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RESTITUTION FOR BREACH OF CONTRACT

Attorney-General v *Blake*[1]

THE recent judgment by Lord Woolf MR in *Attorney-General* v *Blake* confronted this issue head-on and in just three pages of condensed discussion,[2] though in *obiter dicta*, was rather determined to lay down a small bridgehead for restitution for breach of contract in the future.

Blake, a former member of the British Secret Intelligence Service, was convicted of unlawfully communicating information, to the former Soviet Union, contrary to Official Secrets Act 1911, and was sentenced to 42 years' imprisonment. He managed to escape from the prison and went to live in Moscow. He wrote an autobiography, detailing his activities as a member of the Secret Intelligence Service.[3] The main issues dealt with were those of fiduciary duty and the court's inherent power to grant injunctive relief in support of enforcing criminal law. These would not be discussed here.

The historical divide is very clear. For torts and contract, restitution is very rarely awarded. In equity, for breach of fiduciary duty and breach of confidence it is common to award restitution to the plaintiffs. The traditional view has always been that, in assessing damages for breach of contract, the courts are concerned with the plaintiff's loss, both expectation and reliance interests and not with the defendant's profit, the latter has always been regarded as irrelevant.[4] That resulted in the traditional strict denial of restitution for breach of contract and, can clearly be seen in cases like *Teacher* v *Calder*[5] and *Tito* v *Waddell*.[6]

1 [1998] 1 All ER 833.

2 *Ibid*, at 844-846.

3 Sir Richard Scott V-C described it as Blake's 'apologia for the course his life has taken', [1996] 3 All ER 903, at 906, [1997] Ch 84, at 90, *ibid*, at 838.

4 *The Solholt* [1983] 1 Lloyd's Rep 605, at 608; *Surrey County Council* v *Bredero Homes Ltd* [1993] 1 WLR 1361, [1992] 3 All ER 302, [1993] 3 All ER 705.

5 (1899) 1 F (HL) 39.

6 (No 2) [1977] Ch 106. However, where there has been a total failure of consideration, restitution is allowed. That is not in controversy. The restitutionary remedy is awarded because the basis on which the plaintiff has conferred benefit on the defendant has failed.

The Criticism

Although some academics argued for the *status quo*,[7] there has been widespread criticism of this rule. That has been explicitly accepted by Lord Woolf MR, through a good survey of the relevant literature. Lord Woolf MR explicitly recognised that, "if the courts were unable to award restitutionary damages for breach of contract, the law of contract would be seriously defective.[8]

Primarily, the criticism is that in many situations the plaintiff would be deprived of effective remedy for breach of contract, because of a failure to attach value to the plaintiff's legitimate interest in having the contract duly performed. There is indeed an irresistably strong argument from Professor Peter Birks that, where a legitimate interest faces the traditional, but inadequate remedy, then restitution should step in to do justice.[9]

Were there Exceptions?

Prior to *Attorney-General* v *Blake*, there have been exceptions, though in a contorted manner, showing that this denial of restitution rule in breach of contract was not absolute.[10] The gain or savings made by the defendant was sometimes used as the measure of the plaintiff's loss.

In *Wrotham Park Estate Co Ltd* v *Parkside Homes Ltd*,[11] the defendant had built some houses on land in breach of a restrictive covenant enforceable in equity by the plaintiff neighbouring landowner. Brightman J refused an injunction ordering the demolition of the houses. However it was held that

Now that the performance is to be totally abandoned, the benefit conferred earlier must be restored to the plaintiff. There is a condition, though. Money paid to the defendant is recoverable only if there has been a total failure of consideration that, the plaintiff had received no benefit from what he had bargained for. This requirement of total failure of consideration may have been relaxed by the Privy Council in *Goss* v *Chilcott*, [1996] AC 788, [1997] 2 All ER 110. Lord Goff, in *obiter dicta* (at 117) seemed to hold that a partial failure is sufficient to generate a restitutionary claim subject to the requirement that the plaintiff make a counter-restitution for any benefit he has received from the defendant.

7 For instance, I M Jackman argued that there may be no need for restitution to protect the facilitative institution of contract because protection is sufficiently provided by the standard award of expectation damages: (1989) 48 CLJ 302. R A Posner argued from the standpoint of 'efficient breach' theory that, it is more economically efficient to allow breach of contract than to deter it, as restitution would *prima facie* do: *Economic Analysis of Law* (3rd ed, 1986), at 107.

8 *Supra*, note 1, at 845.

9 P Birks, "Profits of Breach of Contract" (1993) 109 LQR 518.

10 No doubt in part affected by the desire to do justice when the courts had to go round the strict denial rule.

11 [1974] 2 All ER 321, [1974] 1 WLR 798.

although the plaintiff's land had not been diminished in value, the defendants were liable to pay substantial damages assessed using the 'hypothetical bargain' approach. What would have been a reasonable contract price for the plaintiff to accept relaxation of the covenant? That was the measure used. In calculating this, a major factor taken into consideration was the defendant's profits from the housing development. Brightman J further emphasised that it was artificial to pretend that the plaintiff would ever have relaxed the covenant. Arguably, damages, in this case ought to be regarded as restitutionary, not compensatory. Furthermore, the authorities that Brightman J relied on in his judgment were tortious restitution cases.[12] However, some argued that the foundation for restitution is the equitable wrong, not the breach of contract.[13] In *Attorney-General* v *Blake*, Lord Woolf MR firmly rejected this artificiality of referring to the proprietary nature of the claim to enforce restrictive covenants annexed to the land.

In *Surrey County Council* v *Bredero Homes Ltd*, both Ferris J of the Chancery Division and the Court of Appeal[14] took a narrow interpretation of *Wrotham Park*. Ferris J limited the claim to nominal damages, as the plaintiff council had suffered no loss. Ferris J distinguished the *Wrotham Park* case on the basis that it was about equitable damages only. There was no jurisdiction to award equitable damages here as at the time the writ was issued, there was no case for an injunction or specific performance. The Court of Appeal affirmed this, and further shot down some of the arguments raised by the council.

The fact that the defendant's breach of contract was deliberate and cynical was not a vital factor for awarding restitution. Steyn LJ emphasized that to concentrate on the motive of the party in breach would be contrary to the general principles of contract law. Lord Woolf MR agreed to this.[15] The fact that the breach of contract was deliberate and cynical is *not by itself* a good ground for departing from the general rule of denial of restitution.

[12] *Whitwham* v *Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538, 65 LJCh 741, 74 LT 804; *Strand Electric and Engineering Co Ltd* v *Brisford Entertainments Ltd* [1952] 1 All ER 796, [1952] 2 QB 246, 46 Digest (Repl) 485; *Penarth Dock Engineering Co Ltd* v *Pounds* [1963] 1 Lloyd's Rep 359.

[13] *Eg, Hospital Products Ltd* v *United States Surgical Corporation* (1985) 156 CLR 41, where the majority of the High Court of Australia (Mason CJ and Deane J dissenting) denied restitution because there was no fiduciary relationship, and only a contractual breach.

[14] *Supra*, note 4, comprising Dillon, Steyn and Rose LJJ.

[15] *Cf* P Birks argued for a cynical wrongdoing test that, restitution should be more widely available as a remedy for breach of contract: "Restitutionary damages for breach of contract: *Snepp* and the fusion of law and equity" (1987) LMCLQ 421.

No doubt, it was also a difficult test to apply in practice and that inquiry into the motive of the party in breach can be problematic.[16]

Arguably, the court should take this into account, and in appropriate circumstances, should count as a *factor* for awarding restitution, to signify that certain horrendous and cynical breaches are not acceptable. Lord Woolf MR did not seem to rule this out.

Also in *Bredero Homes*, the council's argument that the court should award restitution where the party in breach could have been restrained by an injunction from committing the breach or compelled by specific performance, was rejected.[17] However, a different Court of Appeal in *Jaggard* v *Sawyer*[18] took a rather different approach. It held that a court, when exercising its discretion to award damages in lieu of an injunction could, in certain cases, award damages based on the sum that the plaintiff would have demanded for the sale of his right which had been infringed. This is a rather difficult way ahead. Would the bars to specific performance in contracts of personal service or where there was severe hardship, also rule out restitution? Should there be different treatment for different types of injunctions?

Not a Rule of General Discretionary Power to Award Restitution

However, Lord Woolf MR was not prepared to go the way of the radical proposal by Lord Goff and Professor Jones in *The Law of Restitution*,[19] that restitution should be available wherever the defendant has made a gain that he would not have made but for the breach of contract. Under this proposal, courts should have a general discretion to refuse restitution taking into account factors such as the nature of the contract, whether the breach was cynical and any delay by the plaintiff in suing for restitution.[20]

[16] Lord Woolf MR referred to a similar point made by Lord Keith in *Attorney-General* v *Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, at 643, [1990] 1 AC 109, at 261, who said a natural desire to deprive a deliberate wrongdoer of profits is not a valid ground for departing from the normal measure of damages for breach of contract.

[17] *Cf* Beatson argued that restitution could in reality be a monetised form of specific performance, *The Use and Abuse of Unjust Enrichment* (1991).

[18] [1995] 1 WLR 269, [1995] 2 All ER 189, comprising Sir Thomas Bingham MR, Kennedy and Millett LJJ.

[19] (4th ed, 1993).

[20] See also G Jones, "The recovery of benefits gained from a breach of contract" (1983) 99 LQR 443.

Restitution only in Exceptional Circumstances

Instead, agreeing with Steyn LJ in *Bredero Homes*, Lord Woolf MR was only prepared to contemplate restitution in exceptional circumstances.[21] Two exceptional circumstances were accepted as sufficient for the court to consider awarding restitution.

First, where there was skimped performance. This is where the defendant fails to provide the full service, for which he has charged the plaintiff.[22] Justice demands an award of substantial damages in such a case. The amount of expenditure that the defendant had saved through such skimped performance should provide an appropriate measure of damages. It could be presumed that the plaintiff has suffered a loss of an amount corresponding to the amount by which he has been overcharged for the service actually provided. Lord Woolf MR invoked the notion of 'consumer surplus' as support. I take this to mean that the plaintiff, if given the full information of the defendant's condition of product or service, would have asked for a lower price, and would only be willing to pay for the lower price. Under the circumstances, the plaintiff had paid a much higher price. It is this economic concept that could mirror the effect of restitution.[23]

Second, where the defendant did precisely the thing he contracted not to do.[24] In *Attorney-General* v *Blake*, Lord Woolf MR said it covered exactly the facts of the case. As a member of British Secret Intelligence Service, Blake had promised not to disclose official information but he did precisely that for profits, in the publication of his autobiobraphy.

[21] Of course, compensatory damages must first be inadequate as a remedy in the circumstances.

[22] Lord Woolf MR referred to the case cited by Professor Jones, *City of New Orleans* v *Firemen's Charitable Association* (1891) 9 So 486 in his article, *supra*, at note 20, at 455. The defendant contracted with the plaintiff to provide a firefighting service. The defendant was paid the full contract price. After the expiry of the contract, the plaintiff discovered that the defendant had not provided the stipulated number of firemen or horses or the promised length of hosepipe. The defendant had saved itself substantial expense by the breach. However, the defendant had never failed to put out any fires in consequence. The court ruled that the plaintiff had not proved that he suffered any loss and was unable to recover more than nominal damages.

[23] Lord Woolf MR said, "But it would surely be preferable, as well as simpler and more open, to award restitutionary damages." *Supra*, note 1, at 846. This is indeed the frank and open approach that we need from courts, to render it obsolete and unnecessary the use of abusive instrumentalism. See Steyn LJ in *Bredero Homes, supra*, note 4, [1993] 3 All ER 705, at 714, shot down the argument of loss of bargaining opportunity. See R S Sharpe and S M Waddams in "Damages for Lost Opportunity to Bargain" (1982) 2 OJLS 290.

[24] See P Birks, *supra*, note 15.

Lord Woolf MR went on to say that these (very narrow) circumstances regarded as sufficient for the courts to consider awarding restitution, have two things in common. First, the profits are occasioned directly by the breach. Furthermore, there was 'deliberate wrongdoing' that could have been restrained by injunction.

Though *obiter dicta*, this is still a step forward, but not as far as one would prefer. The general rule that damages for breach of contract are compensatory is maintained. But the law can now accommodate claims of restitution in exceptional circumstances, but very narrow exceptional circumstances.

Surely, the circumstances are so varied in the contractual transactions, that the courts ought to have the discretion to award restitution in well-deserved cases. It would have been more exhilarating if the frank and open manner that Lord Woolf MR had manifested in addressing the criticisms of the general denial rule, was carried all the way through.

Of course there is the fear that the difficulty of drawing a line, may allow rampant restitution. But that fear is arguably, unfounded. Steyn LJ feared uncertainty and that restitution would discourage certain economic activity.[25] Surely, the courts are capable to work out the discretion, just like in any other areas of law, in a principled way, laying down guidelines and allowing for incremental and consistent development in the future. Lord Woolf MR's two narrow exceptional circumstances, would be certain. But it is unlikely to do full justice or that it would bring about future principled development, which inevitably requires the courts to have a wider discretion, as advocated by Lord Goff and Professor Jones.

It is foreseeable that this half-measure will be challenged by future cases. There is no clear rationale of having just these two narrow exceptions to the general denial of restitution. The courts will have to confront the issue where the facts are different, but where restitution is well-deserved, and yet do not fall squarely into the two narrow exceptional circumstances. Hopefully by then, whilst doing justice to the plaintiffs, the issue can be addressed in a proper manner, and the law set on a proper course.

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[25] *Supra*, note 4, at 715.

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