

# **LIABILITY TO DISGORGE PROFITS UPON BREACH OF CONTRACT OR A DELICT**

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## **SUMMARY**

Remedies regarding contract and tort are, generally speaking, concerned with the incidence of liability for loss or damage suffered, whereas the claim in unjust enrichment is said to require that the enrichment has occurred at the expense of the creditor. Consequently claims for breach of contract and tort are brought for damages. The following claims will, however, be denied: profits from the party who breached the contract, the tortfeasor or which the otherwise unjustly enriched defendant has gained as a result of breaching the contract, committing the tort or invading the rights of the plaintiff. There are, however, numerous exceptions to this general rule to be found in various jurisdictions. Consequently the question arises whether these exceptions do or do not amount to a new general rule concerning disgorgement of illegally obtained profits.

## **1 A FEW EXAMPLES**

The lease agreement contained a clause in terms of which only the tenant and his family could occupy the premises. Sub-letting was specifically prohibited in terms of the agreement. Despite this the tenant willingly and knowingly breached his contract by sub-letting the premises. The question which arises in this instance is whether he may keep the proceeds of his breach of contract or whether he is liable to disgorge his profits. If in terms of his employment contract the bookkeeper agreed not to engage in any paid work after hours, but he nevertheless renders his services to acquaintances during the late evenings of the weekends, may he then keep the proceeds of this breach of contract or is he liable to disgorgement of his profits? If someone sells a property of somebody else, he may be liable to pay damages to the dispossessed owner. These damages will generally consist of the fair market-price, but if the seller managed to get a much better price, may he then keep the difference or does the dispossessed owner have a claim to the full amount of the realized price? If the defendant commits trespass, for example, by conveying minerals through passages under the claimant's land

in order to save expenses, is he then liable to disgorgement of the savings in favour of the owner, even if he did not cause any harm? If a journalist or a photographer pursues only his own commercial interests and therefore publishes surreptitiously take photographs or fictitious interviews, is he then liable to pay just the proved damages of his victim (if any) or is he also liable to disgorgement of his profits?

## 2 THE PROBLEM: DAMAGES OR DISGORGEMENT OF PROFITS?

The different examples discussed above, partly to be subsumed under the heading of breach of contract, partly under delict, have a common core. Generally speaking both in contract and in delict the appropriate remedy is a claim for damages brought by the victim against the perpetrator. In the various cases, however, the calculation of these damages raises a serious problem. Does the landlord really suffer any quantifiable harm when a decent subtenant occupies the dwelling despite a prohibition on sub-letting? He receives the rent agreed upon, the house does not suffer any more than if it were inhabited by the tenant, so why should anyone be concerned about the gain made by the tenant? The same question arises for the employer of the bookkeeper. Can he really prove any sustained harm, at least as long as the bookkeeper refrains from rendering his service the employer's clients? What about the princess, whose photograph was taken by a paparazzo, while she was sunbathing? Are these any quantifiable damages to be identified? Can any action be brought by a party if he suffered no harm? A negative answer to that question lies around the corner. Indeed, that is exactly the consequence Sir Oliver Wendell Holmes Jr wanted to draw.

"The duty to abide by a contract at common law means that you have pay damages if you do not abide by it – and nothing else. If you commit a delict, you are liable to pay a compensatory sum. If you breach a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference."<sup>1</sup>

It is all about economics. The (in financial respect) most advantageous act is preferable. The calculating citizen, Mammon of the Old Testament, makes a glorious entry into the arena of the law. The stock-example is the boxer Jack Dempsey. Notwithstanding a prior contract with the Chicago Coliseum Club regarding a fight against Harry Wills, Dempsey nevertheless preferred the apparently more profitable contract offered to him by another theatre to defend his title of world heavyweight boxing champion in a fight against Gene Tunney. Oliver Wendell Holmes himself, however, realized that this purely economic approach of the law does not find unanimous appraisal. "Such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can", he reviled. Indeed, opposite Mammon stands Dike, the Greek predecessor of Justitia, who has taught for many years that contracts are binding (*pacta sunt servanda*) and delicts are wrongful. The proposition that only a claim for damages can be brought implies the undeviating denial of a claim to recover

<sup>1</sup> Holmes Jr "The Path of the Law" 1897 10 *Harvard LR* 457 462.

the profits made by the party who is in breach of the contract or by the perpetrator of a delict as a result of his breach of contract or his delict. Which system should prevail? One might wonder whether Mammon does not seem to encourage misfeasors. Should the misfeasor, who has no reason to fear any loss and lets only his pursuit of gains determine his acts, should Mammon really have the final say? Upon a closer look it turns out, that the rule that in case of breach of contract or of delict only remedies for damages will stand, has never been a completely unchallengeable imperative. Even hardliners such as Oliver Wendell Holmes have to admit that both in legal practice and in theory, there is some reason to test these borderlines of the law of remedies. Dike has been gaining ground from Mammon, for example, in case of wilful breach of contract. Although formally maintaining the tenet that the remedy for breach of contract consists of a claim for damages, from a substantive point of view the common law nevertheless already in the 19<sup>th</sup> century recognized an exception to this rule by giving a very wide interpretation to the concept of damages. In terms of this interpretation *expectation damages* were also subsumed within the ambit of damages. In case of a wilful breach of expectation the creditor needs not offer further proof than that the damages were foreseeable.<sup>2</sup> In other jurisdictions ethical foundations of the law of damages are undeniably making progress. We shall compare recent developments in English and German law and eventually draw a few conclusions.

### 3 ENGLISH LAW

One of the important remnants of the distinction between law and equity is the concept of constructive trust.<sup>3</sup> It seemed to occur for the first time in section 8 of the Statute of Frauds of 1877 and was a useful tool for the Chancellor to come to the aid of victims of fraud, duress, misuse of circumstances and misuse of confidence. A recent application of the concept may be found in the decision of the House of Lords in *Foskett v McKeown*.<sup>4</sup> Mr Murphy was chairman of an investment company. As such he had bought a plot of land in the Algarve, Portugal, but he failed to develop it. For his personal account he had taken out a life-insurance policy upon his own life. He had paid the first three (out of five) premiums from his own money. For the last two premiums he, however, used company's money. He tried to solve his financial problems by committing suicide. His children were paid £1,000,000 under the insurance policy. The shareholders of the company claimed 40% of the proceeds of the policy as a proportionate share. The defendants argued that only an equitable lien was available, and the beneficiaries should only receive the amount taken. In the Court of Appeal Sir Richard Scott VC stated that a beneficiary should get a share of the property's total value that was created by any expenditure deriving from trust-property money.<sup>5</sup> In the House of Lords Lord Millet made use of the concepts of constructive trust and tracing and ruled

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<sup>2</sup> *Hadley v Baxendale* 156 Eng. Rep. 145 (1845).

<sup>3</sup> McFarlane "The Centrality of Constructive and Resulting Trusts" in Mitchell (ed) *Constructive and Resulting Trusts* (2010) 207-235; also Oxford Legal Studies Research Paper No. 34/2009 <http://ssrn.com/abstracts=1494945>; and Swading "The Fiction of the Constructive Trust" 2011 *Current Legal Problems* 1-35.

<sup>4</sup> [2000] UKHL 29, [2001] 1 A.C. 2001.

<sup>5</sup> [1998] Ch 265, 278.

that the use of the money Mr Murphy had had on trust constituted a right of the beneficiaries to the payment. Tracing relates to inherent value. Just as if the trustee had taken money, bought a lottery ticket and won, it would be fair to take away the winnings.

This is a good example of disgorgement of profits after and because of invasion by a fiduciary of the rights of those in respect of whom he stands in a fiduciary relationship. This is a fairly modern development, of which the tendrils reach back to the 18<sup>th</sup> century. Famous in this respect is *Keech v Sandford*.<sup>6</sup> In that judgment King LC had argued that the trustee could not renew nor continue a lease in his own name, even if it was not the lessor who had previously refused the renewal or continuation of the lease: “for I well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to ‘*cestui que*’ use”. A conflict of interests lies around the corner, “for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to *cestui que* use”. Specifically in equity one has to be very vigilant. The decision has been very influential. The English are particularly cautious when it comes to a possible conflict of interests. It is a broad Draconian principle that in fiduciary relations an undisputed and indivisible loyalty to the interests of the principal is expected. If the trustee commits any act which conflicts with the principle and thus gives way to his own interests, then he is, irrespective of the harm the trust suffered, liable to disgorgement of his gains via the equitable remedy of account of profits. This principle was recently confirmed in *Boardman v Phipps*.<sup>7</sup> It follows from the sole fact that Boardman was the solicitor to a trust that he had to refrain from any act that could place him in a position where there was even the slightest possibility that the fiduciary position might be abused. Danie Visser considers this an “extremely rigid approach that English law adopts in this regard”, but it is trite law that the trustee is liable to disgorgement of his gains, irrespective of the damages suffered by the trust. The position in South African law is similar. South Africa has also developed a liability to disgorge secret or unauthorized profits as part of a director’s fiduciary relationship to the company. It is, however, doubtful whether the remedy classifies as a remedy for unjust enrichment since the latter presupposes an impoverishment at the side of the plaintiff, whereas the action for account of profits seems likely, irrespective of this impoverishment.<sup>8</sup>

There is a second loophole in the law of damages, although of smaller proportions. Unauthorized use of or intermeddling with another’s property may constitute a delict, for example, the common-law delict of conversion. According to § 227 of the Second Restatement of Torts, one who uses a chattel in a manner which is a serious violation of the right of another to control its use is subject to liability to the other for conversation. The remedy that can be brought is generally a remedy for damages, but even if no harm is suffered American law seems to have no hesitation to award a claim. The most famous example is that of the egg-washing machine in *Olwell v Nye &*

<sup>6</sup> (1728) Cas.temp.King 61.

<sup>7</sup> [1966] UKHL 2; and quoted by Visser *Unjustified Enrichment* (2008) 691.

<sup>8</sup> *Bray v Ford* [1896] AC 44 51–52, per Lord Herschell, the no possibility of conflict rule is “based upon the consideration that, human nature being what it is, there is danger of the person holding a fiduciary position being swayed by interest rather than duty ...”

*Nyssen Co.*<sup>9</sup> Before the war Olwell had sold his company to Nye & Nyssen with the explicit exclusion of a number of machines. Under the circumstances of the financial crisis the buyers considered it cheaper to use manual labour. During the war, however, circumstances changed, manual labour became rare and consequently expensive. They started to make use of the machines which had been stored. Although the re-installment thereof did not deprive the seller of their use, not affect their ability to operate, nor their value, the court nevertheless allowed the claim for a substantial amount of money, ruling that the wrongful invasion of the property rights by Nye & Nyssen to exclusive use of the machines constituted a loss which was compensable in law. Similarly decided is the famous case of the “Great Onyx Cave”, also known under the name of the litigants: *Edwards v Lee’s Administrators*,<sup>10</sup> Edward had discovered a cave under his land. The entrance was on his land. He named it the “Great Onyx Cave”, no doubt because of the rock-crystal formations within it which are known as onyx. He embarked upon a programme of advertising and exploitation for the purpose of bringing visitors to his cave and it became a well-known and well-patronized cave. A stream of tourists yielded substantial revenue. As a result of this Lee, an adjoining landowner, filed a law-suit against Edwards. Claiming that a portion of the cave was under his land and alleging that this was admittedly a case of wilful trespass, he prayed for damages and brought an action for an accounting of the profits which resulted from the operation of the cave. Edwards, from his side, urged that the action sought was fundamentally an action arising from trespass and could therefore not relate to more than nominal damages, which were to be accounted upon nil, since Lee had nothing more than simply a hole in the ground, about 360 feet below the surface, which he could not use and which he could not even enter except by going through the mouth of the cave on Edwards’ property. In the end the Court of Appeal of Kentucky formulated their policy concern: “a wrongdoer should not be permitted to make a profit from his own wrong”. That statement might lead into the heart of the matter: damages or disgorgement of profits, but the Kentucky Court of Appeal did not draw the ultimate consequences of their own policy concern and they awarded the appellee a portion of the net profits Edwards had made equivalent to the sizes of their properties. Edwards had to pay one third of his net profits.

The case shows a substantial similarity to another that was recently decided by the Supreme Court of the United Kingdom, *Star Energy Weald Basin Ltd v Bocardo SA*.<sup>11</sup> Bocardo was the freehold owner of the Oxsted Estate in Surrey. Star Energy had an exclusive licence to drill for oil in Surrey, including the Oxsted Estate. In order to recover the oil Star Energy sank three diagonal wells into the substratum by means of drilling, partly through the underground of the Oxsted Estate. This gave rise to two different questions, the first of which related to the qualification of this perpetration: does it amount to an actionable trespass? This question having being answered in the affirmative, a second one arose, relating to the quantification of damages.

<sup>9</sup> 173 P.2d 652 (Wash. 1946); and Visser *Unjustified Enrichment* 666.

<sup>10</sup> 96 SW (2d) 1028 (Court of Appeal Kentucky 1936). Ziff and Bruce “The Great Onyx Cave Cases – A Micro-history” 2 February 2012 <http://ssrn.com/abstract=1998381> or <http://dx.doi.org/10.2139/ssrn.1998381>.

<sup>11</sup> [2010] UKSC 35.

Since no visible or tangible damage to the Oxted estate had occurred Star Energy took the position that no damages could be awarded. Lord Hope, who delivered the leading speech, however, argued that, if damages are to be assessed on a way-leave or use basis, their measure would be the price that reasonable persons in the position of the parties would have negotiated for a grant for a contractual right for the licensee to extract the oil through the substrata below the Oxted Estate. The Supreme Court eventually remitted the issue of damages to the High Court for determination.

Breach of a fiduciary duty may lay the foundation for liability to disgorgement of profits, even if the harm suffered is calculated upon a lesser amount; similarly an intentional breach of contract or an intentional trespass may lead to disgorgement of profits instead of the payment of damages. The last category can easily be extended to the infringement of personality rights or of intellectual property rights, patents, and rights in designs or copyrights. More interesting, however, is a recent paradigm shift in English law, where a contractual obligation was at stake: *Attorney General v Blake*.<sup>12</sup> *Blake* was a spy. He entered the English Secret Intelligence Service (MI6) in 1944 and took the oath never to reveal any information acquired while on duty. He was anything but a good spy. The Russians caught him, brainwashed him and turned him around. Thereupon the English trapped *Blake* and locked him up in Wormwood Scrubs, one of the bigger penitentiary institutions in Britain. He managed to escape, made his way to Moscow, where he wrote his memoirs, no doubt in breach of his oath. The Attorney-General could not prove any harm suffered by the state (who on earth could have any pecuniary interest in code-breaking activities during World War II?) so he brought the action for account in order to switch the stream of royalties into the direction of the state. Lord Nicholls drew a comparison with the violation of a fiduciary duty. “[Blake] was under a continuing obligation which was ‘closely akin to a fiduciary obligation’”, he remarked and consequently he granted the action for account, stating that disgorgement of profits “reinforces the wider duty of fidelity”. The House of Lords held that in exceptional circumstances an account of profits had to be available as a remedy for breach of contract instead of an action for damages. Although the decision came under severe attack, it nevertheless also found firm support. Steve Hedley argued that the decision in *Blake* constituted such a decisive deviation from the law of damages that it required a statutory basis.<sup>13</sup> Other critics related to the misuse of certain precedents. *Blake* may be a decision that deserves further scrutiny, but it was confirmed in a number of cases. The first is that of *Esso Petroleum C Ltd v Niad Ltd*,<sup>14</sup> in which Esso was awarded the action for account against Niad, that had sought to dive Esso’s price-watch scheme. In *Experience Hendrix LLC v PPX Enterprises Inc*,<sup>15</sup> the estate of Jimmy Hendrix disgorged the proceeds of illegal use of the master recordings of his music. In *WWF – World Fund for Nature v World Wrestling Federation Entertainment Inc*,<sup>16</sup> the wrestlers tried to make use of the identity of the abbreviations of their names (*WWF*) in order to

<sup>12</sup> [2000] UKHL 45; [2001] 1 A.C. 268.

<sup>13</sup> Hedley “Very Much the Wrong People: The House of Lords and Publication of Spy Memoirs (*A-G v Blake*)” 2000 *Web Journal of Current Legal Issues*.

<sup>14</sup> [2001] All E.R. (D) 324.

<sup>15</sup> 1 All E.R. (Comm) 830; [2003] EWCA Civ 323.

<sup>16</sup> [2007] EWCA Civ 286.

receive donations, and in *Giedo van der Garde BV v Force India Formula One Team Ltd*,<sup>17</sup> Van der Garde claimed the savings incurred by his sponsor since the latter, being in breach of contract, refused him the use of the racing car for educational purposes.

Infringement of fiduciary duties stands at the basis of liability for disgorgement of profits. From there it is a small step to intentional trespass and conversion, leading to the same consequences. Another small step leads to disgorgement of profits in cases of infringement of personality rights, patents or other intellectual property rights. It is, however, a huge step from the infringement of fiduciary duties to breach of contract, even when the obligations are akin to fiduciary duties. The development since *AG v Blake* challenges the law of damages. Rightly so?

#### 4 GERMAN LAW

The text of § 812 BGB provides as follows:

“(1) A person who obtains something as a result of the performance of another person or otherwise at his expense without legal grounds for doing so is under a duty to make restitution to him. This duty also exists if the legal grounds later lapse or if the result intended to be achieved by those efforts in accordance with the contents of the legal transaction does not occur ...”

This provision may be traced back to the Second Committee that prepared the German codification. It is an open question whether they really intended to lay the foundations for two different remedies in restitution. In the footsteps of Von Savigny the codifiers tried in first instance to unify the different remedies (*condictiones*) of Roman law, in order to create one single instrument to turn back mistaken payments and infringements of another person's rights. Whatever the answer may be, as early as 1909 Fritz Schulz wrote a long, extremely influential article on disgorgement of profits.<sup>18</sup> According to him every infringement of another person's right (*Eingriff*) requires restitution. The remedy for this is the *Eingriffskondiktion*. Thus Schulz laid the foundation for the typology which was later developed by the Austrian scholar Wilburg and upon which his German colleague Von Caemmerer further elaborated.<sup>19</sup> Given the text of the BGB they distinguished between a remedy to make good a mistaken performance (*Leistungskondiktion*) on the one hand and a remedy to make good an otherwise wrongly acquired enrichment on the other hand (*Nichtleistungskondiktion*), among which the *Eingriffskondiktion* was to be classified.<sup>20</sup> Fundamental to the *Leistungskondiktion* is the transfer of ownership *sine causa*/without legal ground. The *Eingriffskondiktion* required the infringement of the right to exclusive enjoyment, which is an essential

<sup>17</sup> [2010] EWHC 2373.

<sup>18</sup> Schulz “System der Rechte auf den eingriffserwerb” 1909 105 *Archiv für die civilistische Praxis* 1-485. Under the Nazi-regime Schulz (1879-1957) fled to England. Ernst wrote his biography in Beatson and Zimmerman (eds) *Jurists Uprooted. German-speaking Émigré Lawyers in Twentieth-century Britain* (2004) 105-204.

<sup>19</sup> Von Caemmerer “Bereicherung und unerlaubte Handlung” in Dölle, Rheinsteiner and Zweigert (eds) *Festschrift für Ernst Rabel Vol 1: Rechtsvergleichung und Internationales Privatrecht, Tübingen* (1954) 335ff (repr *In Gesammelte Schriften Vol 1* 211ff).

<sup>20</sup> Schermaier “Performance-based” and “Non-performance Based” Enrichment Claims: The German Pattern” 2006 14 *European Review of Private Law* 363-388, with further litt.

component of any property-right (and several other rights). For Wilburg the right of the wrongfully dispossessed owner to the fruits taken by the possessor entails also the right to disgorge the profits gained by the illegitimate use of another's property. For Von Caemmerer the solution to the problem was to be found in a quasi-contractual relationship between the owner and the possessor, in terms of which they agreed upon the liability to disgorgement of the illegally obtained fruits.

Wilburg and Von Caemmerer found strong support for their view in German case law. The German Supreme Court (*Reichsgericht*) as early as 1895 decided the so-called *Ariston*-case.<sup>21</sup> Ariston manufactured devices that with the help of specially prepared cards produced music. A composer who had until then remained unknown learnt that Ariston made use of his compositions in the production process. He brought an action for disgorgement of the proceeds. The *Reichsgericht* qualified the whereabouts of Ariston as an infringement of the composer's copyrights, which gave rise to a claim for damages. The quantification of these damages was anything but simple. Thanks to Ariston the previously unknown composer had acquired a good reputation and the sale of his compositions had made an enormous leap forward. The same problem occurs when one departs from a fictitious licence. With reference to what time does the calculation of the value have to start? In the days when the well-known composer was still unknown? The *Reichsgericht* preferred another mode of calculation. The harm suffered by the composer equals the amount he would have been able to earn, had he commercialized his compositions himself. There is no reason to suppose that this amount deviates from the gains Ariston had made by exploiting the compositions without paying any royalties. Therefore the *Eingriffskondiktion* led to payment of damages by Ariston to the composers that equalled the illegally obtained gains of Ariston. From a substantive point of view this approach shows an important resemblance to disgorgement of profits, almost 100 years before the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in its article 45 gave way to this principle. We should, however, realize that the *Reichsgericht* reached the result by departing from the payment of damages, whereas the TRIPS treaty opens the road for disgorgement of profits right away. The similarity of the results, however, is a serious crack in the concrete wall of the calculation of damages, which aims to place the claimant in the position he would have been in, had it not been for the breach of contract or delict.

There is another slit to be seen, the remedy for management of another person's affairs (*negotiorum gestio*). From the days of Roman law onwards the manager of another person's affairs was liable to complete the work he had voluntarily undertaken and he had a right to indemnification. At the beginnings of the 3<sup>rd</sup> century AD the Roman jurist Ulpian advocated that the manager undertook the obligation to transfer any proceeds of his involvement to the one in whose name he had acted. The text in question<sup>22</sup> serves as the argument that already the Romans made use of the action for management of

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<sup>21</sup> RG 8 June 1895, RGZ 35, 63ff.

<sup>22</sup> D.3.5.5.5Ulp.



another's affairs as an enrichment action.<sup>23</sup> More important, however, is that fact that the Germans proceeded upon this road. To them the sale of another person's assets qualified as management of another person's affairs, albeit a false manager because of the lacking will to serve the other person's interests, but nevertheless the legal consequences of management of another person's affairs were attached to these acts. The proceeds belonged to the owner on the same basis if its sale proceeded from genuine management of another's affairs. This provision is laid down in § 687 Abs 2 BGB:

"(2) If a person treats the business of another person as his own although he knows that he is not entitled to do so, then the principal can assert claims resulting from §§ 677, 678, 681 and 682. If he asserts them, then he is under a duty to the voluntary agent under § 684(1)."

This equals disgorgement of profits.

This reasoning holds true in the context of a quasi-contract, the management of another's affairs. Similar reasoning is found in the context of the contract of mandate. It follows from § 667 that a fiduciary relation imposes a special liability to disgorgement of profits: The mandatory is obliged to return to the mandatory everything he receives to perform the mandate and what he obtains from carrying out the transaction. This obligation is not only restricted to the contract of mandate; according to German case law it also applies to contracts of partnership<sup>24</sup> and to administrators of any legal entity.<sup>25</sup> There is no doubt that the employee is liable to disgorgement of the bribes taken.<sup>26</sup> Similarly the fiduciary obligation of the director *vis á vis* his company does not come to an end with his dismissal. When he persuaded personnel to come over and accept a job in his newly started competing company his behaviour qualified as inappropriate and he was liable to disgorgement of his gains. A few years ago Konrad Busch focused the attention upon the convergence of these German provisions and this case law on the one hand and the fiduciary duties of the common law on the other.<sup>27</sup>

It should be noticed, however, that not every obligation implies fiduciary duties. Consequently not every breach of contract (or delict) entails liability to disgorgement of profits. The *Eingriffskondiktion* will stand in cases of infringement of the right to enjoy a thing (*Zuweisungsgehalt*). Generally speaking ownership involves the right to enjoy. Therefore unauthorized use of someone else's property qualifies usually as a cause of action for the *Eingriffskondiktion*. This is, however, not always the case. The landlord awards the tenant the right to enjoy the leased property. Consequently it is not the landlord's right to enjoyment of the property that is violated in case of a

<sup>23</sup> Von Caemmerer and Schlechtriem *Restitution/Unjust Enrichment and Negotiorum Gestio* [International Encyclopedia of Comparative Law Vol 10] (2007); and Harke *Geschäftsführung und Bereicherung* [Schriften zur Europäischen Rechts- und Verfassungsgesch 53] (2007) 47ff.

<sup>24</sup> § 61 HGB, §§ 113, Abs 1, 161 Abs 2 HGB.

<sup>25</sup> § 88 Abs 2 Aktiengesetz.

<sup>26</sup> BAG 14 July 1961, NJW 1961, 2036; disapproved by Seller, Münch, Komm § 18.

<sup>27</sup> Rusch *Gewinnhaftung bei Verletzung von Treuepflichten. Eine rechtsvergleichende Untersuchung zum englischen und deutschen Recht* [Max-Planck-Institut für ausländisches und internationales Privatrecht. Studien zum ausländischen und internationalen Privatrecht 109] (2003); and dez. Gewinnabschöpfung bei vertragsbruch – Teil II, Anmerkung zu der Entscheidung des House of Lords vom 27. Juli 2000 (*Attorney General v Blake*), Zeitschrift für Europäisches Privatrecht 2002 122ff.

forbidden sub-lease. Therefore he cannot file an *Eingriffskondiktion* against the tenant, nor can he claim the proceeds of the breach of contract.<sup>28</sup> Only under very special circumstances will this be different. In 2001, that is, after the fall of the Berlin wall, the *Bundesgerichtshof* ruled that a landlord in the German Democratic Republic, who had been forced to rent-lease out his property had not voluntarily given up his right to enjoyment and therefore could bring the *Eingriffskondiktion* against the tenant in order to claim the proceeds of the forbidden sub-lease.<sup>29</sup> A similar decision was taken against the tenant who refused to comply with the court order to leave the property. Because of the court order he had lost the right to enjoyment, which had returned to the owner, the forbidden sub-lease infringed upon the owner's right to enjoyment, consequently the *Eingriffskondiktion* would stand.<sup>30</sup>

We may silently surpass the regulation of § 285 BGB, which provides for the case in which the performance has become impossible and the debtor consequently is liberated from his obligation. If he receives a sum in view of this impossible performance, he is liable to disgorgement of what he acquired. The seller who can no longer transfer ownership since the sold property ceased to exist, is obliged to hand over the money he receives from the insurance company, or from the second buyer.<sup>31</sup> This discourages calculating citizens.

The last example taken from German law relates to the personality rights and the intellectual property rights. Given the rather limited definition of the concept of delicts in § 823 BGB the violation of these rights gave only at a relatively late stage during the "50s of the last century rise to claims in restitution for disgorgements of profits". Famous in this respect are the trials which mirror the juicy way of life of Princess Caroline of Monaco and her daughter, which appealed to numerous press mosquitoes of doubtful alloy. Less titillating was the procedure of Oliver Kahn, the German goalkeeper, against Electronic Arts, who exploited Kahn's name and reputation in a computer game.<sup>32</sup> The High Court of Hamburg decided that the perpetrators of the infringement were liable to pay damages. These damages had, however, to be calculated taking into account the proceeds of the infringement of the personality rights.

## 5 CONCLUSION

"This court never allows a man to make profit by a wrong", according to William Page Wood, 1<sup>st</sup> Baron Hatherley PC, QC, in his capacity of Lord Chancellor in Gladstone's first cabinet.<sup>33</sup> His words echoed in the Great Onyx Cave in Kentucky, on the other side of the ocean, but it is time to evaluate his words. To limit liability to the payment of damages only may leave the

<sup>28</sup> BGH 13 December 1995, BGHZ 131, 297; NJW 1996, 838; JuS 1996, 648 (sub-tenancy of a shopping mall).

<sup>29</sup> BGH 21 September 2001, NJW 2002, 60; JuS 2002, 291 (*Karsten Schmidt*).

<sup>30</sup> BGH 12 August 2009 XII ZR 76/08 (Neue Justiz (NJ), 2009, Heft 12 512f, also accessible via <http://lexetius.com/2009,2233>).

<sup>31</sup> BGH 11 October 1979, BGHZ 75, 203; Emmerich, in *Münch. Komm.* § 281 nr 8.

<sup>32</sup> OLG Hamburg, SpuRt (Zeitschrift für Sport und Recht) 2004, S. 210ff (*Oliver Kahn*). Similarly LG Frankfurt/Main, SpuRt 2009, S. 207ff (*Konami*).

<sup>33</sup> *Jegon – Vivian* (1870-1871) 6 LR Ch App. 742, 761 per Lord Hatherley.

perpetrator of a delict (or breach of contract) with substantial gains. This nevertheless seems to be the general rule, and rightly so accordingly to Sir Oliver Wendell Holmes Jr. There is, however, an alternative: disgorgement of profits. Disgorgement of profits gained through wrongs is like the head of the Roman god Janus. It has two faces. It seems to be an ethical and an effective remedy against Sir Oliver Wendell Holmes's calculating citizen. It is not the least institution which pleads strongly in favour of this approach. The American Law Institute has recently published in the Third Restatement of the Law of Restitution and Unjust Enrichment and in the footsteps of Andrew Kull they formulated section 39:<sup>34</sup>

"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."

Some twenty years ago the WTO's Agreement on Trade-related Aspects of Intellectual Property Rights gave way to direct disgorgement of illegally obtained profits in the TRIPS treaty. Article 45 leaves it to the national legislature to opt for a system of damages, adequate to compensate for the injury the right-holder has suffered, as well as for a system of recovery of profits and/or payment of pre-established damages. England has made the remedy for account of profits available as a rather unique regulation of disgorgement of profits obtained by means of infringement of fiduciary duties. In addition England has recently, since *AG v Blake*, amazingly enlarged the scope of the notion of fiduciary, to such an extent that it seems to comprise also ordinary contractual obligations. It seems as if it will not be too long before these instances will no longer serve as exceptions to the general rule (that only actions for damages will stand) but that there will be a general rule in this regard. We have seen more often in legal history that exceptions to a rule have become so numerous, that they begin to outweigh the rule itself.

The recent decision *Giedo van der Garde BV v Force India Formula One Team Ltd*, however, shows the flipside of the coin. Pure disgorgement of profits obtained by breach of contract may entail a definite windfall for the creditor, whereas damages only bring him in the position he would have been in, had the breach of contract or the delict not occurred. Who feels strongly the disadvantages of the one system will grasp for the other one. The Cape Provincial Division made it completely clear that even in trade-mark cases damages are to be claimed, not disgorgement of profits, since the latter system "would involve the adoption of principles wholly derived from English rules of equity ... entirely foreign to the remedial apparatus of our own system of jurisprudence".<sup>35</sup> This observation leads us back to the examples referred to earlier. Generally speaking the forbidden sub-lease is the cause of action for damages, and only in very specific circumstances for disgorgement of profits. The calculation of damages, however, may include factors such as the social duties of the landlord, which may be a charity of which the purpose the advancement of public housing is. If so, the missed opportunity to fulfil the social duties may lead to pecuniary compensation, which may amount to the

<sup>34</sup> Kull "Disgorgement for Breach, the 'Restitution Interest' and the Restatement of Contracts" 2001 *Texas LR* 2021.

<sup>35</sup> *Montres Rolex v Kleinhans* 1985 (1) SA 55 (T); and *Visser Unjustified Enrichment* 686.

illegally obtained gains.<sup>36</sup> A similar remark may be made about the bookkeeper. It is his employer who has to claim and prove his damages, which may include compensation for lesser productivity of the employee. The calculating seller who finds a better buyer and prefers to transfer the property to the latter is liable to pay damages to the former. In recent Dutch cases these damages were calculated with reference to the difference between the price of the first and the second contract, the last one apparently constituting the actual market price.<sup>37</sup> In *Phillips v Homfray* the Chancery Division denied the plaintiff's claim for way-leave rent when the defendant used underground passageways arguing that the plaintiff had suffered no harm of any kind.<sup>38</sup> The scholarly literature on restitution and unjust enrichment generally criticized this decision heavily and indeed, in more recent decisions the loss of bargaining opportunities or the quantification of a fair market price for the rent is taken into consideration. The last example given above stands on the edge of two fundamental rights, namely on the one hand the right to privacy of the victim (Princess Caroline, Oliver Kahn), that seems to call for a full disgorgement of the profits of the journalist and the photographer, and on the other hand the freedom of the press. Maybe the solution of German law deserves to be followed: in case of illegitimate press publications the victim has a claim for damages. The calculation of these damages takes into account the proceeds the journalist or newspaper gained.

*Les extremes se touchent.* Maybe the outcome of the two approaches, liability to payment of damages or liability to disgorgement of profits obtained as a consequence of breach of contract or delicts, needs not to be as different as they seemed to be a first sight. We saw already that a broader definition of damages may lead to results, which are not too far remote from the disgorgement of profits. In cases of wilful breach of contract the expectancy damages come close to disgorgement of profits; the reasoning of the Reichsgericht in the *Ariston*-case identifies the two. By way of fictions a convergence is also imaginable. In any case the value judgment of Sir Oliver Wendell Holmes Jr, that his approach of the compensation for wrongdoing (purely damages) "stinks in the nostrils" of the adherents to a more ethical approach deserves not to be followed. It is definitely worthwhile to challenge the boundaries of the law of damages from an international perspective.

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<sup>36</sup> For Dutch law: HR 18 June 2010, RAV 2010, 83; Prg 2010, 159 note by Abas; LJN: BM0893 (*Doerga/Ymere*), HR 18 June 2010, RvdW 2010, 772; LJN BL 9662 (*Setel/AVR*).

<sup>37</sup> HR 24 September 2004, NJ 2006, 201 note Snijders; LJN: AP7760 (*Van Gemerden/Moes*). Similarly High Court Amsterdam 23 December 2009, LJN: BL6743 (*Leyduin Vastgoed/Gap (Netherlands)*).

<sup>38</sup> *Phillips v Homfray* (1883) 24 Ch D 439.