REVISITING DAMAGES FOR BREACH OF CONTRACT
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Often when drafting commercial agreements practitioners are asked "what if" questions by their clients relating to damages for breach of contract. Clients want to know "what if" the other party to the commercial agreement breaches its obligations. The "what if" questions are often more plentiful in strategic relationships such as joint ventures. Parties want to know how they are protected from the actions of a joint venture partner that violate an agreement and what type of damages can be recovered from the breaching party. Before answering those questions, it is wise to take a step back and re-examine the basic concepts regarding damages for breach of contract.

The purpose of this paper is to examine what interests may be recovered for the breach of contract and how restitutionary remedies interact with contract. Generally, it can be said that there are three principal interests which may be protected through the award of contract damages:[1]

1. Expectation Interest→ where damages are awarded based on putting the plaintiff in the position they would have been if the defendant had performed their promise;

2. Reliance Interest→ where a plaintiff has changed their position because of their reliance on the contract with the defendant, the object is to put the plaintiff in as good a position as they were prior to the promise; and

3. Restitution Interest & Unjust Enrichment→ where a plaintiff, in reliance on a promise, has provided some benefit to a defendant, who has failed to perform their promise. The court then requires the defaulting party to relinquish the value they have received to prevent unjust enrichment. The interest protected is called the restitution interest.

The inclusion of the third interest, restitution, is controversial because it moves away from the traditional role of contract damages, which is to provide compensatory damages. Although restitutionary remedies are readily available in non-contract situations, such as breach of confidence or breach of fiduciary duty, their use in contract has been more restrictive. Nonetheless, restitution has at times been made available as a contract remedy. Historically, the courts have been quite flexible in assessing damages. As a result, determining when the equitable remedy of restitution might be available becomes challenging. The key for any successful practitioner is knowing when these interests can be protected.

The following discussion will highlight how the concept of restitution interacts with contract and provide some guiding principles as to when or if a restitutionary remedy might be available in a breach of contract case.

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[1] Fuller and Perdue, "The Reliance Interest in Contract Damages" (1936), 46 *Yale L.J.* 52. reprinted in Waddams, Trebilcock, and Waldron, *Cases and Materials on Contracts*, 2nd ed. (Emond Montgomery Publications Limited, 2000) 29.

Reliance Interest vs. Expectation Interest

Expectation Interest

Expectation interest is best explained by Lord Atkinson's passage in *Wertheim* v. *Chicoutimi Pulp Company*,[2] indicating "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." While expectation interest can also be satisfied by specific performance, this statement reflects the importance in contract of the principle of compensation, and the focus on what the victim has lost.

Reliance Interest

Where it is not possible to award the expectation interest, such as in cases where it is difficult to enumerate the expectation (e.g., it is too difficult to estimate lost profits because of factual uncertainties), a plaintiff may elect to have damages assessed by reliance interest (sometimes referred to as the wasted expenditures); that is, expenditures made in reliance on the contract being performed. A leading case regarding reliance interest is *Anglia Television* v. *Reed*.[3] In this case the plaintiff had entered into a contract with the defendant to make a made-for-TV movie. The defendant was the lead actor and repudiated the contract because his agent double booked, resulting in the movie being cancelled. The plaintiff was unable to prove expectation interest damages because it could not show lost profits, but could show that it had accumulated expenses in reliance on the contract, such as hiring a director and securing the site location. The court held that the defendant was responsible for the expenses incurred by the plaintiff because the defendant would have known these types of costs were reasonably expected to be incurred.

In *Bowley Logging Ltd.* v. *Domtar Ltd.*,[4] the court imposed a limit as to when reliance interest will be available. It held that a plaintiff may not choose their reliance interest over their lost profits (expectation interest) when the recovery of reliance interest would exceed the value of the expectation of the contract, reasoning that a plaintiff should not be protected from a bad deal and put in a better position than if the contract had been performed.[5] Therefore, when a practitioner is faced with defending a reliance interest claim, a strategic response will be to show that had the contract been performed the claimant would not have been able to recoup their losses.

Expectation interest and reliance interest are vital concepts that relate to the recovery of damages from a breach of contract. A practitioner must know whether their client can define their expectation interest, and/or if seeking reliance interest whether recovery of reliance interest would place their client in a position better than if the contract had in fact been performed.

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[2] [1911] A.C. 301 (P.C).
[3] [1972] 1 Q.B. 60 (C.A); ***see also*** *Apotex Inc.* v. *Global Drug Ltd.* (1998), 83 C.P.R (3d) 448 (Ont. Gen. Div) aff'd [2001] O.J. No. 3849 (C.A) (QL); *900567 Ontario Ltd. (c.o.b. MGW & Associates)* v. *Welsby & Assoc. Taxation Inc.,* [2003] O.J. No. 591 (S.C.J) (QL).
[4] (1982), 135 D.L.R (3d) 179 (B.C.C.A).
[5] ***See also*** A.J Ogus, "Damages for Pre-Contract Expenditure**"**, (1972) 35 Mod. Law Rev. 423**.**

Restitution Interest

In contrast to expectation and reliance interests, the discussion regarding restitution interest in a breach of contract case pertains to whether there can be a recovery of gains (i.e. benefits conferred to a party) made from a breach of contract and not the losses of the victim.

Restitution

The law of restitution is extensive and this paper does not purport to provide a detailed review of that topic. However, for the purpose of this paper, we believe it is important to briefly describe some of the underlying principles. The foundation for a restitutionary remedy will be whether an unjust enrichment exists in the circumstances. In the leading case on unjust enrichment, *Moses* v. *Macferlan*,[6] Lord Mansfield, in describing a claim for recovery in unjust enrichment, stated "the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

In *Moses*, Lord Mansfield adds that restitution is available for:

> money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. [7]

Cartwright J. of the Supreme Court of Canada in *Deglman* v *Guaranty Trust Co.*,[8] recognized the separate nature of contract and restitution by stating that the right of restitution for a breach of promise "appears to me to be based, not on contract, but on an obligation imposed by law."

Is Restitution Available in Beach of Contract Cases?

There are many circumstances in which the availability of a restitutionary remedy is similar to those available in contract. For example, Fridman states that, where the plaintiff has prepaid the entire amount of the contract, and the other party has willfully breached the contract, there has been a total failure of such consideration, and a claim for recovery of the money is based on restitutionary principles.[9] In circumstances of mistake, where there is a contract between the parties and the payor is seeking its return, the claim is not based in contract, but founded on the restitutionary interest that it would be unjust to keep the money.[10] In ineffective transactions, a purchaser could be entitled to reimbursement of a deposit, when it has been paid money pursuant to a purchase and sale agreement and the vendor has failed to close the transaction.[11] The

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[6] [1558-1774] All ER 581**[*Moses*]**.
[7] *Ibid.* at 585.
[8] [1954] 3 D.L.R 785.
[9] G.H.L Fridman, *The Law of Contract*, 5th ed., (Toronto: Thomson Carswell Limited, 2006) at 710.
[10] *Ibid.*
[11] H. Pitch and R. Snyder, *Damages for Breach of Contract*, (Looseleaf ed., Thomson Carswell, Toronto, 2007) 1-4.1.

aforementioned examples help to illustrate that the "same considerations of justice that support the restitutionary remedy also cause the inclination towards the enforcement of contract."[12]

There has been inconsistent treatment by the courts of when a restitutionary remedy will be given when there is a valid and binding contract. Several decisions in England illustrate this inconsistency. For instance, in *Surrey County Council* v. *Bredero Homes Ltd.*,[13] the plaintiff had sold land to the defendant, with a provision that allowed 72 dwellings to be built, but in breach of contract the defendant built 77 dwellings. The Court of Appeal rejected the idea that the plaintiff could recover the additional profit the defendant had made because of their breach of contract on the grounds of protecting their restitutionary interest.

The leading English case on the relationship between beach of contract and unjust enrichment is *Attorney General* v. *Blake*.[14] In *Blake,* the court awarded a restitutionary remedy, where profits were derived from a breach of contract, even though there was no corresponding loss to the plaintiff. The court found that a restitutionary remedy for disgorgement of profits is available in contract in exceptional situations. In this case the defendant had written a book, which disclosed information in contravention to the *Official Secrets Act 1989*, but caused no damage to the government. The government was able to recover the benefit to the defendant from a third party publisher on the basis that the profits were made because of a breach of contract. It should be noted that here the undertaking breached was very similar to a fiduciary obligation, where restitution interest is often available. As a result, it can be said that a restitutionary claim in contract is strongest when breach of contract is combined with a breach of another duty that often gives rise to this remedy.[15]

Canadian Cases

Restitutionary remedies in contract situations have been implemented sparingly in Canada over the years. In *Arbutus Park Estates Ltd.* v. *Fuller*,[16] the court fashioned a remedy for damages even though the plaintiff had not suffered any financial loss. The court held that the defendant's newly constructed garage violated a covenant as to the use of the land. Damages were calculated not on compensatory principles but on the basis that the violation resulted in the defendant saving $700.00 for an architect, who would have ensured compliance with the covenant. As a result, the plaintiff was entitled to the "profit" of the defendant as a restitutionary remedy.

The British Columbia Court of Appeal, in *Jostens Canada Ltd.* v. *Gibsons Studio Ltd.*,[17] required a defendant (a former agent for the plaintiff) to account for profits resulting from a breach of a non-compete clause. The court comments that the agency relationship between the parties instilled a duty similar to a fiduciary obligation, and thus the return of any profits made from their wrongful acts. McCammus and Maddaugh point out that this pre-*Blake* case is consistent with the principles espoused by the House of Lords that indicate a restitutionary remedy in

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[12] S. M Waddams, "Restitution as part of Contract Law", in Andrew Burrows, ed., *Essays on the Law of Restitution*, (Oxford Clarendon Press, 1991), at 206.
[13] [1993] 1 W.L.R 1361 (Eng. C.A).
[14] [2001] A.C 268 (H.L) **[*Blake*]**.
[15] P. Maddaugh and J. McCamus, *The Law of Restitution*, 2nd ed., (Aurora: Canada Lawbook, 2004) at 760.
[16] (1976), 74 D.L.R (3d) 257 (B.C.S.C).
[17] [1999] B.C.J No. 972 (QL).

contract requires more than just a breach of contract but also a breach of some other duty or obligation.[18]

In *Amertek Inc. et al.* v. *Canadian Commercial Corporation et al.*[19] the court cited *Blake* with approval and awarded a disgorgement of the defendant's profits because of a breach of contract. In this case, the defendant was a Canadian government organization designed to facilitate export contracts. The defendant failed to inform the plaintiff of information it had about the profitability of the contract to be entered into by the plaintiff with the U.S Government. In the circumstances, the court found that the defendant had a fiduciary obligation to the plaintiff, and the defendant's failure to inform the plaintiff amounted to a breach of warranty. The court concluded that if not for the defendant's breach of contract, the defendant would have been liable to the U.S Government for costs of reprocurement, and the plaintiff was entitled to this money saved by the defendant as restitution.

Further, the Supreme Court of Canada in *Bank of America Canada* v. *Mutual Trust Co.*[20] has clearly identified that restitution is a part of contract law. In this case, the defendant had breached the contract and refused to advance funds pursuant to the agreement. The plaintiff sought restitutionary damages in addition to expectation damages to account for the time value of money the defendant enjoyed because of the breach (i.e., the benefit the defendant had gained). Major J. stated:

> Contract damages are determined in one of two ways. Expectation damages, the usual measure of contract damages, focus on the value which the plaintiff would have received if the contract had been performed. Restitution damages, which are infrequently employed, focus on the advantage gained by the defendant as a result of his or her breach of contract.[21]

The court awarded restitutionary damages for pre and post judgment interest at a compound rate versus a simple rate to remove any advantage that the defendant had received.[22] The court noted that, while this case did not involve an efficient breach (as that concept is discussed below), restitutionary remedies are rarely employed because courts do not want to discourage its use, where one party can be better off, and the other no worse. This decision highlights that the Supreme Court has assumed that the restitutionary remedy is available in contract as the decision does not reflect extensive discussion of the case law or the contentiousness that exists with respect to its use.

The case law and legal commentary have gone back and forth as to whether recovery and restitution interests should be available in the event of a breach of contract and, if so, whether it is a separate and distinct ground for recovery or it is still tied to contract compensatory principles. The current position in Canada, based on *Blake* and *Bank of America Canada*, appears to be that the right to restitution for a breach of contract exists in exceptional cases.

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[18] P. Maddaugh and J. McCamus, *The Law of Restitution*, (Looseleaf ed., Canada Law Book, Aurora, 2005) at 25:400.
[19](2004), 229 D.L.R. (4th) 419 (Ont. S.C.J).
[20] [2002] 2 S.C.R. 601 **[*Bank of America Canada*]**.
[21] *Ibid* at para 25.
[22]*Ibid* at para 61.

Why is Restitution Considered in Breach of Contract Cases?

Why do the concepts of breach of contract and restitution interact? As long as the innocent party recovers its expectation or reliance interest, why do courts even care if a party breaching a contract makes a profit? The answer may simply be that courts are reluctant to see an individual profit from its own wrong doing through the deliberate breach of contract. In the case of *Watson Laidlaw & Co. Ltd.* v. *Pott, Cassels and Williamson*,[23] Lord Shaw gives an illustration of why a restitutionary remedy would be needed even where the plaintiff suffered no loss.

> A, is a liveryman, has a horse idle in the stable. B, without permission takes the horse, and later returns it. It is no answer for B to say to A: "Against what loss do you want to be restored? I restore your horse. There is no loss. The horse is none the worse, indeed it is better for the exercise.

In *Lac Minerals* v. *International Corona Resources Ltd.*,[24] the court states, in the context of a restitutionary remedy for breach of confidence, that:

> If by breaching an obligation of confidence one party is able to acquire an asset for itself, at a risk of only having to compensate the other for what the other would have received if a formal relationship between them had been concluded the former would be given a strong incentive to breach the obligation and acquire the asset. This does nothing for the preservation of the institution of good faith bargaining or relationships of trust and confidence. The imposition of a remedy which restores an asset to the party who would have acquired it but for a breach of fiduciary duties or duties of confidence acts as a deterrent to the breach of duty and strengthens the social fabric those duties are imposed to protect.

The comments with respect to breach of confidence are equally applicable to the motivation in contract to not reward a wrongdoer.

Reasons for not Fully Embracing Restitution in Breach of Contract Cases

However, there is another school of thought that courts should not be quick to condemn those who deliberately breach their contracts on the basis that an "efficient breach" of contract does not harm the plaintiff. An "efficient breach" of contract occurs when the breaching party receives a benefit or upside from breaching the contract but the plaintiff will have not suffered a corresponding loss. This may explain some of the reluctance of courts to provide restitution remedies in contract. The problem, as Waddams puts it, is that when there are binding contracts in force, determining when an enrichment is unjust is not always clear.[25] Every time a contract is consummated it has the potential to enrich a party. However, the fact that a person made a bad bargain should not, on its own, give rise to restitution.

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[23] (1914), 31 R.P.C. 104 (H.L.) at 119.
[24] [1989] 2 S.C.R. 574 at p. 672-673.
[25] *Supra* note 12 at 212.

Varying Treatment of Restitution Remedy in Breach of Contract Cases

One reason for this varying treatment of the restitution remedy is that there are different theories as to when a claim for restitution should exist. On one extreme there are those who believe that "[t]here is a universal rule which forbids claims in unjust enrichment when there is a subsisting contractual relationship between the parties."[26] Others, such as Professors Maddaugh and McCamus, have been more flexible and state that even where there is a valid and enforceable contract, restitution will be available where there has been a loss at the plaintiff's expense because of the breach of contract.[27]

Fridman argues that much of the confusion with respect to when contract and restitution intersect stems from the historical development of contract that saw it expand to cover situations where there was no contractual relationship such as implied promise or an implied contract. He states that modern developments have made it clear that these circumstances should no longer be considered contracts and that the two principles should be seen as clearly distinct from one another.[28]

As Waddams explains, various contract law doctrines such as misrepresentation, mistake, unconcionability, termination for breach and rectification all contain restitutionary principles designed to prevent unjust enrichment.[29] Waddams suggests that traditional contract damages are quite flexible and damages for expectation interest and restitution are in many cases not very different.

Professors McCamus and Maddaugh propose that acceptance of restitutionary remedies for breach of contract in Canada will be and have at times been accepted in Canada. A main reason for the likely acceptance of the principles in *Blake* is that opponents to restitutionary remedies often argue that the remedy should not be used as a greater deterrent than compensatory damages can provide. However, in Canada it is accepted that punitive damages may be allowed for breach of contract when compensatory damages may not be sufficient.[30] Therefore, the argument that restitutionary damages should not be utilized in contract law becomes much weaker. Thus McCamus and Maddaugh argue that restitution should be available when the test for exemplary damages exists, as used in punitive damage cases.[31]

Under what circumstances will restitution most likely be awarded for breach of contract?

Although not a shocking revelation, when the right affected is proprietary, and when damages measured by contract provide inadequate compensation, then unjust enrichment is more likely to be found. As D'Angelo and Wells highlight, when there is an abstraction or invasion of property compensation is usually by restitutionary measure. This practical approach is often seen in patent law, where a patentee is entitled to be recompensed for the reduction in its profits due to

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[26] L. Smith, "The Mystery of 'Juristic Reason'" (2000) 12 Supreme Court Law Review 237.
[27] *Supra* note 18 at 3:200.20.
[28] *Supra* note 9 at 9-10.
[29] *Supra* note 12 at 198-213.
[30] *Supra* note 18.
[31] *Ibid*; ***see also*** *Vorvis* v. *Insurance Corp of British Columbia,* [1989] 1 S.C.R. 1085.

the infringer's activities, plus a reasonable royalty on all other sales made by the infringer which do not contribute to the patentee's losses.[32]

Is awarding a restitutionary award any different than creatively arguing contract compensatory principles?

Wells and D'Angelo[33] also note that unjust enrichment cases have been made out where there is trespass to land,[34] misuse of information, detention or deprivation of goods.[35] Waddams argues that while these aforementioned types of cases have connections to restitutionary principles, they can in many circumstances be adequately explained by compensatory contractual principles for the loss of an opportunity, such as preventing the trespass. Essentially, Waddams argues that these lost opportunities can be given monetary values equivalent to 'user fees', thus reflecting an expectation rather than restitutionary interest.[36] This very fine distinction helps to explain why in many circumstances a "restitution like" remedy is awarded as a expectation interest.

A very recent case illustrates this struggle in the courts between awarding restitution to prevent unjust enrichment versus disgorging the profits from a breaching party by classifying such profits as part of the expectation interests of the non-breaching parties. In *Bulls Eye Steakhouse & Grill* v. *Select Restaurant Plaza Corp.*,[37] the court canvassed the issue of a restitutionary claim in contract. In this case the tenant had a lease wrongfully terminated by the landlord. The tenant's lease was favorable to the market rates. In its claim the tenant could not state their expectation interest of the contract because they could not accurately predict future profits over the duration of the lease, and as such claimed, amongst other things, for reliance interest and the value of the lease (i.e., the benefit/profit conferred to the landlord for renting the unit at the market rate). Instead, the court provided the tenant the value of the lease on the basis of expectation interest, on the grounds that the restaurant's profits would have increased by an amount proportionate to the savings off market lease rates. Essentially, the plaintiff lost the opportunity and expectation of the low rent, and a market rate rent would have cut into their profit margin. This decrease in profit became the expectation interest from the breached contract. In making the determination not to use a restitutionary remedy the court reinforced the views expressed in *Blake* (see above) that a restitutionary remedy should only be utilized if other contractual remedies prove to provide inadequate compensation. In addition, this finding reinforces the opinion of Waddams who asserts that in many circumstances the compensatory damages of contract law for 'lost opportunity' (although containing restitution like principles) can adequately prevent any unjust enrichment.[38]

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[32] P. Wells and J. D'Angelo, "Bulls Eye: The Assessment of Damages in Cases Involving the Wrongful Abstruction or Use of Property", Lang Michener LLP, 2007.
[33] *Ibid*.
[34] ***see also*** *Whitwham* v. *Westminster Byrmbo Coal & Coke Company* [1896] Ch. D 538. (C.A).
[35] ***see also*** *Strand Electric and Engineering Co. Ltd.* v. *Brisford Entertainment Ltd.*, [1952] Q.B. 246 (C.A).
[36] Waddams, "Profits Derived from Breach of Contract: Damages or Restitution", *JCL (Australia)*, vol 11, January 25, 1997.
[37] [2006] O.J. No. 5309 (QL).
[38] *Supra* note 12 at 212.

Conclusion

In breach of contract situations an aggrieved party is entitled to bring an action under well established contract principles for compensatory damages in relation to expectation interest and reliance interest. The practitioner needs to assess whether a reliance or expectation interest claim should be made. In circumstances where either of those interests would inadequately compensate the plaintiff, then recourse might be available through a restitutionary remedy. The question of when a restitutionary remedy is available in contract will depend on whether the breach of contract amounts to an unjust enrichment. As was evidenced above, not all cases of breach of contract will amount to unjust enrichment. Some factors that will point towards an unjust enrichment include:

(i) suffering a loss of opportunity to bargain;

(ii) whether damages amounting to the plaintiff's loss are insufficient**;**

(iii) if a proprietary interest was violated; and

(iv) if another similar duty is breached where restitution is a common remedy.[39]

It is clear that there are no hard and fast rules as to when a restitutionary remedy will arise in contract, but it is hoped that by illustrating that restitutionary principles are well entrenched in contract, the interplay between the two concepts becomes clearer. A claim for restitution should not be defeated simply because a contract exists between the parties. Practitioners seeking to succeed in a restitutionary claim should look to the interpretation of the contract to determine if a fiduciary duty or other similar duty existed. In the alternative, given the general restrictive use of restitution as a remedy in contract, it may be better for a practitioner to shape claims for "restitution like" damages in the form of an expectation interest.

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[39] ***See also*** *supra* note 36 at 10.