

## AIN'T NO TELLING (WHICH CIRCUMSTANCES ARE EXCEPTIONAL)

DAVID CAMPBELL\* AND PHILIP WYLIE\*\*

### 1. INTRODUCTION

IN *Experience Hendrix LLC v. PPX Enterprises Inc., Edward Chalpin*,<sup>1</sup> the Court of Appeal gives further impetus to the radical recasting of the law of damages for breach of contract along restitutionary lines made possible by *A.-G. v. Blake (Jonathan Cape Ltd. Third Party)*.<sup>2</sup> Whilst *Blake* made it more difficult to argue that hypothetical release damages were compensatory rather than restitutionary in nature, it left a residue of serious uncertainty because it did not make it impossible to do so. *Hendrix* goes a long way towards eradicating this particular uncertainty by awarding hypothetical release damages on an unambiguously restitutionary basis and saying that an account of profits, though not justified in the circumstances of the case, might also have been awarded on this basis. In the belief that *Blake* “marks a new start in this area” [para. 16], *Hendrix* provides, in the abstract at least, the general restitutionary remedy *Blake* posits, of damages unified on a “sliding scale” from partial disgorgement (by hypothetical release damages) through to complete disgorgement (by an account of profits). As this sliding scale is the logical implication of *Blake*, it is a virtue of *Hendrix* to have taken the argument to this next stage.

Unfortunately, this pursuit of the logic of *Blake* necessarily involves the “far reaching and disruptive” consequences for commercial law feared by Lord Hobhouse in his powerful dissent in *Blake*.<sup>3</sup> As it happens, *Hendrix*, the second case to follow *Blake*, is not as disruptive as the first to do so, *Esso Petroleum Co. Ltd. v. NIAD Ltd.*,<sup>4</sup> because the new remedy it extends to claimants is not

\* Cardiff Law School and E.S.R.C. Research Centre for Business Relationships, Accountability, Sustainability and Society (BRASS).

\*\* Cardiff Law School. We should like to thank Hugh Collins, Don Harris, Steve Hedley, Paddy Ireland, Peter Jaffey, Howard Johnson, Bob Lee and Christopher McNall for their comments. *Ain't No Telling* was first recorded by the Jimi Hendrix Experience on 26 October 1967 and first released on their album *Axis: Bold as Love* on 1 December 1967.

<sup>1</sup> [2003] EWCA Civ 323. Unattributed references in square brackets are to this transcript.

<sup>2</sup> [1997] Ch. 84 (Ch.D.); [1998] Ch. 439 (C.A.) and [2001] 1 A.C. 268 (H.L.).

<sup>3</sup> *Ibid.*, 299D-E (H.L.).

<sup>4</sup> Unreported, 22 November 2001 (Ch.D.). In *C.M.S. Dolphin Ltd. v. Paul Maurice Simonet, Blue (G.B.) Ltd.* [2001] Emp LR 895, in which judgment was given some six months earlier

as far-reaching as the one extended in *Esso v. NIAD*;<sup>5</sup> and, for good or ill, the same or a better result for Experience Hendrix LLC might have been reached on the law prior to *Blake*.<sup>6</sup> Nevertheless, making it more likely that these far reaching and disruptive consequences will come to pass is the central feature of the reasoning in *Hendrix*. Though partial and complete disgorgement are now available, the sliding scale which would coherently unite both is the purest chimera. What appears to be a scale if the discussion is conducted at a completely abstract level is, as a practical matter, a very loose collection of sometimes profoundly arbitrary damages quantifications. Even worse, purporting to construct the scale involves an argument which one of the present authors dismissed as “ridiculous in itself” when, some years ago, he perceived it as a logically possible consequence of *Blake*.<sup>7</sup> To see this possibility realised in *Hendrix* does not, we are afraid, make it less ridiculous, and that this distinguished Court of Appeal takes up such a position shows just how inappropriate restitutionary damages would be as a generally available remedy for breach of contract, though this general availability is precisely what *Blake* and now *Hendrix* move towards.

## 2. THE SLIDING SCALE IN THEORY

The claimant in *Hendrix* is a company owned by the family of Jimi Hendrix, who are the remaining beneficiaries of his estate. Hendrix was a rock musician who died in 1970, aged 27, from an overdose of sleeping drugs. From the middle of 1966 until his death, Hendrix enjoyed enormous success and this period of his life was a combination of intense musical activity and hectic personal affairs. The brevity of his career has not prevented his posthumous reputation from being very great. All adult rock music fans would acknowledge that a good case can be made that he was the most innovative rock guitarist who has ever played, and the claimants continue to earn very large sums from the sale of his recordings.

In 1965, before he became successful, Hendrix entered into an exclusive service agreement of three years’ duration with the present first defendant, a company then and now largely under the control of the present second defendant, Mr. Edward Chalpin, and we shall take the interests of PPX and Mr. Chalpin to be identical. Prior to

than *Esso v. NIAD*, Lawrence Collins J. (at para. [142]) was prepared to award an account on the authority of *Blake* but did not find it necessary to do so.

<sup>5</sup> See note 46 below.

<sup>6</sup> See section 6 below.

<sup>7</sup> D. Harris *et al.*, *Remedies in Contract and Tort*, 2nd. edn. (London 2002), p. 267. Much of Campbell’s thinking on this topic has been formed in the course of joint work with Donald Harris and Roger Halson.

1965, Hendrix was not a “featured artist”. After his medical discharge from the army in 1962, he became a “sideman”, largely playing guitar in support of other artists. The 1965 exclusive service agreement would have confined Hendrix to being a sideman to the now obscure Curtis Knight, a musician managed by Mr. Chalpin. In 1967, PPX sued Hendrix for breach of this agreement, and after his death continued the action against his estate. In 1973, the action was settled on terms which, inter alia, restricted PPX’s rights to exploit Curtis Knight recordings on which Hendrix played and of which PPX possessed master copies. In 1995 and 1999, PPX entered into agreements with third parties to exploit these recordings which Buckley J. at first instance found to be in breach of the 1973 settlement.<sup>8</sup> Buckley J. granted an injunction against further exploitation of these recordings by PPX but denied damages or an account of profits, and it is the claimant’s appeal against this part of the judgment that is of interest here. Dismissing other issues in the appeal questioning liability, the Court of Appeal held that both damages and an account could have been available on restitutionary grounds, though on the facts awarded only the former.

Both before Buckley J.<sup>9</sup> and before the Court of Appeal [para. 14], the claimant maintained from the outset that damages quantified on what it called the “traditional” basis of compensation for lost expectation could not be recovered for want of certainty. This quantification would have required an assessment of the volume of sales of the claimant’s recordings lost as a result of the release of the defendant’s recordings, and the claimant maintained that “[s]uch an assessment would, from a practical point of view, be impossible”.<sup>10</sup> The claimant therefore framed two alternative bases of quantification: (1) “the *Wrotham Park Estates* basis”, or (2) an account of profits on the authority of *Blake*.<sup>11</sup> What is novel about *Hendrix* is that it puts both of these remedies on a unified restitutionary footing, as a matter of doctrine at least.

The *Wrotham Park Estates* basis of course refers to Brightman J.’s “beneficent interpretation”<sup>12</sup> of Lord Cairns’ Act<sup>13</sup> in *Wrotham Park Estate Co. Ltd. v. Parkside Homes*.<sup>14</sup> As is now well enough understood as to need no exposition here,<sup>15</sup> these are “hypothetical release” damages representing what the claimant

<sup>8</sup> *Experience Hendrix LLC v. PPX Enterprises Inc., Edward Chalpin* [2002] EWHC 1353 (Q.B.).

<sup>9</sup> *Ibid.*, at para. [49].

<sup>10</sup> *Ibid.*; see further pp. 612–613 below.

<sup>11</sup> *Ibid.*

<sup>12</sup> *A.-G. v. Guardian Newspapers (No. 2)* [1990] 1 A.C. 109, 286.

<sup>13</sup> Chancery Amendment Act 1858, s. 2 (now Supreme Court Act 1981, s. 50).

<sup>14</sup> [1974] 1 W.L.R. 798.

<sup>15</sup> *Harris et al.*, note 7 above, pp. 255–258, 488–491.

could have charged the defendant for permission to, in this case, release its recordings, had such permission been sought rather than, as it were, simply assumed by breach. These damages have been taken to be compensation for the hypothetical lost opportunity to bargain for the release, but the attempt to do so in cases such as *Jaggard v. Sawyer*<sup>16</sup> has been beset with many difficulties.<sup>17</sup> *Blake* has done much to put these damages on a restitutionary rather than a compensatory footing. In *Hendrix*, the Court of Appeal, without any argument that really adds to previous discussions of the matter, takes it that this is the best footing for these damages. Though *Jaggard v. Sawyer* is not followed [paras. 16, 34], no sustained argument for this is given. However, as we agree that this is the right doctrinal line to take after *Blake*, we will say no more about it here and assess the consequences of it being established that these damages are restitutionary in nature.

The first consequence is that these damages can be described as effecting partial disgorgement of the wrongful profits which the defendant obtains by breach. If one asks what sum the defendant would have paid to be released from his contractual obligations, the only answer which seems to be ruled out is 100 per cent. of the profit he hopes to make, for surely it cannot be maintained that any rational defendant would agree to pay that price for release, which completely removes the incentive he had to seek that release. In *Wrotham Park*, Brightman J. by no means maintained this but instead awarded the claimant merely 5 per cent. of the profit the defendant made.<sup>18</sup> This is a rudimentary form of apportionment which, as we say, effects partial disgorgement of the defendant's profit.

Though the origins of the account of profits remedy lay in equity, it is firmly established that this may be regarded as a restitutionary remedy effecting total disgorgement of the defendant's profits.<sup>19</sup> As such, it is an obvious complement to hypothetical release damages. The two together seem to provide a full range of restitutionary remedies for breach of contract, on a "sliding scale" extending from various levels of partial disgorgement (hypothetical release damages) to total disgorgement (account of profits).<sup>20</sup> This position certainly was implicit particularly in Lord Nicholl's speech

<sup>16</sup> [1995] 1 W.L.R. 269.

<sup>17</sup> Harris *et al.*, note 7 above, 255–262.

<sup>18</sup> *Wrotham Park Estate Co. Ltd. v. Parkside Homes* [1974] 1 W.L.R. 798, 815–816.

<sup>19</sup> *My Kinda Town v. Soll* [1983] R.P.C. 15, 55.

<sup>20</sup> The felicitous term "sliding scale" is used by Professor Burrows in comments on the Restitution Discussion Group email forum: (enrichment@lists.mcgill.ca).

in *Blake*,<sup>21</sup> and has been made explicit in a recent account of his extra-judicial views:

Once one had crossed the threshold of being able to recover an account of profits for breach of contract, rather than compensatory damages or specific relief, Lord Nicholls thought that the measure of recovery could extend from expense saved through to stripping a proportion of the profits made through to stripping all the profits made from the breach. The *Wrotham Park Estate* case (where 5 [per cent.] of the profits had been stripped) was therefore based on the same principles as *A.-G. v. Blake* (where all the profits had been stripped).<sup>22</sup>

Though, as we shall see,<sup>23</sup> the distinction between hypothetical release damages and an account of profits does not in practice disappear, looking at the matter purely from an abstract, classificatory perspective, all that is left is to replace these usages with “partial” and “total” disgorgement and the range of restitutionary remedies constituting an alternative to remedies based on expectation will be complete.<sup>24</sup>

### 3. THE LEGITIMATE INTEREST

If one accepts the approach set out by *Blake*, it would indeed, as the Court of Appeal holds in *Hendrix* [para. 43], be “anomalous and unjust” if PPX did not have to pay some measure of restitutionary damages for the gains it made by breach. The obvious problem with this is that, whatever the intrinsic merits of this approach, remedies for breach of contract have previously been based on compensation of loss, and the generalised restitutionary approach threatens to demolish the structure of those remedies. To avoid this, *Blake* affirms that it continues to be “axiomatic” that damages for breach of contract are normally compensatory<sup>25</sup> and restitutionary departures from this are, though a growing category which will be “hammered out on the anvil of concrete cases”,<sup>26</sup> to

<sup>21</sup> Harris *et al.*, note 7 above, pp. 261–262.

<sup>22</sup> A. Burrows and E. Peel (eds.), *Commercial Remedies* (Oxford 2003), p. 129.

<sup>23</sup> See section 4 below.

<sup>24</sup> The various distinctions which have been drawn between “restitution” and “disgorgement” (e.g. L.D. Smith, “The Province of the Law of Restitution” (1992) 71 Can. B. Rev. 672, 683–694; P. Jaffey, *The Nature and Scope of Restitution* (Oxford 2002) chs. 4, 11–13; and J. Edelman, *Gain-based Damages* (Oxford 2002), ch. 3) also now disappear, in theory at least, into the unified sliding scale, for in the light of *Blake* they now appear to be mere staging posts on the progress towards the creation of that scale, in which unjust enrichment itself disappears into the category of wrongs: P. Birks, “Unjust Enrichment and Wrongful Enrichment” (2001) 79 Texas L. Rev. 1767. The “sliding scale” thinking is applied to a critique of Edelman in A. Burrows, *The Law of Restitution*, 2nd. edn. (London 2002), pp. 461–462.

<sup>25</sup> *A.-G. v. Blake (Jonathan Cape Ltd. Third Party)* [1998] Ch. 439, 456E (C.A.) and [2001] 1 A.C. 268, 282B (H.L.).

<sup>26</sup> *Ibid.*, 291F (H.L.).

take place only in “exceptional circumstances”.<sup>27</sup> By dispensing with *Jaggard v. Sawyer* and related cases, *Hendrix* sacrifices one set of brakes upon the restitutionary argument to the logic of that argument; but that logic always meant that those brakes could not hold. At this stage of the progress of the restitutionary juggernaut it remains the case that a new set of brakes have to be manufactured and applied, and *Hendrix* attempts to do so. Unfortunately, these brakes will prove to be as ineffective as the old.

One way of identifying exceptional circumstances is to find something aggravating about “the moral calibre of the defendant’s conduct”:<sup>28</sup> that it was “deliberate and cynical”, or involved “skimping on performance” or “doing exactly what one promised one would not do”, have been advanced as aggravating circumstances.<sup>29</sup> Serious reflection shows all of these to be unsatisfactory reasons to depart from compensatory damages,<sup>30</sup> and there was a marked hesitation about all of them in the House of Lords’ hearing of *Blake*.<sup>31</sup> Despite the Court of Appeal being aware of this [para. 28], its opinion that “there has been a deliberate breach” [para. 58] which involved doing “the very thing [the defendant] had contracted not to do” [para. 36] unarguably played a part in its decision in *Hendrix*. As this means that a clear line over these grounds has not even been maintained between the House of Lords’ decision in *Blake* and *Hendrix*, the second case to follow it,<sup>32</sup> the law is a dreadful mess.<sup>33</sup> As we believe nothing ultimately can be done to straighten this mess out, we leave these factors related to the defendant and turn to the relative novelty in *Hendrix*, its argument about a factor relating to the claimant.

In *Blake*, Lord Nicholls was anxious to avoid defining exceptional circumstances and said the following,<sup>34</sup> which is quoted in *Hendrix* [para. 27]:

No fixed rules can be prescribed. The courts will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision that has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not

<sup>27</sup> *Ibid.*, 285G.

<sup>28</sup> *Ibid.*, 456H (C.A.).

<sup>29</sup> *Ibid.*, 457–458.

<sup>30</sup> Harris *et al.*, note 7 above, pp. 18–19, 213–214, 274–275, 200–208, 275–276.

<sup>31</sup> *A.-G. v. Blake (Jonathan Cape Ltd. Third Party)* [2001] 1 A.C. 268, 277G, 291D (H.L.).

<sup>32</sup> That the defendant “did the very thing it contracted not to do” was decisive in *Esso Petroleum Co. Ltd. v. NIAD Ltd.*, unreported, 22 November 2001 (Ch.D.), at [60].

<sup>33</sup> This was predicted in D. Campbell and D. Harris, “In Defence of Breach: A Critique of Restitution and the Performance Interest” (2002) 22 L.S. 208, 228 n. 109.

<sup>34</sup> *A.-G. v. Blake (Jonathan Cape Ltd. Third Party)* [2001] 1 A.C. 268, 285G–H (H.L.).

exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity, and, hence, in depriving him of his profit.

This "legitimate interest" is central to *Hendrix*. The reasoning is stated with economy by Peter Gibson L.J. [para. 58]:

because (1) there has been a deliberate breach by PPX of its contractual obligations for its own reward, (2) the claimant would have difficulty in establishing financial loss therefrom, and (3) the claimant has a legitimate interest in preventing PPX's profit-making activity carried out in breach of PPX's contractual obligations, the present case is a suitable one (as envisaged by Lord Nicholls [in *Blake*])<sup>35</sup> in which damages for breach of contract may be measured by the benefits gained by the wrongdoer from the breach. To avoid injustice I would require [the defendant] to make a reasonable payment in respect of the benefit it has gained.

It is the failure to prove substantive compensatory damages that gives the claimant the legitimate interest which allows it to pursue a restitutionary remedy. It *may* well be necessary to add to this legitimate interest one of the variables relating to the defendant's conduct in order to actually be awarded the remedy; one can hardly say as the position is so unclear. But let us look at the legitimate interest equated with failure to prove substantive compensatory damages in itself.

The difficulties with this equation are enormous. Before turning to the irremediable and disastrous ones, let us examine a perhaps irremediable but relatively minor one. If one takes Lord Nicholls' words repeated by the Court of Appeal at face value, they do not authorise what was done in *Hendrix*.<sup>36</sup> Lord Nicholls speaks of "preventing the breach". The restitutionary measure which will come closest to this is an account of profits, for, as we have said, if the defendant has to give up all the profit he will make by breach, he has no incentive to breach. But only partial disgorgement was awarded in *Hendrix* and that disgorgement will arise only if the breach is *not* prevented but allowed to take place so that the profits to be disgorged will be generated.<sup>37</sup> What is being exposed here is the way that restitutionary remedies, which turn on abhorrence of "wrongfulness" understood widely, are an uncomfortable graft onto the stock of Lord Cairns' Act, the purpose of which is *not* to

<sup>35</sup> *Ibid.*, 283H–284A.

<sup>36</sup> This difficulty was predicted in Harris *et al.*, note 7 above, p. 270.

<sup>37</sup> It is an interesting issue, noted by Mance L.J. [para. 26] but not raised by the facts of *Hendrix* so far established, whether partial disgorgement should still take place even if, as it happens, the defendant does not realise any profit at all from the breach. For present purposes, it is enough to note that the defendant will breach only when he *expects* to make a profit (or avoid a loss), and that Lord Cairns' Act allows him to do so.

prevent a nuisance, a breach, etc. but to award damages in lieu of an injunction, *i.e.* to allow the nuisance, the breach, *etc.* to take place, and the “wrongful profits” flowing therefrom to be generated as a result.<sup>38</sup>

Deriving *Wrotham Park* damages from equity therefore must point in the direction of apportionment as prevention is antithetic to the purpose of Lord Cairns’ Act. But once these damages are put on a restitutionary footing, this then points in the direction of total disgorgement. If the argument is successfully mounted that the defendant has wrongfully profited from, say, a breach, why is the claimant confined to getting only part of those profits; or, to put it the other way around, why does the defendant get to keep any? However, though we will return to the practical implications of the tortured way in which Lord Cairns’ Act has been interpreted since Brightman J.’s “beneficent interpretation” of it, let us allow the possibility of partial disgorgement and follow the results.

These results are the doing of exactly what the House of Lords counselled against in *Johnson v. Agnew*, treating Lord Cairns’ Act as providing for “the assessment of damages on [a] new basis”.<sup>39</sup> In defiance of what even Goff and Jones thought “historically sound and correct in principle”,<sup>40</sup> the claimant is now effectively allowed to choose between the “traditional” and the “new” basis. As we have seen, in *Hendrix* the claimant from the outset maintained that it could not prove a compensatory claim. By doing so, it gained the legitimate interest and, if the account of profits had been granted, what it must have believed would be a considerable advantage.<sup>41</sup> We do not suggest that the claimant refused to frame an expectation claim when one could readily have been framed, for although complicated claims on this basis are commonly made by those with a more robust attitude to quantification than the claimant displays,<sup>42</sup> *Hendrix* does fall into an “IPish”<sup>43</sup> area where proof problems are acknowledged.<sup>44</sup> The recordings PPX released of, as has been noted, Jimi Hendrix as sideman to Curtis Knight, display very few of Hendrix’s own qualities. The claimant would

<sup>38</sup> D. Campbell, “*Hamlet* without the Prince: How Leng and Leong Use Restitution to Extinguish Equity” [2003] J.B.L. 131, 133–135.

<sup>39</sup> [1989] A.C. 367, 400D.

<sup>40</sup> *Goff and Jones on the Law of Restitution*, 6th. edn. (London 2002), para. 20.019.

<sup>41</sup> But see section 6 below.

<sup>42</sup> S. Eastwood, “Breach of Contract, Restitution for Wrongs and Punishment: Comment” in Burrows and Peel (eds.), note 22 above, pp. 125–126; see further M.G. Bridge, “Expectation Damages and Uncertain Future Losses” in J. Beatson and D. Friedmann (eds.), *Good Faith and Fault in Contract Law* (Oxford 1995), ch. 17.

<sup>43</sup> *World Wide Fund for Nature v. World Wrestling Federation Entertainment Inc.* [2002] F.S.R. 32, at [63] *per* Jacob J.

<sup>44</sup> *United Horse-shoe and Nail Co. Ltd. v. John Stewart and Co.* (1888) 13 App. Cas. 401, 413.



not itself have released these recordings,<sup>45</sup> and the argument that their release would have reduced the volume of the sales of its own recordings of Hendrix's music proper would have been difficult to make in a way which involved quantification of the losses [para. 14]. This, of course, is why, damages being inadequate, an injunction was granted: this is what the proceedings before Buckley J. largely were about.

But what is to prevent a future claimant from simply declining to frame an expectation claim in order to press a restitutionary claim which it prefers? Any at all complicated consequential loss claim can easily be depicted as difficult in such a way as to allow this; and, in any case, it is up to the claimant to advance evidence of substantial loss of any sort. Unless we envisage surreal statements of claim in which the defence tries to prove that the claimant is entitled to substantial damages (perhaps against the claimant's denial that this is the case), *Hendrix* moves towards the actualisation of the possibility, clearly latent in *Blake*, of the claimant having a complete freedom to elect to sue in expectation or restitution according to which will yield the best results for him.<sup>46</sup> It is indisputable that this possibility exists when, for example, passing off<sup>47</sup> or a fiduciary duty is involved,<sup>48</sup> and competent counsel will advise comparing the fruits of the different actions. Mehigan and Griffith's authoritative practitioners text on restraint of trade says in so many words: "If the plaintiff has not suffered any or only minor loss or thinks that the defendant's gain is much greater than his loss, he may be tempted to sue for an account of profits".<sup>49</sup> *Hendrix* will oblige competent counsel to think of this in simple contract cases,<sup>50</sup> with the further consequence that:

If in the future [claimants] will be able to claim wrongful profits in the alternative, in every such case the claimant's solicitor will be duty bound to demand extensive disclosure in order to find out whether such a claim is worth pursuing.<sup>51</sup>

<sup>45</sup> *Experience Hendrix LLC v. PPX Enterprises Inc.*, *Edward Chalpin* [2002] EWHC 1353 (Q.B.), at [50].

<sup>46</sup> This clearly is the result of *Esso Petroleum Co. Ltd. v. NIAD Ltd.*, unreported, 22 November 2001 (Ch.D.), at [65], in which the claimant was expressly given a choice of three bases of quantification, including an account.

<sup>47</sup> *Lever v. Goodwin* (1887) L.R. 36 Ch. D. 1, 7.

<sup>48</sup> *Industrial Development Consultants Ltd. v. Cooley* [1972] 2 All E.R. 162.

<sup>49</sup> S. Mehigan and D. Griffiths, *Restraint of Trade and Business Secrets*, 3rd. edn. (London 1996), p. 320. See further note 68 below.

<sup>50</sup> Eastwood, note 42 above, p. 127.

<sup>51</sup> *The Sine Nomine* [2002] 1 Lloyd's Rep. 805, at [3]. The typically casual attitude taken to the disclosure problems involved in extending restitutionary remedies was noted in D. Campbell, "The Treatment of *Teacher v. Calder* in *A.-G. v. Blake*" (2002) 65 M.L.R. 256, 266–268.

It was to stop exactly this possibility arising generally in contract that what is taken to be the leading authority for “efficient breach” in the UK, *Teacher v. Calder*,<sup>52</sup> was defended in *Blake*, even as the arguments which were bound to undermine it were put forward.<sup>53</sup> Similarly, *The Sine Nomine*,<sup>54</sup> an arbitration award published in the *Lloyd’s Reports* which affirms the possibility of efficient breach after *Blake*, was approved in *Hendrix* [para. 33]; but this will prove as ineffective a brake as the approval of *Teacher v. Calder* in *Blake*. In *The Sine Nomine*, the defendant owners of a vessel breached by withdrawing it from the service of the claimant charterers. The claimants were, of course, entitled to any market damages they were caused thereby,<sup>55</sup> and indeed were awarded substantial damages of this sort.<sup>56</sup> However, though the facts are not fully laid out, it is a clear implication from those published that the reason the defendant withdrew the vessel is that it wanted either to enter into an exceptionally lucrative alternative charterparty or to make an exceptional profit by carrying its own cargoes.<sup>57</sup> If the claimant was confined to market damages, this would be an efficient breach in the way this is normally meant,<sup>58</sup> and this is what the tribunal did.<sup>59</sup> Mance L.J. says of this case:

The tribunal’s understandable conclusion was that an award of wrongful profits was inappropriate where both parties were dealing with a marketable commodity (the services of a ship in that case) for which a substitute can be found on the market [para. 33].

But how can it be denied that, from a restitutionary perspective, *The Sine Nomine*’s denial of a restitutionary remedy (of partial disgorgement by hypothetical release if not total disgorgement by an account) is unsupported?<sup>60</sup> The defendant breaches, makes a

<sup>52</sup> [1899] A.C. 451, 467 *per* Lord Davey, 462 *per* Lord Watson concurring.

<sup>53</sup> Harris *et al.*, note 7 above, pp. 263–268 and Campbell, note 51 above, 264.

<sup>54</sup> [2002] 1 Lloyd’s Rep. 805.

<sup>55</sup> *Ibid.*, at para. [3].

<sup>56</sup> *Ibid.*, 805 col. 1.

<sup>57</sup> Perhaps influenced by language employed at *ibid.*, paras. [4, 10], Mance L.J. [para. 33] explains the breach by saying that “the market had risen”. With respect, this cannot be enough, for a general rise in the market would leave no margin between what the defendant hoped to gain by breach and the amount it would be liable to the claimant on normal principles, and so breach, far from being efficient, would have been senseless. There must have been what in *The Sine Nomine* [2002] 1 Lloyd’s Rep. 805, at [10] is called “an adventitious benefit” to explain the defendant’s conduct (and the claimant’s in pursuing this claim).

<sup>58</sup> The tribunal refines the possible measure of “wrongful profits” in a way which is theoretically correct but need not be discussed here: *Ibid.*, at para. [4].

<sup>59</sup> *Ibid.*, at para. [5], following the denial of an account in identical circumstances in *The Siboen and the Sibotre* [1976] 1 Lloyd’s Rep. 293, 337 col. 1.

<sup>60</sup> Professor Jones obviously disapproves of *The Sine Nomine* in *Goff and Jones*, note 40 above, para. 20.043a, but does not go so far as to say it is wrong. However, the grounds on which he argues that it “may have been correct on its facts” are, with the greatest respect, unconvincing. The charterers *did* prove an expectation loss (note 56 above) and the loss *cannot* have been equal to the profits gained (note 57 above).

profit by so doing, and disgorges nothing (unless one somewhat unscrupulously regards the market damages which were paid for compensatory reasons as partial disgorgement).<sup>61</sup> Mance L.J.'s ground for distinguishing the cases simply does not speak to the matter. Or rather, it shows just what contradictions the restitutionary argument involves, for the circumstances he is describing would support the argument given for the existence of the legitimate interest in *Hendrix*! If there is no substitute on the market, damages may be inadequate and an argument for some form of literal enforcement may arise.<sup>62</sup> It is the fact that there is a substitute to be found on the market that will likely mean that the claimant's loss will be met with adequate damages, and therefore that, as Peter Gibson L.J. has it, "the claimant would have difficulty in establishing financial loss" [para. 58].

It is a very serious mistake to confine one's concept of efficient breach to those breaches whereby the defendant hopes to realise an extra profit.<sup>63</sup> The same efficiency lies behind breaches whereby the defendant hopes to avoid extra expense.<sup>64</sup> If these breaches fall subject to the restitutionary critique, the consequences would be disastrous. This clearly emerges if we consider the following hypothetical but absolutely straightforward cases. The defendant agrees to deliver generic goods to the claimant for a price of £1 m. Part of the factory in which he intended to make the goods is then destroyed by fire, and, were he to try to perform his obligations by rescheduling his production in order to still make the goods himself, it would cost him £1.5 m. to do so. These goods are available on the market for £1.1 m. The rational thing to do is to breach. On "traditional" damages rules, the defendant will be liable for £100,000 market damages, that sum representing, of course, the excess of the claimant's payment to a third party seller over the contract price, and it is rational for the defendant to breach because this is smaller than the £500,000 extra expense which actual

<sup>61</sup> There appears to be an unsatisfactory concession to just this effect in *The Sine Nomine* itself: [2002] 1 Lloyd's Rep. 805, at [10].

<sup>62</sup> Harris *et al.*, note 7 above, pt. 3.

<sup>63</sup> *Ibid.*, chs. 1, 17 (esp. pp. 11–17). The argument of these chapters is run together to make the point polemically in Campbell and Harris, note 33 above.

<sup>64</sup> Pace E. McKendrick, "Breach of Contract, Restitution for Wrongs, and Punishment" in Burrows and Peel (eds.), note 22 above, p. 106 n. 72, readers may care to reflect on *The Puerto Buitrago* [1976] 1 Lloyd's Rep. 250, 254–255, in which it was denied that a claimant had a "legitimate interest" (in the sense of Lord Reid's *dicta* in *White and Carter (Councils) Ltd. v. McGregor* [1962] A.C. 413, 431; discussed in Harris *et al.*, note 7 above, pp. 160–165) in obtaining specific performance when damages were an adequate remedy. This case is the mirror image of *The Sine Nomine*, and the reasons why it was right to confine the claimant to compensatory damages in *The Puerto Buitrago* apply to *The Sine Nomine*. Blake and Hendrix would reverse the meaning of "legitimate interest", from being an obstacle the claimant must clear to be awarded a remedy in excess of compensatory damages to a reason for awarding him such a remedy.

performance would cause him. It is overall efficient that he do so because, whilst the defendant saves, the claimant suffers no loss of expectation. On a first look, and certainly so far as the appeal courts in *Blake* and *Hendrix* envisage, even the wider scope of restitutionary damages should cause no problem here.

But let us imagine that the goods were available on the market for £1 m. The defendant will *a fortiori* wish to breach, but things are very different from the restitutionary perspective. The claimant now has no loss on compensatory rules, and it is difficult to see why this will not generate a restitutionary claim. It is not good enough to say that he really has no loss for if, perhaps influenced by *Hendrix*, the claimant says he cannot prove one, how are we to disagree? For argument's sake we might allow that some sort of arrangement for compulsory disclosure may provide a way around this (though things are getting very, very far fetched indeed), but the underlying theoretical problem cannot be solved. For even if we establish that the claimant really is compensated by nominal damages because he did not, in fact, suffer a substantial loss, the defendant has not had to pay for the hypothetical release from his obligation to deliver by which he made a saving of £500,000. He has compensated the normal expectation loss but not paid a sum in addition to this for release. And once this is allowed, then it equally applies if the market price were £1.1 m., for the defendant did not pay for the hypothetical release which allowed him to make a net saving of £400,000 (£500,000–£100,000) in that circumstance. It is, we submit, impossible to distinguish these two cases on the ground that in one of them compensatory damages are nominal; the logic of disgorgement of wrongful profits must apply to both (and if it applied to merely one it would still be completely unacceptable). It is principally for this reason that the *Blake* argument now extended in *Hendrix* was called “ridiculous in itself” in earlier work, because if the defendant has to pay for release in these cases, commercial law as we have it will collapse.<sup>65</sup>

This collapse is brought closer by *Hendrix*, but it always was implicit in the wider availability of restitutionary remedies for breach of contract regarded as a wrong.<sup>66</sup> In the restitution literature,<sup>67</sup> this issue has so far principally surfaced in the questions raised against what once seemed as axiomatic as damages

<sup>65</sup> Harris *et al.*, note 7 above, p. 267.

<sup>66</sup> Pace Burrows, note 24 above, p. 486 n. 18 and McKendrick, note 64 above, p. 105 n. 68.

<sup>67</sup> P. Birks, “Inconsistency Between Compensation and Restitution” (1996) 112 L.Q.R. 375, 378; Burrows, note 24 above, p. 463 n. 7; A. Burrows, *Remedies for Torts and Breach of Contract*, 2nd edn. (London 1994), p. 305 (but cf. 1st edn., 1987, 268–269), A. Burrows, *Understanding the Law of Obligations* (Oxford 1998), pp. 40–44; A. Burrows and E. McKendrick, *Cases and Materials on the Law of Restitution* (Oxford 1997), p. 581 n. 4; Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Report No. 247, 1997), paras. 3.64–3.72 and A.M.

being compensatory: that awarding compensatory damages and an account for the same breach involves double recovery.<sup>68</sup> Of course, once they appreciate the consequences of carrying through the logic of their treatment of this “election of damages” problem, the advocates of restitution will not want this implication to be realised,<sup>69</sup> and they may partially resile by inventing defences to restitutionary claims which, in essence, mimic the flexibility of the expectation award.<sup>70</sup> Certainly the advocates of restitution are sufficiently sophisticated to be able to advance theories which will do this.<sup>71</sup> But it will be pointless. At its best, it would not deliver any of the economy of doctrine which we have always been told is the point of the restitutionary effort,<sup>72</sup> for we would have to go round the houses which the restitution effort is now beginning to construct whereas we hitherto have been spared that labour. But furthermore, what one has seen of the incoherence produced just by carrying the legitimate interest from *Blake* to *Hendrix*—not to speak of the points about the defendant’s conduct—makes one certain that things will become much worse in the sense that the journey round the houses may be very long and difficult indeed. This point is, we are afraid to say, emphatically rubbed in if one turns, as we now do, from the conditions of making a restitutionary award at all to what *Hendrix* tells us of how to determine whether partial or total disgorgement is appropriate.

#### 4. LIABILITY FOR TOTAL DISGORGEMENT

If one allows that liability to a restitutionary remedy was established in *Hendrix*, then the availability of the sliding scale poses a novel choice: should there be partial or total disgorgement when both are available? If any restitutionary remedy was to be given in *Blake*, the exceptional nature of Blake’s conduct meant that it had to be total disgorgement. In *Hendrix*, the Court of

Tettenborn, “Bribery, Corruption and Restitution: The Strange Case of Mr. Mahesan” (1979) 95 L.Q.R. 68, 72.

<sup>68</sup> *Tang Min Sit v. Capacious Investments Ltd.* [1996] 1 A.C. 514, 521B–D. All practitioners’ texts, e.g. Mehigan and Griffiths, note 49 above, p. 320, have so far accepted without demur the impossibility of combining expectation damages and an account, but one now expects this to change (for a while).

<sup>69</sup> Though, of course, welcoming *Blake* heartily, the sixth edition of *Goff and Jones* (note 40 above, paras. 20.024–20.034a) does not alter its basic conceptual architecture to accommodate it (*Ibid.*, para. 1.095).

<sup>70</sup> M. G. Bridge, “Restitution and Retrospective Law” (1999) 14 *Butterworths Journal of International Banking and Financial Law* 5, 8.

<sup>71</sup> E.g. there is a line traceable between Tettenborn, note 67 above, 70, 72 and Law Commission, note 67 above, para. 3.62, of finding a place for the defence which could be based on the allowance given in equity for the defendant’s skill and effort (*Boardman v. Phipps* [1967] 2 A.C. 46) expended in realising a profit by efficient breach.

<sup>72</sup> P. Birks, “Definition and Division: A Meditation on *Institutes* 3.13” in P. Birks (ed.), *The Classification of Obligations* (Oxford 1997), ch. 1.

Appeal seems to proceed on the basis of determining whether the defendant's conduct was as exceptional as Blake's, for if so, it would lead to total disgorgement through an account of profits. However, as it decides that that conduct was not "exceptional to the point where the Court should order a full account of all profits" [para. 44], it concludes that only the less serious remedy of partial disgorgement is appropriate [paras. 44, 55]. We shall return to this way of approaching the matter, but for the moment let us look at the reasons why it was decided that *Hendrix* merited only partial disgorgement.

Three reasons are given [para. 37; cf. para. 29], but, with respect, they reduce to one. The first two reasons are that *Hendrix* is not as "sensitive" as a national security case, nor involves as much notoriety. We shall see that the second of these reasons may, in fact, be questionable, but even allowing both, they cannot take us very far. Hopefully almost every case that will ever be heard will be distinguishable from *Blake* on this basis, and certainly every normal commercial case of the sort that caused concern to Lord Hobhouse will be. We are left with the third reason, that "there is no direct analogy between PPX's position and that of a fiduciary".

We are in deep waters indeed here, and the precise way this is put by Mance L.J. is important. It is not obvious that there was a private law interest (based on Blake's signing the Official Secrets Act as a condition of obtaining employment with the security services) in *Blake* at all.<sup>73</sup> But even allowing that there was, it was categorically found that Blake was not a fiduciary.<sup>74</sup> This is but grudgingly recognised in *Hendrix* [para. 29], but, of course, this is the significance of *Blake* as a restitutionary case. Had Blake been a fiduciary, an account of profits would have been awarded against him at first instance.<sup>75</sup> Leaving aside the extraordinary features of *Blake*, it is completely settled that an account may be awarded for breach of a fiduciary duty. The entire doctrinal point of *Blake* is that the House of Lords awarded an account for a simple breach of contract.

The advance of restitution must be somewhat undermined if, having in *Blake* got rid of the necessity of finding a fiduciary obligation to justify the award of an account of profits, one found that necessity restored in *Hendrix*.<sup>76</sup> And it is this that Mance L.J.'s

<sup>73</sup> *A.-G. v. Blake (Jonathan Cape Ltd. Third Party)* [1997] Ch. 84, 93B (Ch.D).

<sup>74</sup> *Ibid.*, 91E–96D.

<sup>75</sup> *Ibid.*, 96E–97A.

<sup>76</sup> It may well be possible to construct an argument on the basis of a close reading of Mance L.J.'s judgment that adheres to the distinction between restitution and disgorgement: see note 24 above. It is hard, however, to recover a *ratio* from *Hendrix* that does so, and impossible to do so from the judgment of Peter Gibson L.J. Most importantly, the logic of the wrongful profits argument informing *Hendrix* undermines this distinction, as we are arguing.

careful wording seeks to avoid. In *Blake*, Lord Nicholls found that Blake's contractual obligation not to disclose official information was "closely akin to a fiduciary obligation, where an account of profits is a standard remedy in the event of breach", and this is drawn upon in *Hendrix* [para. 29] to distinguish PPX's breach, for, it will be recalled: "there is no direct analogy between PPX's position and that of a fiduciary". There are, of course, tolerably settled if hardly immutable rules about what does and what does not constitute a fiduciary relationship. But no direct reference to these rules would be to the purpose here, for the last thing we are able to do is argue that PPX was a fiduciary; we must show it was in a position *analogous* to a fiduciary.

But, of course, if a party analogous to a fiduciary gets a remedy previously given only to fiduciaries, then in the sense most important in the common law that party *is* a fiduciary: *ubi remedium ibi jus*. And for this reason *Hendrix* is the latest in the line of restitutionary arguments that have had the effect of broadening the class of fiduciaries, the second to do so in reliance on what prior to *Blake* would have been thought a flat contradiction or a misuse of terms<sup>77</sup> but which *Blake* clearly makes possible: "the characterisation of a contractual obligation as fiduciary".<sup>78</sup> We do not want to enter into the argument in principle here, for what we would say in defence of the "self-denying ordinance"<sup>79</sup> which we believe should be observed here has been said by others:<sup>80</sup> "Fiduciary duties should not be superimposed on ... common law duties simply to improve the nature or extent of the remedy".<sup>81</sup> What we want to point to is the absurdity of treating the facts of *Hendrix* as justifying the extension of fiduciary obligations.

The, as it were, ethical atmosphere of *Blake* was dominated by concern not to allow a person to profit from wrongdoing which involved despicable conduct. It was no technical issue of the nature of the wrong involved in breach of contract that guided the Court of Appeal and the House of Lords in *Blake*. But as Lord Hobhouse pointed out in *Blake*,<sup>82</sup> it is wrong to allow the search for a "just response"<sup>83</sup> or "practical justice"<sup>84</sup> to dominate appeal

<sup>77</sup> Lord Millett, "Equity's Place in the Law of Commerce" (1998) 114 L.Q.R. 214, 225.

<sup>78</sup> *A.-G. v. Blake (Jonathan Cape Ltd. Third Party)* [2001] 1 A.C. 268, 285G (H.L.).

<sup>79</sup> S. Worthington, "Fiduciaries: When is Self-denial Obligatory?" [1999] C.L.J. 500.

<sup>80</sup> S. Worthington, "Reconsidering Disgorgement for Wrongs" (1999) 62 M.L.R. 218 and S. Worthington, and R. Goode, "Commercial Law: Confining the Remedial Boundaries" in D. Hayton (ed.), *Law's Future(s)* (Oxford 2000), ch. 15.

<sup>81</sup> *Norberg v. Wynrib* (1992) 92 D.L.R. (4th.) 449, 481.

<sup>82</sup> *A.-G. v. Blake (Jonathan Cape Ltd. Third Party)* [2001] 1 A.C. 268, 299F (H.L.).

<sup>83</sup> *Ibid.*, 287G.

<sup>84</sup> *Ibid.*, 292C.

court reasoning even in the circumstances of *Blake*, and, even more than this, there is the question of the precedent doing so sets for other cases.<sup>85</sup>

In *Hendrix*, the Court of Appeal is pleased that it has obtained “practical justice” [para. 42] by preventing the “anomalous and unjust” outcome of PPX avoiding paying for the use of the master copies “by simply breaching the agreement” [para. 43]. But Buckley J. was quite right to conclude that he “could not begin to compare” *Hendrix* with *Blake*,<sup>86</sup> for the cases are very different indeed. Some detail of the career of Jimi Hendrix beyond that to be found in the judgments is very helpful here.<sup>87</sup> The settlement which PPX breached by exploiting the recordings was, as we have said, of litigation PPX had brought against Hendrix for breach of an exclusive service agreement entered into in 1965. There can be no doubt that Hendrix deliberately breached this agreement; indeed this breach is quite a famous episode in the history of rock music. Regretting the 1965 agreement virtually as soon as he made it, Hendrix almost immediately and repeatedly broke it by playing outside of its confines surreptitiously. It was whilst playing in his own band under the alias of Jimmy James in Greenwich Village in June 1966 that Hendrix was “discovered” by Chas Chandler, a very well established rock musician. Chandler then took Hendrix from New York to London and there formed and promoted the Jimi Hendrix Experience, the band which provided the platform for Hendrix’s great success.

Hendrix’s playing when he was discovered and during the period when the Jimi Hendrix Experience shot to fame was all in clear breach of the 1965 agreement, and, especially until the 1973 settlement, Hendrix or those with rights derived from him were in constant dispute with Mr. Chalpin. In (the admittedly all more or less hagiographic) biographies of Hendrix, Mr. Chalpin is always criticised and the 1965 agreement is always referred to as “punitive”, “ill-advised”, “miserly”, *etc.*<sup>88</sup> That agreement unarguably had a great deal of the quality made familiar by *Schroeder Music Publishing Co. v. Macaulay*.<sup>89</sup> In *Hendrix*, Mance L.J. hints [paras. 7, 39] that it was an exploitative agreement.

<sup>85</sup> *Ibid.*, 299D–E.

<sup>86</sup> *Experience Hendrix LLC v. PPX Enterprises Inc., Edward Chalpin* [2002] EWHC 1353 (Q.B.), at [50].

<sup>87</sup> In his capacity as one of the leading authorities on the career of Jim Hendrix, Mr. Paddy Ireland has referred us to H. Shapiro and C. Glebbeek, *Jimi Hendrix: Electric Gypsy* (London 1995), pp. 95–107 as the best account of this period of Hendrix’s career. (See also the other entries for “Chalpin” in the index). We have read other biographies of Hendrix and their accounts of this period do not materially differ from Shapiro and Glebbeek, although all have a more histrionic tone.

<sup>88</sup> These epithets are taken from the biography of Hendrix in the BBC’s Music Artist Database.

<sup>89</sup> [1974] 1 W.L.R. 1308.



Nevertheless, it *was* an agreement, and it was not set aside<sup>90</sup> but settled on terms which divided the benefits and burdens between the parties. The current litigation therefore arises to protect rights which certainly were obtained by breach, and, what is more, a deliberate (indeed a repeated, deceitful and prolonged in the face of the non-breaching party's manifest disapproval) breach which would be regarded as a notorious episode in the history of rock music were it not that such breaches by artists are generally viewed positively by those who write that history. If this was not enough, it seems clear that had Hendrix been more forthright at the outset, all this litigation could have been avoided. Chandler sought to buy Hendrix out of all his commitments (he was under contract to others in addition to PPX), but was unintentionally or otherwise deceived by Hendrix, who did not tell him about Chalpin.<sup>91</sup> There can be little doubt that at that time Hendrix could have been bought out of his commitments to Chalpin for a pittance.

Mance L.J. evidently did not feel the analogy between *Blake* and *Hendrix* was strong enough to justify an account, but he must have believed it strong enough to justify the hypothetical release damages which come lower down the sliding scale. But it is, we feel obliged to say, simply ridiculous to hold that any analogy can be drawn between *Blake* and *Hendrix* for the purposes of legitimating any restitutionary remedy. *Blake* is an absolutely *outré* case to which only one previous case in recent English litigation can be compared, the *Spycatcher* case, where the use of the same restitutionary argument<sup>92</sup> was advocated.<sup>93</sup> In our opinion, although *Blake's* turpitude does not excuse what was done in *Blake*, no-one can fail to sympathise with the motivation behind the decision. But the corollary of depicting the breach as a wrong which generates the "temptation to do justice"<sup>94</sup> must be that the claimant is clearly

<sup>90</sup> Mance L.J. at one point observes that "the litigation about the agreement dated 15th October 1965 was not going well for PPX" [para. 39]. We are unable to do more than speculate on the basis of what we know of the 1965 agreement, but it would appear that any such difficulties must stem from the *Schroeder v. Macaulay* quality of that agreement leading PPX's counsel to fear the court would not take too harsh a view of Hendrix's breach; *i.e.* the exact opposite of that view of breach which cases like *Hendrix* are seeking to promote: cf. Campbell, note 38 above, 139–140. The settlement of the US part of the earlier litigation is, however, described as follows in Shapiro and Glebbeek, note 87 above, p. 291: "[whether the 1965 agreement was enforceable] was never put to the test; Chalpin pressed his suit against Warner Brothers [whose rights were derived from Hendrix] in America, who rolled over and settled. Why? Possibly because, having seen Jimi's earning potential, they didn't want to take any chances of lengthy litigation putting a freeze on their ability to release his material and earn them far more than they could ever lose in court. There was also a risk that the court would find in favour of Ed Chalpin and declare all subsequent agreements null and void. So Ed Chalpin received a very favourable settlement".

<sup>91</sup> *Ibid.*, p. 106

<sup>92</sup> P. Birks, "A Lifelong Obligation of Confidence" (1989) 105 L.Q.R. 501.

<sup>93</sup> *A.-G. v. Guardian Newspapers (No. 2)* [1990] 1 A.C. 109.

<sup>94</sup> N. Andrews, "Civil Disgorgement of Wrongdoers' Gains: The Temptation to do Justice" in W.R. Cornish *et al.* (eds.), *Restitution: Past, Present and Future* (Oxford 1998), ch. 10.

in an ethically superior position, and this is the import of the description of the non-breaching party in *Blake* as “innocent”.<sup>95</sup> However, it will never be black and white in this way when it comes to applying *Blake* to more usual commercial cases. *Hendrix* merely takes to an extreme the incoherence which is bound to follow from disregarding the core aim of the law of contract, to give effect to the agreement of the parties, in order to respond to what are wrongs according to the restitutionary reclassification of obligations. It is a most important virtue of freedom of contract that it allows the court to avoid this incoherence by avoiding, so far as is possible,<sup>96</sup> the imposition of exogenous moral criteria on commercial dealings at all.

That we are obliged to point this out in a comment on a decision of the Court of Appeal would be remarkable had it not long been clear that this replacement of the parties’ valuations of their conduct by exogenous ones supplied by restitutionary theories of unjust enrichment, wrongfulness, corrective justice, *etc.* is at the heart of the restitutionary recasting of remedies for breach.<sup>97</sup> *Hendrix* is not the worst example we have so far seen. Disapproval of *City of New Orleans v. Firemen’s Charitable Association*<sup>98</sup> played a large part in getting the argument for the expansion of restitution going in this country,<sup>99</sup> and clearly formed part of the mental atmosphere of *Blake*.<sup>100</sup> Rearrangement of the outcome of this case was advocated, although this was a contract which was not even breached!<sup>101</sup> At least in *Hendrix* there was a breach, albeit a breach of an obligation which the defendant undertook as a consequence of the other party’s prior breach. This is, we suppose, an improvement, but surely not sufficient to stir up the indignation necessary to give colour to appeals to “practical justice”. The restitutionary argument takes us deep into territory which the legitimacy of the law of contract has been based upon refusing to enter, and *Hendrix* graphically shows us how wise that refusal has been.

*Hendrix* is, then, a signal failure in its attempt to distinguish the grounds on which a party in breach may be confined to partial or granted total disgorgement. All we know about these grounds are

<sup>95</sup> *A.-G. v. Blake (Jonathan Cape Ltd. Third Party)* [2001] 1 A.C. 268, 278 (H.L.).

<sup>96</sup> D. Campbell and H. Collins, “Discovering the Implicit Dimensions of Contracts” in D. Campbell *et al.* (eds.), *The Implicit Dimensions of Contract* (Oxford 2003), ch. 2.

<sup>97</sup> H. Collins, “Legal Classifications as the Products of Knowledge Systems” in Birks (ed.), note 72 above, ch. 3.

<sup>98</sup> 9 So. 486 (1891).

<sup>99</sup> G. Jones, “The Recovery of Benefits Gained from a Breach of Contract” (1983) 99 L.Q.R. 443, 455.

<sup>100</sup> *A.-G. v. Blake (Jonathan Cape Ltd. Third Party)* [1998] Ch. 439, 458D–E (C.A.).

<sup>101</sup> *Harris et al.*, note 7, pp. 277–278.

that they must be more vague than the grounds upon which we have previously identified a fiduciary relationship; they need only be analogous to such a relationship. We learn nothing of the extent of the analogy except that it involves some sort of moral disapprobation connected to wrongfulness. What little had previously emerged about the boundaries of wrongfulness<sup>102</sup> cannot but be obfuscated by *Hendrix's* finding that rights *acquired by breach* come within those boundaries! This is, we are sorry to have to conclude, a joke at the expense of a restitutionary argument which is intended to remove “discretionary remedialism”<sup>103</sup> from the law.

### 5. THE SLIDING SCALE IN PRACTICE

This regrettable situation does not exhaust all that is unsatisfactory about *Hendrix*. So far we have looked at its shortcomings for defendants. We must now turn to its shortcomings for claimants in general, and Experience Hendrix LLC in particular.

The doctrinal attractions of the sliding scale are obvious: restitutionary remedies following breach appear to be theoretically unified into a scale and coherent damages quantifications would seem to follow. But, partly because the gap between the hypothetical release and an account of profits cannot actually be smoothed away, these attractions have very little practical substance indeed; and once this is realised, the entire edifice collapses. When the claimant turned away from compensatory remedies because of quantification problems and sought an account, surely it was implicit that the account would be easier to quantify. But, of course, long experience of accounts shows that this is not so.<sup>104</sup> An important subsidiary issue in *Hendrix* was the claimant's attempt to enlist the Court's assistance in securing the information needed to obtain an account, the claimant having no confidence in an undertaking to account provided by the defendant [paras. 47–49]. *Hendrix* is in an area which is the natural habitat of search and freezing orders, the “nuclear weapons” of commercial litigation.<sup>105</sup> As has been said in previous work:

an account of profits in practice suffers from defects similar to those encountered in quantifying damages for loss of future business. Logically, the plausibility of this remedy rests on [the claimant] being able to provide evidence of the gains [the defendant] has made by his wrongful conduct, and this must

<sup>102</sup> S. Hedley, *Restitution* (London 2001), esp. ch. 4.

<sup>103</sup> P. Birks, “Three Kinds of Objection to Discretionary Remedialism” (2001) 29 W.A.L.R. 1.

<sup>104</sup> *Price's Patent Candle Co. Ltd. v. Bauwen's Patent Candle Co. Ltd.* (1858) 70 E.R. 302, 303.

<sup>105</sup> *Bank Mellat v. Naipur* [1985] F.S.R. 87, 92.

encounter proof problems analogous to those [the claimant's] own expectation claim must encounter, with the added very serious complication that the evidence must be sought from [the defendant], who obviously will not wish to provide it.<sup>106</sup>

To turn from an expectation claim to an account is to jump out of the frying pan into the fire; but if one turns away from an expectation claim to hypothetical release, the case is even worse: a jump into the blast furnace. Consideration of the cases shows that, in the face of the want of evidence, the Court has often reached some very rough and ready quantifications of accounts.<sup>107</sup> But at least in an account one has a clear goal of disgorging all of the defendant's gains. What proportion is to be disgorged for hypothetical release? We do not want to dwell on a point that has been extensively discussed in earlier work but merely sum up the conclusion of that work: what has so far prevailed in hypothetical release cases since *Wrotham Park* is complete arbitrariness made tolerable by moderation, and there is no way whatsoever in which this can be changed.<sup>108</sup>

When awarding the claimant in *Wrotham Park* £2,500,<sup>109</sup> Brightman J. acted in the usual way in Lord Cairns' Act cases, for faced with the necessity of making an award about which he could say nothing except that it was "fair", he acted with "great moderation". However, the fact that Brightman J. knew that, by awarding £2,500, he was awarding 5 per cent. of the £50,000 the defendant expected to make by its breach, was most unusual in modern hypothetical release cases. In most such cases, *no evidence of the defendant's profit has been available*, and so the "remedy" has been the purest guesswork: an arbitrary apportionment of a sum which is not even known. One awaits the conclusion of the litigation in *Hendrix* with interest, for so far it too has been a case in which there has been no evidence of the profit the defendant made by breach [para. 14].

The conclusion which must be faced is that *Hendrix* manifests the gross logical fallacy at the heart of the legitimate interest point. If the legitimate interest is generated by the difficulty of consequential loss quantification, then to turn from this to an account, where evidential difficulties routinely lead to very rough and ready approximations, or to hypothetical release damages, the conceptual difficulties of which typically have led to the abandonment even of a pretence of principled quantification, is, we

<sup>106</sup> Harris *et al.*, above note 7, p. 571.

<sup>107</sup> *E.g. Normalec Ltd. v. Britton* [1983] F.S.R. 318; discussed in Campbell, note 38 above, 136 n. 27.

<sup>108</sup> Harris *et al.*, note 7 above, pp. 268–272, 491–494.

<sup>109</sup> *Wrotham Park Estate Co. Ltd. v. Parkside Homes* [1974] 1 W.L.R. 798, 815–816.

are sorry to say, lamentable. It would *always* be possible to provide a compensatory damages quantification if one only had to achieve the standard of what is commonly done in the quantification of accounts and of hypothetical damages,<sup>110</sup> and therefore the whole argument just falls. The explanation of why this logical absurdity has been put forward in *Hendrix* must refer to the hidden text in the case, or rather to two hidden texts. The first is the, as it were, academic text: *Hendrix* is a vehicle for the promotion of restitution,<sup>111</sup> and one can see what is being done here. The practical text is more complicated.

Before the thoughts of a number of leading academics, practitioners and judges became so focused upon restitution, a claimant facing a situation where he feared he would be inadequately compensated by a compensatory damages award would seek literal enforcement, and in a case like *Hendrix* the appropriate remedy was the injunction which was indeed obtained. A prohibitory injunction is, of course, a remedy for the future, in this case against “yet further exploitation”<sup>112</sup> of the recordings. It might be the case that between the breach and the judgment, the defendant had made profits by the breach, and, in the right case, he could be made to disgorge these “past profits” by an account of profits as a supplemental equitable remedy. This is what is sought in *Hendrix* [para. 36]. Though the transcripts of the case do not allow one to be certain,<sup>113</sup> it would seem likely that the claimant did not originally seek to supplement its injunction with an account [para. 14], and when it amended its statement of claim to do so, perhaps influenced by the very harsh comments Professor Birks has made about equity,<sup>114</sup> or by the atmosphere left by those comments, it framed that claim in a most thoroughly restitutionary way, directly upon *Blake*.

We recall that as a first alternative to the compensatory damages which it maintained would be nominal, the claimant asked for an award on “the *Wrotham Park Estates* basis”, or, as a second alternative, for an account on the authority of *Blake*. It is, with due respect, not obvious why it did so. It did obtain partial disgorgement *via* hypothetical release, but, unless Experience Hendrix LLC receives novel treatment indeed when the damages

<sup>110</sup> *E.g. Joseph v. National Magazine Co. Ltd.* [1959] 1 Ch. 14, 21.

<sup>111</sup> This point in particular, but also a number of the other points made in this article, have been indicated by Mr. Hedley in comments he has made on the Restitution Discussion Group email forum: note 20 above.

<sup>112</sup> *Experience Hendrix LLC v. PPX Enterprises Inc., Edward Chalpin* [2002] EWHC 1353 (Q.B.), at [45].

<sup>113</sup> The relationship of *Hendrix* to *Island Records Ltd. v. Tring International plc.* [1995] F.S.R. 560 is unclear.

<sup>114</sup> P. Birks, “Equity, Conscience and Use” (1999) 23 *Melb. U.L. Rev.* 1, 21–22.

are quantified—as seemingly encouraged by Mance L.J. at para. [46]—it will obtain a very moderate award. The awards so far made on a *Wrotham Park* basis have been so moderate that it is hard to distinguish them from nominal damages,<sup>115</sup> and so to see in what way they really differ from the compensatory award and therefore what the point of them is.<sup>116</sup> The award of £2,500 in *Wrotham Park* itself worked out at £116 *per* house and the defendant kept a margin of £47,500 from the gains yielded by the breach. A result like this may well fail to satisfy Experience Hendrix LLC. Parallels to hypothetical release damages are, of course, available in situations like *Hendrix* without reliance on restitution, either for breach of common law restraint of trade<sup>117</sup> or under some provision related to intellectual property,<sup>118</sup> and they may well be higher,<sup>119</sup> though admittedly quantifications are so woolly in these “licence damages” cases that it is hard to be precise.<sup>120</sup>

If the claimant had obtained total disgorgement *via* an account of profits, no doubt it would have been better pleased, and it is not clear to us from the merits as we are able to understand them from the materials available to us why it did not try to get this by pleading an infringement of an intellectual property right or even by passing off.<sup>121</sup> In this way it could have tried to get that account by relying on statute or settled equitable authority rather than by relying on the winner of the very strongly contested prize of most controversial contract case decided by the House of Lords in the last twenty years.

<sup>115</sup> There is an exception which proves the rule: *Marine and General Mutual Life Assurance Society v. St. James Real Estate Co.* [1991] 2 E.G.L.R. 178; discussed in Harris *et al.*, note 7 above, p. 494.

<sup>116</sup> *Ibid.*, pp. 268–272, 491–494 and Campbell, note 51 above, 264–265.

<sup>117</sup> *Seager v. Copydex (No. 2)* [1969] R.P.C. 250.

<sup>118</sup> The Court of Appeal in *Hendrix* would have been receptive to an argument under the Copyright Designs and Patents Act 1988 [paras. 39–40]. In *Redrow Homes Ltd. v. Betts Bothers plc.* [1999] 1 A.C. 197, it was held that normal compensatory damages under the 1988 Act, s. 96(2) and “additional” damages under s. 97(2) were available only in the alternative to an account of profits.

<sup>119</sup> In *Ludlow Music Inc. v. Williams (No. 2)* [2002] E.M.L.R. 29, at [57–59], Pumfrey J. denied additional damages under the Copyright Designs and Patents Act 1988, s. 97(2). However, believing himself not to be tightly bound by the tradition of moderation in awarding equitable damages and being inclined to “err on the side of generosity to the claimant” (*Ludlow, loc. cit.*, at para. [48]), he awarded (in addition to an injunction) a 25 per cent. royalty under s. 96(2) (*Ibid.*, at para. [66]).

<sup>120</sup> This aspect of *Hendrix* is discussed at length in an unpublished paper by Professor Jaffey, “Disgorgement and ‘Licence Fee Damages’ in Contract”.

<sup>121</sup> Uncontested evidence for the claimant given by one Mr. McDermott [para. 14] raises the suspicion that the PPX recordings were marketed in a misleading way, in effect as “Jimi Hendrix” records when in fact they were “Curtis Knight” records, and it would appear that an English passing off action relating to this evidence succeeded in 1968: Shapiro and Glebbeek, note 87 above, pp. 290–291. It is difficult to see that sufficient sums would have been involved to justify continuation of these proceedings after the injunction had been awarded unless these recordings were sold as “Jimi Hendrix” recordings.

Much of what Mance L.J. says in *Hendrix* [paras. 39–41] leads one to believe that he would have looked sympathetically on “IPish” arguments. But no doubt there were all sorts of difficulties with these arguments of which we are unaware which prevented the claimant from pursuing them.<sup>122</sup> For present purposes, the point is that to do so the claimant would have had to show something in addition to simple breach of contract to gain the remedy; the tortious element of passing off or the intellectual property right. The point of the claimant’s argument in *Hendrix* is to make all this unnecessary by making these additional factors unnecessary, just as *Blake* purported to make the additional factor of a fiduciary relationship unnecessary, and therefore obtain the wider remedy for simple breach of contract. As the account of profits was not awarded in *Hendrix*, we are left in the “analogous to a fiduciary” half-way house. But, having, we believe, raised serious objections to treating *Hendrix* as anything other than a contract case if the additional element could not be shown, we wish to generalise from this to say that it is important that what has so far been erected of the half-way house should be demolished rather than that we proceed to its completion.

In *World Wide Fund for Nature v. World Wrestling Federation Entertainment Inc.*,<sup>123</sup> heard about a year before *Hendrix*, Jacob J., we respectfully submit, took the right line.<sup>124</sup> A claimant who had been awarded an injunction for breach of a restraint of trade also sought to amend its statement of claim to seek an account on the authority of *Blake*. Like so many cases in the truly burgeoning areas of business information and intellectual property law, W.W.F. does not fit comfortably into the existing legal categories, which are continually being stretched by highly competent claimants’ counsel pleading to usually extremely receptive commercial courts. The restraint was, in essence, over the use of the initials “W.W.F.” shared by the parties, and so had some of the colour of a trademark case, although Jacob J. quite rightly insisted this was a restraint case. Having done so, he distinguished *W.W.F.* from *Blake* and denied the account in clear terms:

[In *W.W.F.*] all one really has ... is a negative covenant. The fact that it relates to the use of initials and so is a bit “trademarkish” or “IPish” does not mean the common law should provide what Parliament provides by statute for an

<sup>122</sup> We are grateful to Mr. Howard Johnson for describing to us in detail what these may have been.

<sup>123</sup> *World Wide Fund for Nature v. World Wrestling Federation Entertainment Inc.* [2002] F.S.R. 32. The Court of Appeal affirmed the granting of the injunction, but there was no cross-appeal as to account: [2002] F.S.R. 33.

<sup>124</sup> *Pace* McKendrick, note 64 above, pp. 106–107.

infringement of a registered mark or intellectual property right ... I conclude that the proposed amendment should not be allowed.<sup>125</sup>

Anyone at all familiar with intellectual property law will see many parallels between the language of that law and the language now being used in the argument for the widening of restitution. Restitutionary arguments often cast longing looks at the account of profits remedy as it is applied in intellectual property cases,<sup>126</sup> and the extension of intellectual property reasoning to simple contracts was clearly invited by Lord Nicholls' speech in *Blake*.<sup>127</sup> We would no longer have "breach" but rather "wilful infringement" by a "cynical and deliberate" "wrongdoer" or "pirate". These parallels certainly are strong, but rather than this being to the good, it should scream out a warning about what is being proposed. It is not merely that our leading intellectual property judges are presently arguing that copyright in particular already gives claimants excessive rights;<sup>128</sup> nor that the economic and legal justifications for intellectual property are questionable.<sup>129</sup> It is that, for good or ill, intellectual property rights are not based on contractual relationships but on monopolies granted by the state on the grounds that it is necessary to radically intervene in what would be the outcome of competition. Despite the vulgar understanding to the contrary, intellectual property rights are not of the market but oust the market, and this should make us extremely cautious about extending remedies thought appropriate in that sphere to simple contract, for simple contract is, of course, the legal foundation of competition.

## 6. CONCLUSION

By not attempting to use the arguments that were available to it prior to *Blake*, Experience Hendrix LLC may have allowed an academic agenda to take precedence over a practical one; but this triumph of the academic over the practical is something that certainly characterises *Blake*, and was said in *Blake* about the line

<sup>125</sup> *World Wide Fund for Nature v. World Wrestling Federation Entertainment Inc.* [2002] F.S.R. 32, at [63].

<sup>126</sup> A. Tettenborn, *Law of Restitution*, 3rd edn. (London 2002), pp. 253–255.

<sup>127</sup> *A.-G. v. Blake (Jonathan Cape Ltd. Third Party)* [2001] 1 A.C. 268, 278D–280F (H.L.).

<sup>128</sup> Hon. Sir Robin Jacob, "The Onward March of Intellectual Property Rights and Remedies" in R.C. Dreyfuss et al. (eds.), *Exploring the Boundaries of Intellectual Property* (Oxford 2001), ch. 17 and Mr. Justice Laddie, "Copyright: Over-strength, Over-regulated, Over-rated" (1996) 5 *European Intellectual Property Review* 253.

<sup>129</sup> S. Picciotto and D. Campbell, "Whose Molecule Is It Anyway? Private and Social Perspectives on Intellectual Property" in A. Hudson (ed.), *New Perspectives on Property Law: Obligations and Restitution* (London 2003), ch. 14.



of cases stretching back to *Wrotham Park*.<sup>130</sup> This is not to say *Hendrix* was “academic” in the sense of having no costs. *Hendrix* shows that we are in the midst of the period of very expensive mischief<sup>131</sup> which will have to be endured whilst the attempt to place remedies for breach of contract on a restitutionary basis works its way out of the appeal courts. One may frame the hope that this is happening quickly, and indeed there is a striking parallel between the brilliant but quickly vanishing efflorescence of the career of Jimi Hendrix and the career of restitution for the wrong of breach of contract in the appeal courts. There was a distinct loss of confidence in the “skipping” and “doing what one promised not to do” arguments between the Court of Appeal and the House of Lords’ hearings of *Blake*, and that these arguments still play a role in *Hendrix* is inconsistent with what is explicitly said of them in that case. The “legitimate interest” argument which *Hendrix* emphasises also involves, we say with all respect, manifest inconsistencies. We do not wish to argue that expectation damages work perfectly well, or even as well as one imagines a reformed system of remedies might work, but *Hendrix* is clear evidence that the general restitutionary alternative is very markedly inferior. If the remedy sought in *Hendrix* could have been obtained by means available prior to *Blake*, *Hendrix* may be a pointless case. However this is, dealing with it in a way heavily influenced by *Blake* has led the Court of Appeal to produce a judgement that is, with all respect, undermined by some very weak arguments.

That the career of restitution for wrongful breach of contract shows signs of emulating the brevity of that of Jimi Hendrix himself shows just how mistaken is the restitutionary effort to displace expectation in contract. By seeking to impose an external criterion of wrongfulness on the parties’ conduct, substituting their valuations of that conduct for the parties’ own, the proponents of restitution are running against basic freedom of contract, and therefore against the core of the legitimacy of the market economy and the liberal democratic polity. Even the extremely distinguished academics, practitioners and judges who have so exhorted restitution for wrongs since Birks’ *Introduction* appeared in 1985<sup>132</sup> are a really rather feeble force when opposed to this, and once they realise what they have done in *Blake*, they will resile from it.

<sup>130</sup> *A.-G. v. Blake (Jonathan Cape Ltd. Third Party)* [2001] 1 A.C. 268, 277H (H.L.).

<sup>131</sup> D. Campbell, “Classification and the Crisis of the Common Law” (1999) 26 J. Law and Soc. 369, 377.

<sup>132</sup> P. Birks, *An Introduction to the Law of Restitution* (Oxford 1985; rev. edn. 1989), ch. 10. It is possible to trace the influence of this thinking back to Professor Birks’ 1982 *Current Legal Problems* lecture: P Birks, “Restitution and Wrongs” [1982] C.L.P. 53.

The striking parallel between the careers of Jim Hendrix and restitution for wrongful breach will not, unfortunately, extend much beyond their brevity. For any adult who places any value on rock music, Hendrix has left a number of excellent songs. But restitution's general application to contract will yield nothing positive. In the course of the appeal courts finding this out, we will at least gain the benefit of learning just how inappropriate general restitutionary damages are to the market economy. But, of course, serious reflection on the reason why expectation rather than restitutionary damages became the default rule in contract remedies in the first place,<sup>133</sup> and therefore are the legal basis of the market economy, would have made this lesson unnecessary.

<sup>133</sup> Harris *et al.*, note 7 above, ch. 1.