meaning and also that liability does not turn on the rather random question of the precise form of wrongdoing chosen by the defendant to cause intentional harm, especially where that wrongdoing is serious enough to count as a crime. But Lord Hoffmann's approach is backed more closely by authority, plus if the defendant would not have been liable had he personally committed, for example, a breach of statutory duty because the statute properly construed does not support civil liability, it is hard to see why he should be liable in the three-party situations covered by the economic torts. In any event, the House of Lords may soon have the opportunity to consider the question in detail, in the related context of liability for the economic tort of "unlawful means conspiracy", when *Revenue and Customs Commissioners* v. *Total Network SL* [2007] EWCA Civ 39 goes on appeal. This case involved a complex "carousel fraud" in which goods were allegedly imported into the UK from the EU by the defendant, a Spanish company, sold from company to company in the UK and then exported back to the defendant, all in the space of one day. The fraud was committed by reclaiming input VAT from the claimant Commissioners, on production of the appropriate invoice documentation, while the UK company which should have paid the corresponding amount of VAT went quietly bust without paying it. The VAT legislation has statutory procedures for recovery of overpaid credits, but the Commissioners were unable to use them at the time of this fraud for technical reasons so sought to make the defendant liable in damages for the tort of "unlawful means conspiracy" instead. The problem with this claim was that the criminal offence committed by the defendant, the offence of common law "cheat" (preserved by section 32(1)(a) of the Theft Act 1968 in revenue cases) is not itself actionable in tort. The Court of Appeal unanimously thought that, in principle, this should not prevent the offence of cheat from counting as "unlawful means" for the purposes of an unlawful means conspiracy, but with great reluctance found that they were precluded by binding authority from reaching this conclusion. Leave to appeal to the House of Lords was given, so it is greatly to be hoped that their Lordships will have a further opportunity to decide the fundamentals of liability for the various economic torts that depend on what "unlawful means" means.

JANET O'SULLIVAN

CHANGING CONCEPTIONS OF COMPENSATION

COMPENSATION is becoming an increasingly nebulous concept. Historically, the courts have drawn a clear distinction between

compensatory relief and restitution; the former fixing on the loss sustained by the claimant and the latter focussing on the gains made by the defendant. Recent cases, however, have cast doubt on this division, with the courts exhibiting an increasing willingness to construe compensation as incorporating both loss-based and gain-based awards (see the recent decision of Morritt C. in *Charter plc* v. *City Index Ltd.* [2006] EWHC 2508 (Ch), [2007] 1 W.L.R. 26, noted [2007] C.L.J. 265). This breakdown of terminological precision has led to worrying analytical confusion. Nowhere has this been more apparent than in the recent Court of Appeal decision in *WWF – World Wide Fund for Nature* v. *World Wrestling Federation Entertainment Inc.* [2007] EWCA Civ 286.

In 1994, the World Wide Fund for Nature and the World Wrestling Federation entered into a settlement agreement concerning the use of the initials "WWF". The Federation subsequently broke this agreement and the Fund sought damages for breach of contract. In 2001, the Fund applied for leave to amend its claim to include an account of profits (following the decision of the House of Lords in *Attorney-General* v. *Blake* [2001] 1 A.C. 268). Jacob J. refused this application. Several years later the Fund brought a claim for damages measured on the *Wrotham Park* basis (assessed by reference to the sum that the Fund might reasonably have demanded from the Federation in return for relaxing its rights under the settlement agreement). At first instance, Peter Smith J. held that such damages were available ([2006] EWHC 184 (Ch), noted [2006] C.L.J. 272). This finding was appealed by the Federation on two grounds: (i) that the remedy sought by the Fund was the same as, or a juridically highly similar remedy to, the relief previously refused by Jacob J. (the Federation argued that both measures were gain-based); and (ii) that the Fund's attempt to raise a claim for *Wrotham Park* damages was an abuse of process.

The Court of Appeal allowed the appeal on the second ground. Chadwick L.J. insisted that the Fund could and should have raised its claim for *Wrotham Park* damages in October 2001 and that its failure to do so established that it had decided not to make such a claim (at [67]). The Fund's subsequent course of action amounted to an abuse of process and was "inconsistent with the underlying interest that there should be finality in litigation" (at [74]). This conclusion is doubtful at best. Reasoning from silence is always dangerous and it is all the more so when the court reads back into a situation an understanding of the law that was not current at the time. The Court of Appeal's analysis attached insufficient weight to the fact that a clear distinction between account of profits and *Wrotham Park* damages had not yet been articulated at the time when the Fund applied for leave to amend its claim (this only occurred eighteen months later in *Experience Hendrix*

LLC v. *PPX Enterprises Inc.* [2003] EWCA Civ 323, [2003] 1 All E.R. (Comm.) 830). Given the general uncertainty surrounding the nature and availability of *Wrotham Park* damages in October 2001, it is not surprising that the Fund did not attempt to bring a claim for the remedy then.

As regards the first ground of appeal, the Court of Appeal rejected the Federation's claim that *Wrotham Park* damages and account of profits are highly similar and insisted that both remedies are in fact compensatory, not gain-based (Chadwick L.J. at [59]). A compensatory interpretation of *Wrotham Park* damages is not uncommon with several commentators arguing that the award provides compensation for the claimant's lost opportunity to bargain (see Sharpe and Waddams (1982) 2 O.J.L.S. 29). Elsewhere, I have sought to show that this interpretation is fictitious in situations where the claimant would never have agreed to release the defendant from his obligations (see (2007) 123 LQR 48) but at least the approach has the support of some significant judicial dicta (see *Jaggard* v. *Sawyer* [1995] 1 W.L.R. 269 and Lord Hobhouse in *Blake* at 298). The Court of Appeal's interpretation of account, on the other hand, was completely novel and constituted a radical departure from the conventional understanding of such awards.

If we take compensation to refer to "loss" or even to "deprivation of a right", it is clear that the account of profits ordered in *Blake* was not compensatory. It was defendant-focussed, fixing on the gains acquired by the defendant. The Crown's loss and the rights of which it had been deprived were simply irrelevant. Attempts to rationalise the award as a proxy for compensation in situations where loss is difficult to measure must fail because the remedy has been ordered in cases where no loss had been suffered (*Boardman* v. *Phipps* [1967] 2 A.C. 46) and where the claimant's loss was easy to measure (*Tang Man Sit* v. *Capacious Investments Ltd* [1996] A.C. 514). Nor can account of profits be explained as compensation for a lost opportunity to bargain because, as Chadwick L.J. observed in *WWF*, "the concept of a notional bargain between the Crown (as employer) and a double agent - under which the Crown was to be taken as having agreed (for a suitable sum) to release the agent from an undertaking not to publish official secrets – was, perhaps, too bizarre to contemplate" (at [46]). In truth, account of profits can only be treated as compensatory if compensation is given a strained and artificial meaning; one that incorporates all forms of monetary relief (with the possible exception of punitive damages). Such a meaning undermines the crucial distinction between compensation and restitution and leaves the classification of remedies in a state of abject disarray.

The dangers of this kind of conceptual malaise are vividly illustrated by the decision in *WWF* itself. Chadwick L.J. reached two seemingly contradictory conclusions in relation to the first ground of appeal: (i) that both account of profits and *Wrotham Park* damages are compensatory (at [59]); and (ii) that Jacob J.'s judgment only affected the availability of account of profits (at [69]). But why, if both measures of damages are compensatory, should one be available where the other is not? Is it not more likely that the differences in availability (which are relatively undisputed) point towards differences in juridical basis? Perhaps the differences exist because account of profits is gain-based while *Wrotham Park* damages are compensatory or alternatively it might be because the awards reflect two different measures of gain-based damages (the approach preferred by this author). These questions remain open for debate but regrettably the Court of Appeal's insistence that the two awards be treated as compensatory hindered any detailed discussion of these important matters.

RALPH CUNNINGTON

COMPOUND INTEREST MADE SIMPLE

IN *Deutsche Morgan Grenfell Group plc.* v. *I.R.C.* [2006] UKHL 49, [2007] 1 A.C. 558 (noted [2007] C.L.J. 24) the House of Lords recognised that a taxpayer which had been required to pay tax prematurely, in breach of EC law, could bring a claim in unjust enrichment for restitution, with the ground of restitution being mistake of law. In *Sempra Metals Ltd.* v. *I.R.C.* [2007] UKHL 34, [2007] 3 W.L.R. 354 the House of Lords considered the nature of the remedy for such a claim.

It had been accepted by the parties that the appropriate measure of restitution in the case was interest to reflect the Revenue's enrichment from having the use of the claimant's money until the time when the tax would have been lawfully received. But the key issue concerned how this interest should be assessed. It had been held in *Westdeutsche Landesbank Girozentrale* v. *Islington L.B.C.* [1996] A.C. 669 that only simple interest could be awarded for common law claims in unjust enrichment, with compound interest being confined to equitable claims. Although *Westdeutsche* was not formally overruled, since *Sempra* was concerned with interest *as* the measure of the principal sum rather than with interest *on* the principal sum, the House of Lords placed the law relating to the award of interest on a new footing.

Three distinct issues relating to the award of interest were considered. The first concerned the identification and valuation of