ENRICHMENT 111 (J. Neyers, M. McInnes & S. Pitel eds., 2004). In my view, however, we can still make sense of the claim to restitution in cases of mistaken payment by paying attention to proprietary rights: the plaintiff is seeking to vindicate her right to the contested object by claiming that she has better title to it than does the defendant. For an argument to this effect, see A. Botterell, *Property, Corrective Justice, and the Nature of the Cause of Action in Unjust Enrichment*, 20 CAN. J.L. & JURIS. 275 (2007). For criticism of this sort of position see D. Klimchuk, *The Structure and Content of the Right to Restitution for Unjust Enrichment*, 57 U. TORONTO L.J. 661 (2007).

to this general rule.²² For in disgorgement, the defendant is required to do two things: first, to give up a gain; and second, to give up that gain to the plaintiff, even though there may be no corresponding loss on the part of the plaintiff.²³ The problem is that while disgorgement requires that a transaction between the plaintiff and the defendant occur and that the defendant's gain be linked to something the defendant did with respect to the plaintiff, it is not clear that the thing given up by the defendant is something to which the plaintiff has any sort of right. Recall that in order for something to be a *corrective justice* remedy, it must be something to which the plaintiff has some sort of normative entitlement: it must rectify the wrong suffered by the plaintiff at the defendant's hand. But as Fuller and Perdue argue with respect to expectation damages, in ordinary contractual cases such a normative entitlement is dubious. And a similar argument can be made with respect to disgorgement damages, since they, too, seem to remedy without compensating. This suggests that like expectation damages, the remedy of disgorgement for breach of contract is similarly problematic from the perspective of corrective justice.

And indeed, this has been the traditional view of the common law. A particularly clear example of this can be found in *Tito v. Waddell* (No. 2).²⁴ There the defendant mining company made an agreement with the plaintiffs, who were inhabitants of Ocean Island, to replant the island once it had completed its mining operations there. When the defendant failed to replant the island, the plaintiffs sued for breach of contract. Because, however, the plaintiffs were no longer living on the island, they could not establish any loss as a result of the breach of contract. Moreover, the difference in value between the island planted and the island unplanted was insignificant. The plaintiffs asked for damages equal to the amount of money that the defendant had saved in failing to replant the island as promised. The Court denied this request. In his reasons, Vice-Chancellor Megarry said the following:

If the defendant has saved himself some money, as by not doing what he has contracted to do, that does not of itself entitle the plaintiff to recover the saving as damages: for it by no means necessarily follows that what the defendant has saved the plaintiff has lost.²⁵

22. Again, I do not mean to deny that there can be other exceptions to the general rule. Cases in which the remedy of specific performance is given provide examples of remedies that take a nonstandard form.

23. That the defendant is made to give up something to the plaintiff indicates that we are dealing here with something other than restitution for unjust enrichment. For, as noted above, in unjust enrichment the defendant is made to give something back to the plaintiff. Disgorgement, on the other hand, does not presuppose that the damages awarded to the plaintiff were in any way something to which the plaintiff had an antecedent right.

24. *Tito v. Waddell*, *supra* note 10.

25. *Id.* at 322. See also *Surrey Cnty. Council v. Bredero Homes Ltd.*, [1993] 1 W.L.R. 1361 (C.A.) 1364 (Dillon L.J.): "[T]he remedy at common law for a breach of contract is an award

III. RECONCILING DISGORGEMENT AND CORRECTIVE JUSTICE

To recap: the primary goal of private law damages is to compensate an injured plaintiff for her loss. Consequently, if a defendant breaches a contract with a plaintiff, the plaintiff is entitled, so far as it can be done with money, to be put in the position she would have been in had the contract been performed. This typically results in an award of damages based on the plaintiff's expectation interest. In some cases, however, courts have been prepared to award disgorgement damages for breach of contract instead.²⁶ In such situations, the defendant is required to give up by way of damages an amount equal to the gain she has realized by her contractual breach, even when there is no corresponding loss on the part of the plaintiff. This is part of what makes the remedy of disgorgement damages for breach of contract puzzling from the perspective of corrective justice. For again, an award of disgorgement damages can be justified only if it undoes a wrong suffered by the plaintiff at the defendant's hand. But what wrong might such an award be undoing? This question is at the core of the puzzle presented by disgorgement damages for breach of contract. As I argue below, one way to approach the wrong in question is to adopt a particular conception of the right to contractual performance, the so-called *transfer* or *ownership theory* of contractual performance. And my argument is that a more nuanced understanding of what gets transferred at the time of contract formation may also provide us with an answer to the puzzle identified above.

With this in mind, I would like to turn to the idea that in cases of contractual breach, the plaintiff has been deprived of something to which she has an entitlement or right. This, I think, is an idea that is worth taking seriously.²⁷ In explaining expectation damages, for example, Peter Jaffey says that:

expectation damages represent the net value to the plaintiff of the performance that he was due to receive under the contract but did not. It appears to

of damages, and damages at common law are intended to compensate the victim for his loss, not to transfer to the victim if he has suffered no loss the benefit which the wrongdoer has gained by his breach of contract."

26. For examples, see *Hickey & Co.*, *supra* note 18; *Adras*, *supra* note 18; and *Blake*, *supra* note 18.

27. This idea may be at work in those who see in the old waiver of tort cases—*e.g.*, *United Austl. Ltd. v. Barclays Bank*, [1941] A.C. 1; *Lamine v. Dorrell* (1701) 2 Ld. Raym. 1216; and *Phillips v. Homfray* (1883) 24 Ch. D 439—a possible explanation for disgorgement for breach of contract. Historically, the owner of a chattel that the defendant had converted and sold was able to "waive the tort" of conversion and recover the proceeds of the sale from the defendant, even when that would give the owner more than the value of the object lost. In such cases there was a clear invasion of a property interest, which the common law sought to protect, and so, to the extent that the defendant had disposed of something to which the plaintiff had an antecedent right, the additional gain was something that legitimately belonged to the plaintiff. Thus the plaintiff was not being awarded anything that was not already hers or to which she was not already entitled. The issue is whether an analysis similar to the proprietary one can be made to work in cases of breach of contract.

be the appropriate remedy on the basis that the plaintiff was *entitled to receive the defendant's contractual performance*, and the damages are so far as possible a pecuniary equivalent to this contractual entitlement.²⁸

The important idea here is that expectation damages make sense only on the assumption that the plaintiff had a right or entitlement to the defendant's contractual performance. Making sense of this idea of *contractual performance* is, I think, the key to resolving the puzzle with which we began.

What is meant by "contractual performance"? The phrase admits of several interpretations. On the one hand, in saying that the plaintiff has a right to contractual performance, we might mean that the plaintiff has a right to the thing promised, a right that is in rem or proprietary in nature, as against the whole world.²⁹ Alternatively, we might mean that the plaintiff has a right to the performance of the promise, a right that is personal in nature, as against the defendant.³⁰ Thus, suppose A contracts with B for X. Then let us say that the object or thing promised or contracted for is X. And let us say that the action promised or contracted for is B's providing A with X. Similarly, where A contracts with B for some Xs, let us say that the objects contracted for are some Xs and that the action contracted for is B's providing A with some Xs. I introduce this terminology in order to be able to talk about the promisee having a right to the promisor's doing something, that is, the action contracted for, and to be able to distinguish that situation from the promisee's having a right to the object contracted for. (If you have reservations about this distinction, not to worry; I consider the distinction again below.)

In the meantime, however, let me try to forestall a possible objection. It might be objected that while this way of thinking about contractual performance makes sense in the context of contracts involving the sale of goods, there are many contracts that are not sales at all and so, a fortiori, are not sales of goods: contracts for employment; contracts for the carriage of people or goods; contracts, such as insurance contracts, involving risks; and money-lending and other financial contracts. However, while this observation is certainly true, it does not affect the more general point that there is a conceptual distinction to be drawn between the object and the action contracted for. In non-sale of good contracts this distinction is difficult to make out, since in such cases it is plausible to suppose there is only an action

28. P. Jaffey, *Restitutory Claims Arising on Contractual Termination*, in UNJUST ENRICHMENT AND THE LAW OF CONTRACT 243 (E.J.H. Schrage ed., 2001) (emphasis added).

29. There might be worries about this use of terminology: rights are always rights against individuals, so even a right as against the whole world is in a sense in personam. The point, rather, is that we call a right that is good as against the entire world an in rem right.

30. While this way of putting things is familiar, it is not entirely accurate. This is because the expressions "in rem" and "in personam" were originally applied by Roman lawyers to *actions*: an action *in rem* asserted a relationship between a person and a thing; an action *in personam*, a relationship between persons. See B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW (1975), at 100. Nonetheless, I will stick with the familiar usage in what follows.

contracted for: the promisor's doing or performing a certain action.³¹ But in other situations, the object/action distinction is capable of being drawn. So this observation does not, it seems to me, affect the general point I wish to make.

Now, one way to make sense of the idea that there is a distinction between kinds of contractual performance is to argue that there are two fundamentally different ways in which an individual can come to acquire rights of ownership in something.³² According to the first way of acquiring such rights, an individual acquires ownership immediately by virtue of coming to control or possess the object in question.³³ Peter Benson dubs this "first occupancy."³⁴ This manner of acquisition is characteristic of property.

According to the second way of acquiring rights of ownership, such rights are acquired derivatively by way of transfer. Thus, in contract, the promisee acquires ownership rights by virtue of having those rights transferred to her by the promisor. On this view, the acquisition of contractual rights is "derivative in the sense that it is acquisition from, and with the participation of, the owner, and the object acquired is acquired by one *in the condition of being owned by the other*."³⁵ These rights are clearly in personam in nature, since they hold only against the promisor. But they are also genuine incidents of ownership: the promisee has the right, at the time performance is due, to possess, use, and alienate the object promised. So, says Benson, "both personal and real rights are taken as rights of ownership. Their difference lies in how ownership is acquired and as against whom it operates."³⁶

Benson's idea, as I understand it, is this: contract gives rise to (personal) rights against the promisor, while property generates (real) rights against the whole world. But this is not to say that the rights generated by contract are insubstantial or that they do not include rights of ownership. Rather, to call a right contractual is to say two things: first, that it was acquired via transfer; and second, that it holds only against the transferor.³⁷ So, as Benson says, "[w]hat makes rights in personam as opposed to in rem is just the fact that the operative facts giving rise to the right are transactional."³⁸ By calling the

31. For example, suppose A hires B to perform a magic show at her son's birthday. There it might be supposed that the thing contracted for—the magic show—is just the action contracted for—i.e., B's performing the magic show.

32. See P. Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW* 118 (P. Benson ed., 2001); P. Benson, *Philosophy of Property Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 752 (J. Coleman & S. Shapiro eds., 2002); and P. Benson, *Disgorgement for Breach of Contract and Corrective Justice: An Analysis in Outline*, in *UNDERSTANDING UNJUST ENRICHMENT* 311 (J. Neyers, M. McInnes & S. Pitel eds., 2004).

33. See, e.g., *Pierson v. Post*, 3 Cai. 175, 2 Am. Dec. 264 (N.Y. Sup. Ct. 1805).

34. See Benson, *Philosophy*, *supra* note 32.

35. Benson, *Disgorgement*, *supra* note 32, at 322 (emphasis in original).

36. *Id.* at 324 (emphasis in original). For a similar analysis, see L. Smith, *Disgorgement*, *supra* note 19.

37. Note that the concept of transfer is broader than that of contract, in the sense that rights could be acquired via transfer without being acquired via contract. If A gives X to B as a gift, then B acquires X via transfer from A.

38. Benson, *Philosophy*, *supra* note 32, at 786.

operative facts giving rise to the right “transactional” Benson means that the right in question arises from the interaction between two individuals. The contrast here is with rights that arise from first occupancy, that is, with rights that arise from the actions of a single individual considered in isolation. This suggests that the real distinction between rights in personam and rights in rem is not in the first instance *constitutive*—having to do with their intrinsic nature or with the sort of rights they are—but is instead *etiological* or *historical*. In other words, the distinction between proprietary and contractual rights has to do with *how* a given right is acquired and not so much with what the right is *to* or whom the right is *against*.³⁹

So suppose that Alice contracts with Bert for some widgets. According to Benson, this contract effects a transfer: Bert, who is the owner of the widgets, transfers to Alice certain rights to Bert’s contractual performance. But in what, exactly, does such contractual performance consist? There are two possibilities. On the one hand, it is natural to suppose that the contractual performance to which Alice is entitled is *the action contracted for*, namely Bert’s delivering some widgets to Alice. Thus, where there are different ways of satisfying the demand for contractual performance (by delivering this group of widgets, or that group of widgets, or some other group of widgets), the promisee is only entitled to the promisor’s performing a certain kind of action. Call this sort of contractual performance a *generic performance*.

On the other hand, where there is only one way of satisfying the demand for contractual performance, then the promisee is entitled to *the thing promised*. Thus, if Bert promises to provide Alice with a particular widget W, then it is natural to think that Alice has an ownership right to W, that is, the object promised. And so, if Bert fails to provide Alice with W and in doing so realizes a profit or a gain, that profit or gain belongs to Alice since it flows from Alice’s ownership rights in W. Call this sort of contractual performance a *particular performance*.

In short, one way to interpret Benson’s argument is as follows: the expression “contractual performance” can refer to two distinct things. Where the thing contracted for is *not* unique, the “contractual performance” to which the promisee is entitled refers to the promisor’s performing a certain kind of action; this is characteristic of generic performance. Where the thing contracted for *is* unique, the “contractual performance” to which the promisee is entitled refers to the object promised; and this is characteristic of particular performance. From this it follows that where the object promised is unique and is not transferred to the promisee at the agreed time of performance, the promisor is using as her own what rightfully belongs to the promisee. The promisee is therefore entitled to any gains that

39. The view described above has become known as the transfer theory of contract, and its origins can be traced back to the work of Hugo Grotius; see H. GROTIUS, *THE RIGHTS OF WAR AND PEACE, INCLUDING THE LAW OF NATURE AND OF NATIONS* (A.C. Campbell trans., Hyperion Press, 1979). For criticism of transfer theories generally, see STEPHEN A. SMITH, *CONTRACT THEORY* (2004), at 97–103.

the promisor realizes as a result of that breach. This is because those gains belong to the promisee as a matter of right—they are, as it might be said, incidents of ownership.

IV. WEINRIB'S OBJECTION

If the distinction between a personal right to the action contracted for and a real or proprietary right to the thing contracted for is defensible, then we have a way of resolving our puzzle. For if a promisee has a proprietary right to the thing contracted for, then she has the exclusive authority to determine the purposes to which the object is to be put both at and after the time of contractual performance. From this it seems to follow that any profit realized by the promisor as a result of her breach is something to which the promisee is normatively entitled.

This is an attractive argument. Still, it is only as good as the claim, first, that there is such a thing as a proprietary right to the thing contracted for, and second, that contractual agreements for unique objects—which are an instance of what I have been calling particular performances—reflect such an antecedent right. This is the focus of Ernest Weinrib's criticism of disgorgement damages from the perspective of corrective justice.

In "Punishment and Disgorgement as Contract Remedies," Weinrib returns to an account of private law found in Kant's *Metaphysics of Morals*.⁴⁰ There Kant introduces a distinction between agents who are capable of exercising the power of choice and external objects of choice. According to Kant, external objects of choice are fundamentally different from self-determining agents. Kant says that the expression "an object is *external to me*" can mean either "that it is an object merely *distinct* from me (the subject) or else that it is also to be found in *another location* . . . in space or time."⁴¹ According to Kant, moreover, such external objects are the very things "on which agents can exercise their self-determining capacity and accordingly make into the subject matter of rights."⁴² Kant identifies three kinds of external objects, but for our purposes only one is relevant, and that is "another's *choice* to perform a specific deed."⁴³ Kant sums this up in the following passage:

By a contract I acquire something external. But what is it that I acquire? Since it only the causality of another's choice with respect to the performance he has promised me, what I acquire directly by a contract is not an external thing but

40. Weinrib, *Punishment*, *supra* note 7; I. KANT, *THE METAPHYSICS OF MORALS* (Mary Gregor ed., Cambridge University Press, 1996).

41. KANT, *supra* note 40, at 37 [6:246].

42. Weinrib, *Punishment*, *supra* note 7, at 65.

43. KANT, *supra* note 40, at 37 [6:247]. The two other kinds of external objects identified by Kant are "a (corporeal) thing external to me" and "another's *status* in relation to me" *Id.* [6:247].

rather his deed. . . . By a contract I therefore acquire another's promise (not what he promised), and yet something is added to my external belongings; I have become *enriched (locupletior)* by acquiring an active obligation on the freedom and means of the other.—This right of mine is, however, only a right against a person . . . and indeed a right to act upon his causality (his choice) to perform something for me; it is not a *right to a thing*.⁴⁴

Now, Kant does not deny that we can come to possess external corporeal objects. But he insists that we do not do so simply by entering into a contractual agreement with another person for such objects. A contract generates only a right to the promisor's choice of action. Consequently, on Kant's view, the promisee does not have a proprietary entitlement to anything; at best she has a personal right to the promisor's contractual performance.

Applying this Kantian approach to contractual performance, Weinrib concludes that disgorgement is incompatible with principles of corrective justice. Because a contract generates only a personal claim to the promisor's contractual performance, there is no link between contractual entitlement and proprietary right. And because such a link is required in order for the remedy of disgorgement to make sense from the perspective of corrective justice, there can be no disgorgement for breach of contract.

A natural objection to this is that the possibility of particular or specific performance shows that a promisee *can* have a right to the thing contracted for. Weinrib disagrees. As he says:

This approach to the entitlement is inconsistent with corrective justice's conception of the relation of right and remedy. For corrective justice the right is conceptually prior to the remedy that responds to the right's infringement. Of course, if the system of private law is well-ordered, the remedy will reflect the kind of entitlement that the plaintiff has. The remedy, however, does not determine the nature of the underlying right. Whether the entitlement is proprietary or not depends on the concepts internal to the juridical relationship between the parties. . . . It does not depend on the court's response to the defendant's injustice. The remedy, therefore, cannot transform into a proprietary right that which is not already one before the remedy is fixed.⁴⁵

The key idea here is that because rights are prior to remedies, an award of specific performance cannot transform a nonproprietary interest into a proprietary one. Thus we cannot argue that if a certain sort of remedy has been awarded, a certain sort right is in play. Granted, if the promisee has a proprietary entitlement to the object contracted for, then an award of specific performance appropriately reflects that right. But from this it does not follow that *if* an award of specific performance is granted, *then* the promisee has a prior proprietary entitlement to the object contracted

44. *Id.* at 59 [6:274].

45. Weinrib, *Punishment*, *supra* note 7, at 82.

for. To argue in this fashion would be to affirm the consequent of the first conditional.

The Kantian approach to contract formation is a version of what has become known as the transfer theory.⁴⁶ According to this view, what is transferred at contract formation is a *right* to somebody else's future choice or performance, or what Kant calls "an active obligation on the freedom and means of the other."⁴⁷ And I can acquire such a right "only if I can assert that I am in possession of the other's choice (to determine him to perform it) even though the time for his performing it is still to come."⁴⁸ In other words, Kant's idea is that at contract formation the promisee comes into possession of something, namely the promisor's promise of future performance, and is thereby presently enriched; for the promise becomes part of the promisee's goods and belongings.

This is an attractive and powerful view.⁴⁹ But it has its problems. Perhaps the most vexing problem is that it is not clear that the contracting parties are in fact capable of doing what the transfer theory requires them to do. In the words of Stephen Smith, the problem is that "the rights that transfer theories suppose are transferred by contracts do not exist prior to the makings of contracts."⁵⁰ According to this objection, a promisor is in no position to transfer to the promisee a right to the promisor's choice to perform some future action at the time of contract formation because the promisor has no such right in the present. The contract brings the right into existence; the right does not generate the contract. But this seems to me to be mistaken. In the absence of any constraints, I am free to do whatever I want. By promising that I will paint your house next Tuesday, however, I am limiting my freedom; in Kant's language, in doing so I might be said to incur an obligation with respect to my freedom and means. The ability to limit my freedom in this way is surely something that is properly mine, since that ability is constitutive of what it means to be an autonomous individual. But from this it follows that when I agree to paint your house, I am transferring to you a limit or obligation on my freedom that arises out of my ability to set my own ends. And in accepting that transfer, you come to acquire a right to my doing something, namely, painting your house.

V. MEETING WEINRIB'S CHALLENGE

Weinrib, in effect, offers a challenge: either show how a promisee can acquire a right to the thing promised at the time of contract formation, in which case disgorgement makes sense from the perspective of corrective

46. For discussion see S. SMITH, *supra* note 39.

47. KANT, *supra* note 40, at 59 [6:274].

48. KANT, *supra* note 40, at 38 [6:248].

49. For further discussion and elaboration of Kant's account of contract, see A. RIPSTEIN, *FORCE AND FREEDOM* CH. 5 (2009).

50. S. SMITH, *supra* note 39, at 101.

justice, or accept the conclusion that the promisee can have a right only to the action contracted for, in which case disgorgement—understood as a corrective justice remedy—is misguided. Weinrib’s assumption seems to be that this disjunction exhausts the space of possibilities and that disgorgement for breach of contract can make sense only if the promisee has a right to the *thing contracted for*. But this assumption is open to dispute.

As shown above, one way to meet this challenge is to introduce, as Benson does, a distinction between two senses of “contractual performance.”⁵¹ But this will hardly convince Weinrib, who denies that “contractual performance” is ambiguous in such a manner.⁵² For again, on Weinrib’s broadly Kantian view, the only thing acquired at contract formation is the right to another’s performance or choice. So let us accept for the sake of argument that the expression “contractual performance” always and everywhere refers to the promisor’s choice to do a certain thing. Let us agree, in other words, that no distinction can be drawn between the object or thing contracted for and the action contracted for. Does it follow that disgorgement cannot be an appropriate remedy for breach of contract from the perspective of corrective justice? I do not see that it does.⁵³ Let me explain.

I begin with an uncontroversial case. If Alice contracts with Bert for a generic action—if, for example, Bert agrees to provide Alice with *some* widgets—then Bert will perform the action contracted for by delivering some widgets to Alice. The fact that Alice has contracted for an action that is generic means that there are many different ways in which Bert can perform the contract.⁵⁴ Consequently, although Alice has a right against Bert that Bert deliver some widgets to her, she does not have a right against Bert that Bert not deliver some widgets to somebody else. In contracting with Bert to ensure that a certain state of affairs obtain, in other words, Alice has not contracted with Bert to ensure that another state of affairs not obtain.

Or again, if Alice and Bert agree that Bert will deliver some cows to Alice in exchange for fifty dollars, it does not follow that Alice and Bert have agreed that Bert will not deliver some cows to Charlie. So if, in breach of his obligation to deliver some cows to Alice, Bert instead delivers some cows to Charlie, and in so doing, realizes a profit, Alice cannot claim that the gains thereby realized belong to her. Why? Because she had no antecedent claim to that particular action.

51. Benson, *Disgorgement*, *supra* note 32, at 324–328.

52. Weinrib, *Punishment*, *supra* note 7 at 67.

53. Neither does Benson. See Benson, *Disgorgement*, *supra* note 32, at 329.

54. What if Alice contracts with Bert for seventeen nonparticular widgets, and Bert has only seventeen widgets to sell? Does this satisfy the uniqueness requirement? I do not believe so, because Alice does not care which widgets she receives; she simply wants seventeen of them. If Bert were to sell fifteen of those widgets to a third party, Alice could not complain that Bert had sold the widgets promised to her, since no particular widgets were in fact promised. I return to this issue below.

On the other hand, suppose that Bert agrees to deliver some *specific* object to Alice. Then Alice has contracted for a particular action, and the performance in question is a particular performance. Thus, if Alice contracts with Bert for some particular action, not only does Alice have a right against Bert that Bert perform that action—in this case, delivering the object in question to Alice—but Alice also has a right against Bert that Bert not perform that action with respect to somebody other than Alice. The first promise brings into existence a second promise. In contracting with Bert to ensure that a specific state of affairs obtain, Alice has also, in effect, contracted with Bert to ensure that another state of affairs does *not* obtain.

To make the example slightly more concrete: if X and Y agree that Y will deliver Bessie the cow to X in exchange for fifty dollars, and if X and Y agree that ownership will not pass until delivery, then X and Y have implicitly agreed that Y will not deliver Bessie the cow to Z. Thus, if Y delivers Bessie to Z instead, and in so doing, realizes a profit, X can legitimately complain that the profit properly belongs to him. Why? Not because X had a right to Bessie. For we have already agreed that, consistent with Kant's account of contract formation, what is acquired at contract formation is not a right to a thing but rather a right to another's performance of a certain action. Rather, the explanation for why X can legitimately complain that Y's profit or gain belongs to him is due to the fact that X had an antecedent claim to that particular *action*. The delivering of Bessie—equivalent to making X the owner of Bessie—was the action X contracted for. And so in performing that action with respect to a third party Z, Y is transferring to Z something that is not hers to transfer.⁵⁵

In sum, the problem with Weinrib's argument is his assumption that an entitlement to the action contracted for cannot give rise to the acquisition of a right that is sufficiently fine-grained to justify awarding disgorgement damages in cases of contractual breach. To assume this, however, is to confuse having a right of ownership with having a proprietary right. Weinrib seems to assume that if there is no proprietary right to a thing, there can be no right of ownership "nearby." But if Alice has a right that Bert contractually perform some particular action A, then, on the current view, Alice has an ownership right in A as well as an ownership right in any action of Bert's that is incompatible with A. Consequently, where A is a particular action and where Bert's doing B is incompatible with his doing A, then Alice is entitled by way of damages to any profits realized by Bert as a result of

55. I take what I say here to be compatible with the sort of view defended in L. Smith, *Disgorgement*, *supra* note 19. Smith takes the position that the crucial question is whether the defendant's gain is causally linked to her breach of contract. (For a similar view, *see also* Farnsworth, *supra* note 19.) On my view, such a requirement will be satisfied where the action contracted for is appropriately specific. Where Y agrees to deliver Bessie to X but instead delivers Bessie to Z, any gain made by Y will be causally linked in the appropriate way to her breach of contract, since absent the breach there would have been no gain to which X had a normative entitlement.

doing B. Because doing B is something over which Alice can assert a right of ownership, any gains that result from Bert's doing B properly belong to Alice.

I am proceeding on the assumption that the parties to a contract only contract for a particular action or, as Kant would say, for another's choice to perform a specific deed. So let me briefly touch on two potential worries with this assumption. The first worry is that because the performance or action contracted for will be particular just in case the object contracted for is unique, this is nothing but the ambiguity view of "contractual performance" in another guise. But this cannot be correct. For the fact is that the argument presented above does not explicitly rely on the assumption that by entering into a contract, the promisee acquires a proprietary entitlement to the thing contracted for. I do not mean to deny that uniqueness plays a role in the present analysis, but the analysis proceeds entirely in terms of actions contracted for. It is therefore hard to see how Weinrib, for example, could object to the framework within which the foregoing argument is made.

The second objection is that the distinction between actions or performances that are generic and actions that are particular is spurious. I suggested above that an action is generic if there are different ways of performing that action. So where Y agrees to deliver some cows to X, the idea is that this counts as a generic action because Y could meet her contractual obligations in any number of different ways: by delivering to X this group of cows, or that group of cows, or some other group of cows. But perhaps this is a mistake. After all, it might be argued that even with respect to what I am calling particular actions or performances—such as Y's agreeing to deliver Bessie the cow to X—there are any number of different ways in which that contractual requirement could be met: Y could deliver Bessie by car, or by truck, or by train, in the morning or in the afternoon. According to this objection, in other words, because no action is suitably particular in the required sense, no account of disgorgement damages for breach of contract can succeed that hinges on a distinction between particular and generic performances.

This is a legitimate concern. But the thing to focus on is the nature of the action being performed and what that action entails. As I suggest above, on the present view, certain contracts include what might be called *implicit* or *subsidiary* promises. Consider again Y's promise to deliver Bessie to X. This promise entails a subsidiary promise not to deliver Bessie to Z. This is because in doing so, Y would be bringing about a situation that would make it impossible for her to meet her contractual obligations to X. Because of the intimate relation between the contract and this subsidiary promise, it follows that X has an ownership interest in the subsidiary promise. And this is what entitles X to disgorgement damages should the contract be breached. By way of comparison, there is doctrine supporting this kind of view in the case of personal services contracts, where negative injunctions

are often available,⁵⁶ as well as in contracts involving conveyances of real property.⁵⁷ If an opera singer agrees to sing at a concert hall on a certain night, then her performance of that personal service contract entails the promise that she will not perform the same service for somebody else. What is characteristic of both personal services contracts and contracts involving real property is that a market substitute for the action contracted for is often unavailable. Thus the fact that a negative injunction may be available in a particular case is an indication that the contract is, in the terminology of the present paper, a contract for an appropriately particular action or performance.

The upshot is that the law of contract must have the resources available to draw a distinction between actions contracted for that are particular and actions contracted for that are generic; otherwise, certain remedial features of contract law become mysterious. Consequently, it cannot, it seems to me, be a particular problem for the account set out above that it appeals to such a distinction. Why, for example, does the law treat contracts for personal services or for real property differently from contracts for ordinary objects or actions? The obvious answer is that the difference has to do with the lack of an appropriate market substitute in the former sorts of cases. But this sort of analysis can be appealed to by the present account as well. Y agrees to sell Bessie to X. Y proceeds to sell Bessie to Z, breaching her contract with X and realizing a profit. Because Y's action will not be an action for which there is an obvious market substitute, it is fair to say that Y's action is a specific one. Consequently, an award of disgorgement damages will not be inappropriate.

But still, why should the *particularity*, or lack thereof, of the action contracted for make such a crucial remedial difference? I say above that if Alice and Bert enter into a contract for a specific action A and if Bert does B—where doing B is incompatible with doing A—then Alice can demand by way of damages any profits realized by Bert as a result of doing B. This takes care of the case of X, Y, and Bessie. But suppose that Y has twenty-five cows, that Y agrees to sell fifteen cows to X, but that Y then sells twenty cows to Z. By selling twenty cows to Z, Y has also brought about a situation that makes it (practically) impossible for her to meet her contractual obligations to X. And yet, according to the present argument, this is not a case where disgorgement is an appropriate remedy for breach of contract, since the contract was not for any cows in particular.

The particularity of the action contracted for is important because it is only when an action is suitably particular that a promisee can be said to own the promisor's contractual performance. In other words, only particular

56. See, e.g., *Lumley v. Wagner* (1852), 42 E.R. 687 (H.L.); and *Doherty v. Allman*, (1878), 3 App. Cas. 709 (H.L.). For discussion, see also *Tribune Ass'n v. Simonds* (N.J. Ch. 1918) 104 A. 386.

57. See, e.g., *Coppola Enterprises, Inc. v. Alfone*, 531 So. 2d 334 (Fla. 1988); and *Gassner v. Lockett*, 101 So. 2d 33 (Fla. 1958).

actions contracted for can give rise to the appropriate normative entitlement. This may seem to produce anomalous results. For example, it may be clear to both parties to a contract that a promise to deliver nonspecific goods to the promisee will prevent the promisor from other performances. Perhaps the promisor's agreement to provide some steel to the promisee will prevent the promisor from participating in a larger project, one that would require all of the promisor's steel-making capacity. Performing the first contract does not logically preclude performing the different contract, but practically it does, and this is known to both parties. Still, on the present analysis, disgorgement would not be available should the promisor breach the first contract with the promisee. The reason is that in this sort of case there is no performance that the promisee can be said to own. Again, the contract is for some steel, but no steel in particular, and this is insufficient to give rise to the sort of normative entitlement that would make disgorgement appropriate.

Again, what emerges from the foregoing is that on pain of incomprehensibility, contract law must be able to distinguish contractual performances that are particular from contractual performances that are merely generic. What the argument of the present paper adds to this distinction is the further claim that when an action or performance contracted for is particular, disgorgement will be available should the contract be breached. To be sure, I have not provided necessary and sufficient conditions for when an action contracted for will count as a particular action, and I doubt very much that such conditions can be articulated in a clear and noncircular manner. What I have suggested is that the sorts of considerations that lead to the availability of negative injunctions or give rise to a remedy of specific performance may be useful in distinguishing actions contracted for that are appropriately particular from actions contracted for that are not.

Before concluding this section, let me touch on one last point. It is often important to distinguish rights of ownership from rights to the *acquisition* of ownership or obligations to transfer ownership. For example, I might enter into a contract with you according to which, once I pay you a sum of money, I immediately become the owner of certain goods even if those goods remain in your possession. Or I might enter into a contract with you according to which, once I pay you a sum of money, I acquire the right to the ownership of certain goods once I take possession of them. The important point here is that there is a distinction between actual ownership and (mere) rights to acquisition of ownership. However, although such a distinction can be drawn, it seems to me to be tangential to the deeper issue here. For even if I have only a right against you to the acquisition of various rights of ownership, it remains the case that once you transfer the goods that are the object of our contractual agreement to somebody else, I can stand on such rights and demand disgorgement damages. This is not because I owned or had actual possession of the goods. Rather, I am entitled to disgorgement damages because I had a right to the acquisition of the goods and

because in transferring them to another person, you misappropriated that right.

The argument presented above rests on a distinction between actions or performances that are generic and actions or performances that are particular. It also relies on a distinction between proprietary rights and what I am calling “rights of ownership.” And I recognize that these distinctions may require more by way of defense than I provide here. My primary aim, however, is not to defend this picture of the nature of contractual performance against every possible objection but simply to show that Weinrib’s rejection of the idea that if a promisee and a promisor contract for something unique then the promisee has a proprietary right to the thing contracted for does not automatically lead to the conclusion that disgorgement for breach of contract is unavailable from the standpoint of corrective justice. Other possibilities must be considered.

VI. THREE APPLICATIONS

To recapitulate, I am arguing that even if we ignore the distinction between the object and the action contracted for, sense can still be made of the idea of ownership in contractual performance, and that this idea can serve to justify disgorgement damages in certain cases of breach of contract.

What I would like to do now is briefly review some cases in which such an award has been discussed. I propose to focus on three such cases: the Israeli case of *Adras Building Material v. Harlow & Jones*,⁵⁸ the U.K. case of *Attorney General v. Blake*,⁵⁹ and the Australian case of *Hospitality Group Pty Ltd. v. Australian Rugby Union Ltd.*⁶⁰

In the Israeli case of *Adras*, the defendant had agreed to sell steel to the plaintiff. When the price of steel spiked, however, the defendant instead sold the steel to a third party for a profit. Because the plaintiff failed to purchase substitute steel at the elevated price before the market receded, no loss was suffered. Nonetheless, the Supreme Court of Israel awarded the plaintiff the gain that the defendant had realized by selling its steel to the third party.

Given the foregoing analysis, it is clear that the decision in *Adras* is misguided from the perspective of corrective justice. Because the contract was for some steel, but no steel in particular, the contract did not give the plaintiff an ownership right in the defendant’s performance. To be sure, by selling steel to a third party, defendant became unable to sell steel to the plaintiff. But forcing the defendant to disgorge his profits is unjustified here. The reason is simple: there is no link, causal or otherwise, between the plaintiff’s (hypothetical) lost profits and the action that the plaintiff actually

58. C.A. 20/82, 42(1) PD 221 [1988], *translated in* 2 R.L.R. 235 (1995).

59. [2000] 3 W.L.R. 625 (H.L.).

60. [2001] F.C.A. 1040.

contracted for. Because the plaintiff contracted for a generic action rather than for a particular action, it is improper to argue that the action that the defendant performed with respect to the third party was the very action contracted for. It could not be, since no particular action was contracted for at all.

In *Blake*, George Blake, a former employee of the British intelligence service and a spy, breached his contract of employment with the Crown by publishing his memoirs. Although the contents of the memoirs were no longer confidential at the time they were published, and although Blake was not a fiduciary of the Crown, the House of Lords concluded that the Crown was entitled to the money owed to Blake by his publisher. Here the issue is more complicated than it was in *Adras*. A proprietary analysis will not do, since it is hard to see what possible object or thing could have been contracted for. So the only option is to argue that the Crown had a right of ownership in Blake's choice to perform or not perform a particular action. Here is such an argument: Blake's employment contract with the Crown required that he not publish his memoirs. This constitutes a form of negative covenant: Blake agreed that he would refrain from performing a certain action. By so agreeing, Blake transferred to the Crown rights of ownership in the action that consisted in his being able to publish his memoirs; as a result, that action was no longer one in which he had ownership rights. Consequently, in publishing his memoirs, Blake performed the very action in which the Crown had ownership rights. The preceding analysis therefore entails that the Crown was entitled to the profits realized by Blake as a result of his contractual breach.⁶¹

A third illustrative case is *Hospitality Group*. There the appellant Hospitality Group had sold "hospitality packages" to customers interested in attending various rugby matches in Australia. Hospitality Group, having no relationship with the plaintiff Australian Rugby Union (ARU), purchased tickets from a third party that had itself purchased tickets directly from ARU, and then Hospitality Group sold those tickets to its customers as part of its hospitality packages. These tickets contained a condition that they were not to be resold for a profit or used for any other commercial activity and that the bearer of a ticket could be denied entrance to the event if the ticket had been resold in contravention of the condition. The plaintiff ARU argued, first, that the defendant was bound by the contractual condition found on the tickets, and second, that by reselling the tickets, the defendant had breached its contract with ARU. ARU further argued that it was entitled to the profits realized by the defendant from its resale of the tickets. The defendant argued that because there was no privity of contract between it and ARU, it could not be held liable for breach of contract.

61. One consequence of this view is that where what is contracted for is that the promisor not do something, then where that thing is done, the promisee is entitled by way of right to any profits realized by the promisor as a result of her breach. But this seems not implausible.

The Federal Court of Australia held that the appellant was subject to the no-resale condition, that it had breached that condition by reselling tickets as part of its hospitality packages, but that disgorgement was not an available remedy. The court explicitly declined to follow *Blake* and instead endorsed the view that because damages for breach of contract are always compensatory, disgorgement for breach of contract is never available. On the present analysis, however, this is arguably a case in which disgorgement should have been available. If we agree, as seems plausible, that Hospitality Group accepted the conditions set out on the tickets, it follows that the defendant had a contractual relationship with the plaintiff. But the conditions there set out implied an implicit or subsidiary promise that the ticket holder would not perform a certain action, namely, resell the tickets for a commercial purpose. That leads to the conclusion that ARU had an ownership right in Hospitality Group's actions and that when Hospitality Group resold the tickets, ARU had a right to the profits acquired thereby. On the present analysis the remedy of disgorgement should therefore be available for Hospitality Group's breach of contract.

VII. FURTHER OBJECTIONS AND REPLIES

There are several residual objections that could be raised to the account set out above. First, there is the complaint that the account rests on a tenuous conception of what is acquired at contract formation. Second, there is the complaint that the account turns disgorgement damages into expectation damages. And third, there is the complaint that the account does not accurately represent the purpose that disgorgement damages play in other parts of private law and so cannot be appropriately generalized.

Let me begin with the first complaint. Can it be said that the account sketched above rests on a mistaken concept of what is acquired at contract formation? It is certainly true that the argument set out above owes much (too much?) to Kant's conception of contractual performance. Still, three things can be said in its favor. First, although I do not argue that we *must* think of contract formation and performance in Kantian terms, it remains an attractive account of what is acquired at contract formation and is therefore worth considering carefully. Second, because Weinrib appeals to the Kantian conception of contract formation, and because I am arguing that Weinrib's worries about the incompatibility of disgorgement damages with corrective justice are misplaced, it is appropriate to rely on the Kantian conception of contract formation in making that argument. And third, because my goal is to show how corrective justice and disgorgement for breach of contract can coexist, it is surely acceptable to do so by adopting a particular account of what is acquired at contract formation. Perhaps, as noted at the outset, my conclusion would be better expressed conditionally: *if* one adopts a Kantian conception of what is acquired at contract formation, *then* one can reconcile

disgorgement for breach of contract with principles of corrective justice. All the same, it is a conclusion that is worth taking seriously.

The second complaint is that the present account turns disgorgement damages into a form of compensation damages. By way of example, take a case where the promisor breaches his contract with a promisee and thereby realizes a profit that properly belongs to the promisee. Had the promisor not breached the contract, the profits (or perhaps more properly, the right to the profits) would have been the promisee's. So in requiring the promisor to disgorge his profits, the law is doing nothing more than putting the promisee in the position she would have been in had the contract been performed. In other words, just as with expectation damages, on the present account, the promisee is getting nothing more than what she was entitled to get and is therefore being compensated for what she has lost.

I am inclined to accept this conclusion with one important proviso. On the present account, disgorgement damages should be no more puzzling than expectation damages. Just as expectation damages serve to put the complaining party in the position she would have been in had the contract been performed, disgorgement damages do nothing more than give to a disappointed promisee what she was entitled to in the first place. They do not give her anything more; rather, they serve to compensate her for what she has been deprived of by way of the promisor's contractual breach.

The proviso I have in mind has to do with the meaning of "compensation." I suggested above that disgorgement damages serve to compensate, since they give to a disappointed promisee what she would have received had the contract been performed. But care must be taken. This is because "compensation" means different things to different people. On some views, many damage awards ought to be viewed as compensatory on the grounds that they are remedies for taking away the plaintiff's right to bargain.⁶² But in other situations, things are less clear.

Consider a case in which a defendant breaches her noncompetition agreement with her former employer and realizes a ten-thousand-dollar profit as a result. It may well be that had she not breached her noncompetition agreement, her former employer would have got some but not all of that business, in which case the defendant's gain would be greater than the plaintiff's loss. Nonetheless, some will say that awarding the plaintiff ten thousand dollars in damages is not so much disgorgement of gains as handing the plaintiff the value of the right that the defendant misappropriated, even though the award exceeds the plaintiff's loss. And perhaps such an award of damages can be thought of as being compensatory. Still, even if this is correct, this is surely not compensation in the sense of compensation for loss suffered. And there are some who would argue that such a remedy should not be thought of as being compensatory at all. For example, Robert Stevens

62. Here I have in mind the approach exemplified in R. Sharpe & S. Waddams, *Damages for Lost Opportunity to Bargain*, 2 O.J.L.S. 290 (1982).

argues that such an award might be better thought of as being *substitutive* for a right.⁶³ And substitutive damages of that sort seem distinct both from damages that compensate plaintiffs for losses suffered and from damages that strip defendants of gains realized as a result of breach of contract.

The upshot of the foregoing, therefore, is that so long as it is clear what is meant by “compensation,” nothing stands in the way of viewing disgorgement damages as a form of compensatory damages. Again, this is because disgorgement damages seek to put the disappointed promisee in the position she would have been in had she in fact received what she was promised and so was entitled to at the time of contract formation.

The third objection proceeds from the observation that disgorgement damages are awarded in cases where there has not been a contractual breach, as in cases of breach of fiduciary duty. According to this objection, the problem with the current proposal is that it fails to portray accurately the more general role played by the remedy of disgorgement in other parts of the law. I am tempted to say in response that my interest has been in disgorgement for breach of contract, not disgorgement in general, and thus that it is unfair to complain that I have failed to do something that I never set out to do. But still, there is something to this complaint, since one would like an account of disgorgement damages that is applicable not only to cases of breach of contract but to other cases as well. All the same, it seems to me that very idea underlying why disgorgement is an appropriate remedy for breach of contract—namely that the promisee has an ownership right in the promisor’s action—also applies to cases of breach of fiduciary duty. That is to say, the reason the fiduciary must give up any profits earned as a result of his breach of his fiduciary obligations is because, to the extent that the fiduciary treated as his own something the beneficial title to which properly belonged to the plaintiff, the plaintiff can legitimately complain that any profits thereby realized were hers: she had a right or entitlement to them. The underlying explanation is the same in both cases.

VIII. CONCLUSION

I began by arguing that the remedy of disgorgement is *prima facie* puzzling from the perspective of corrective justice. I then proposed a way of resolving this puzzle in a manner that is consistent with principles of corrective justice. This resolution depends on a particular interpretation of the expression “contractual performance.” Finally, I suggested that if the action contracted for is suitably particular, and if, in breach of contract, the promisor realizes a profit, then the promisee is entitled, by way of right, to those gains. The upshot of this argument is that the remedy of disgorgement for breach of

63. See R. STEVENS, *TORTS AND RIGHTS* ch. 4 (2007), at 70–72. See also the remarks in EDELMAN, *supra* note 2, at 184.

contract looks, at least from the perspective of corrective justice, similar to expectation damages; it also looks very similar to restitution.

I cannot claim that the position I am defending here is entirely novel. It finds support in the writings of Kant and more recently in those of Peter Benson and Ernest Weinrib. Nonetheless, the scope of this sort of position has, I think, been underappreciated. For if I am right, even scholars who do not distinguish between the *thing* contracted for and the *action* contracted for are committed to thinking that in certain cases a promisee has a right that a particular action be performed. And as I have tried to show, two further things follow from this: first, that if in such cases the promisor performs that action with respect to somebody else, the promisee's ownership rights in that action are violated; and second, that in such cases, any gains thereby realized by the promisor are subject to disgorgement and must be given back to the disappointed promisee.

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