Alternatives to Expectation: When Can You Get Disgorgement, Gain-Based, or Restitutionary Damages for Breach of Contract?

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Expectation damages have long been the default remedy for breach of contract, and in most circumstances this is more than appropriate. However, the expectation measure falls short of providing adequate relief in circumstances in which it is not possible to quantify the plaintiff's expectation interest. In such cases, it appears necessary to depart from the default remedy, and in some cases to go as far as awarding gain-based damages where they are merited.

In Atlantic Lottery Corp Inc v Babstock*, the Supreme Court of Canada confirmed that gain-based damages can be awarded to remedy a breach of contract in certain circumstances. Drawing on the Court's observations and existing jurisprudence, the author provides a more principled framework for answering the two questions put forward by the Court for determining whether a gain-based remedy ought to be available in response to a breach of contract.*

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Introduction

The recent Supreme Court of Canada decision in *Atlantic Lottery Corp Inc v Babstock (Atlantic Lottery)* is most notable for the Court's conclusions on waiver of tort and class action certification.[1] It is also potentially important, however, for what it does and does not say in relation to the availability of disgorgement damages for breach of contract. This aspect of the decision has important implications for class counsel who may wish to consider seeking a disgorgement remedy rather than damages for breach when advancing a claim in contract in order to prevent individual issues from predominating over issues common to the class. It is also potentially important for parties in non-class proceedings where breach and liability are clear, but loss or damage and thus *damages* are difficult to ascertain or quantify. This paper will consider the Court's remarks on the availability of disgorgement damages for breach first, before then suggesting a more principled and predictable basis for determining whether disgorgement damages are called for in any given case, and thus when and whether such a remedy can stand as an alternative to expectation damages where the latter (and other forms of relief) are not readily available.

1. 2020 SCC 19 [*Atlantic Lottery*].

My proposed framework will focus on the two questions or issues considered by the Court as part of the two-stage analysis it employed to determine whether a gain-based remedy, such as disgorgement damages, was available in this case. These questions are, first, whether other forms of relief for breach are inadequate, and second, whether a gain-based remedy is warranted in the circumstances. In relation to the first question, I will principally focus on the availability and adequacy of expectation damages since these are the default remedy for breach, and the remedy whose unavailability has been the primary issue in leading cases on disgorgement damages in contract to date. I will also unpack the underlying reasons for potentially answering each of the two abovementioned questions one way or another. These reasons include whether the contractual entitlement breached conformed to our underlying assumptions about the nature of contacts and contractual entitlements, and why and/or whether a departure from these assumptions may make it impossible to assess expectation damages, potentially necessitating disgorgement damages if other forms of relief, such as punitive damages, are not available either. I will then conclude by explaining the significant role that epistemological obstacles play in answering these questions and in making gain-based remedies not only available but also necessary.

I. The Court's Position

Before engaging with the Court's remarks on the topic of disgorgement damages for contract, a few words are needed in order to explain the background to the Court's decision. I will provide a brief summary of the circumstances of the case and the nature of the contract claim made by the plaintiffs before turning to the Court's own comments.

A. Background of Atlantic Lottery

Atlantic Lottery began as a class action brought by natural persons resident in Newfoundland and Labrador against the Atlantic Lottery Corporation (ALC), which is jointly owned by the four Atlantic provinces: Nova Scotia, New Brunswick, Newfoundland and Labrador, and Prince Edward Island.[2] The essence of the complaint was that video lottery terminals, which are a form of slot machine provided by ALC, conveyed a false impression as to the odds of winning and that they exacerbated the risk of addiction to gambling.[3] Both of

2. See *ibid* at para 1.

3. See *ibid* at paras 4, 92–93.

these allegations were said to constitute a breach of an alleged implied contractual obligation on ALC's part to provide games of merchantable quality that were fit for purpose.[4] Class counsel did not, however, allege that ALC's breach of this obligation had caused any actual harm and did not seek to claim damages for any loss sustained by members of the class on account of the breach.[5] Instead, for tactical reasons likely similar to those underpinning their preference for a gain-based remedy for the separate class claim advanced in tort, counsel framed its claim for the alleged breach of contract as being for disgorgement damages on the basis that a breach of contract is actionable as of right without proof of loss and that the breach in question warranted such an extraordinary remedy.[6]

Ordinarily, the question of whether or not the alleged implied obligation did in fact exist and whether or not it had in fact been breached by ALC would be rationally prior to any question as to remedy. In the circumstances of a certification proceeding though, such factual allegations are accepted as true for the purposes of determining whether the pleadings disclose a viable claim and satisfy the criteria for pursuit as a class action.[7] Thus, the Court's remarks on the contract claim advanced by counsel are confined strictly to the availability of a disgorgement remedy, assuming the truth of the alleged obligation and the alleged breach.[8] In the final result, the Court split five to four on the overall question of the viability of the class action and upon the particular issue of disgorgement for the alleged breach of contract.[9] The majority allowed the appeal and dismissed the application for certification of the class action, while the minority would have allowed certification and specifically found that the alleged contract claim met the requisite standard for certification.[10]

B. The Court's Remarks

The majority and the minority differed in their perspective on the availability of disgorgement in response to the breaches of contract allegedly perpetrated by

4. See *ibid* at paras 4, 95.
5. See *ibid* at para 67.
6. See *ibid* at paras 38, 49.
7. See *ibid* at para 14.
8. See *ibid* at para 49.
9. See *ibid* at para 67.
10. See *ibid* at para 68.

ALC. The majority, written for by Brown J, was of the view that disgorgement would not be available with respect to the alleged breaches.[11] The minority, written for by Karakatsanis J, in contrast, was of the view either that disgorgement was available with respect to the alleged breaches, or that a full trial was needed to decide the issue and that the possibility could not be dismissed without a full record.[12] Despite this difference in conclusions, both groups notably drew from many of the same authorities, and each gave particular attention to the leading speech of Lord Nicholls in the landmark House of Lords' decision in *Attorney General v Blake (Blake)*.[13]

Blake's unusual facts involved a former British spy-turned traitor, Blake, who had written memoirs containing information obtained by him while he worked as a spy for the British government during the Cold War.[14] By the time of Blake's memoir—written many years after his discovery as a double agent, his subsequent imprisonment, and his final daring act escaping prison to flee to the Soviet Union—the information in question was no longer confidential.[15] The British government nonetheless objected to Blake profiting from the disclosure of this information and wished to deprive him of this profit.[16] In the circumstances, no action would lie against Blake for breach of fiduciary duty nor breach of confidence.[17] The British government was, however, able to bring an action for breach of a contractual undertaking of confidentiality made by Blake as a condition of his employment.[18] As a means to strip Blake's profit though, the action at the outset would have been best described as a "Hail Mary pass".

The particulars of the British government's claim in *Blake* are that it sought the equitable remedy of "account of profits" in response to Blake's undeniable breach of his contractual undertaking.[19] An account of profits, which works to

11. See *ibid* at paras 61–62.

12. See *ibid* at paras 107, 135.

13. [2000] UKHL 45 [*Blake*].

14. See *ibid* at 275.

15. See *ibid*.

16. See *ibid*.

17. See *ibid* at 276. A claim for breach of fiduciary duty was dismissed at trial. This was upheld on appeal to the Court of Appeal, and the claim was abandoned before the case reached the House of Lords. A claim for breach of confidence clearly cannot lie if the information is not or no longer confidential.

18. See *ibid* at 277.

19. See *ibid* at 280, 284.

strip a defendant of a profit made in breach of duty, had never before been awarded for a breach of contract, however.[20] It was also, strictly speaking, not available at common law and generally not made available by equity acting in its auxiliary capacity with respect to claims arising in contract, unlike specific performance or injunction.[21] Jurisdictional issues aside, the biggest obstacle to the British government's claim was the apparent general inconsistency of contract with a claim for "disgorgement".[22] Certainly, earlier courts had from time to time assessed monetary remedies for breach on bases that seemed to depart from the standard paradigm of contract damages that look to put the plaintiff in as good a position as they would have been had the contract been performed, and typically do so by assessing the value of any "thing" lost by the plaintiff or anything they have "lost out on" as a result of the breach.[23] But

20. See *ibid* at 284. Lord Nicholls states: "The researches of counsel have been unable to discover any case where the court has made such an order on a claim for breach of contract."

21. See *ibid* at 285; Dyson Heydon, Mark Leeming & Peter Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th ed (Chatswood: LexisNexis Butterworths, 2015), ss 26–005. The learned authors point out that while there had been an action of account at common law going back to at least 1200, the common law action had fallen into disuse in favour of the procedure in equity by 1760, but for one case later that century with none since. See also *Beloit Canada Ltd v Valmet-Dominion Inc*, [1997] 3 FC 497 at 99.

22. See *Blake*, *supra* note 13 at 284. Lord Nicholls held:

> In *Tito v Waddell (No 2)* [1977] Ch 106, 332, a decision which has proved controversial, Sir Robert Megarry V-C said that, as a matter of fundamental principle, the question of damages was 'not one of making the defendant disgorge' his gains, in that case what he had saved by committing the wrong, but 'one of compensating the plaintiff'. In *Occidental Worldwide Investment Corporation v Skibs A/S Avanti* [1976] 1 Lloyd's Rep 293, 337, Kerr J summarily rejected a claim for an account of profits when ship owners withdrew ships on a rising market.

Ibid.

23. See *ibid* at 284. Lord Nicholls held:

> There is a light sprinkling of cases where courts have made orders having the same effect as an order for an account of profits, but the courts seem always to have attached a different label. A person who, in breach of contract, sells land twice over must surrender his profits on the second sale to the original buyer. Since courts regularly make orders for the specific performance of contracts for the sale of land, a seller of land is, to an extent, regarded as holding the land on trust for the buyer: *Lake v Bayliss*, [1974] 1 WLR 1073.

crucially, while earlier courts had made awards in respect of profits that were made in breach, no earlier court had ever *explicitly* made a monetary award assessed on the basis of a profit made by the defendant solely *by way of a breach* (i.e., where the fact of the profit itself was not the wrong, but was instead simply the by-product of the breach).

This situation with respect to damages appeared to leave the British government at a distinct disadvantage vis-à-vis Blake. It was clear that the government had not "lost anything", as that phrase is typically understood, because the information was no longer confidential. It was also clear that they had not "lost out on anything" in the sense of some expected future benefit because there was no chance that the British government would have sought to profit from the relevant information in this way. Thus, it did not look as though there were any damages potentially payable to the British government in its breach of contract action at all and no basis for an account of profits (i.e., a disgorgement award). A majority of their Lordships nonetheless found for the British government and held that an account of profits was in fact available in the circumstances of the case.[24] Lord Nicholls, in the leading speech of the decision, opined that although new ground was being broken, only limited direction could be given to future courts and that the exact parameters of profit stripping in an action for breach of contract were better left to be "hammered out on the anvil of concrete cases".[25] What could be said, however, was that a disgorgement type remedy in response to a breach of contract depended, at a minimum, on two issues.[26] First, as a necessary prerequisite, whether other remedies were inadequate to compensate the plaintiff with respect to the breach,[27] and second, whether the circumstances warrant such an award.[28] The

Ibid. In *Reid-Newfoundland Co v Anglo-American Telegraph Co Ltd*, [1912] AC 555, a railway company agreed not to transmit any commercial messages over a particular telegraph wire except for the benefit and account of the telegraph company. The Privy Council held that the railway company was liable to account as a trustee for the profits it wrongfully made from its use of the wire for commercial purposes. In *British Motor Trade Association v Gilbert* [1951] 2 All ER 641, the plaintiff suffered no financial loss but the award of damages for breach of contract effectively stripped the wrongdoer of the profit he had made from his wrongful venture into the black market for new cars.

24. See *ibid* at 288, 290–93.

25. *Ibid* at 291.

26. See *ibid* at 285. Lord Nicholls does not frame matters quite this clearly, but two issues can clearly be discerned: whether other remedies are inadequate, and if an account of profits is warranted.

27. See *ibid*.

28. See *ibid*.

latter question is clearly more open textured, and it is this aspect that Lord Nicholls,[29] and Lord Steyn concurring with him,[30] intended for later courts to elaborate upon more fully. Their Lordships did however provide a list of circumstances to consider. This included the subject matter of the contract, the purpose of the provision breached, the circumstances in which the breach occurred, the consequences of the breach, and the circumstances in which the relief was being sought.[31]

In the circumstances of *Blake* itself, the majority held *inter alia* that the Attorney General had a legitimate interest in preventing Blake from profiting from the disclosure of confidential information and that this justified a disgorgement remedy in the circumstances.[32] Other factors were also advanced to justify the award, but this idea of "legitimate interest" appears to have been the most influential subsequent to *Blake*, and it is the factor most heavily emphasized as important by Brown J for the majority in *Atlantic Lottery*.[33] Although, as I will explain below, Brown J's remarks on legitimate interest come only after having resolved the first issue against the plaintiffs.[34]

Justice Brown's application of *Blake* begins with the first question or issue listed above, which is whether other remedies available for breach of contract are inadequate in the circumstances.[35] Justice Brown's conclusion on this point is that they are not inadequate in the circumstances merely because of evidentiary challenges to be overcome in the assessment of loss, or because of the plaintiffs' preference for a gain-based award.[36] Instead, inadequacy is said to flow "*not* from the availability of evidence, but from the nature the claimant's interest".[37] Genuine inadequacy was said to arise "where, for example, the plaintiff's loss is

29. See *ibid*.

30. See *ibid* at 291. Lord Steyn states, "[e]xceptions to the general principle that there is no remedy for disgorgement of profits against a contract breaker are best hammered out on the anvil of concrete cases".

31. See *ibid* at 285.

32. See *ibid* at 287–88, 290–93.

33. See *Atlantic Lottery*, *supra* note 1 at paras 52–55.

34. See *ibid* at paras 59–61.

35. See *ibid* at para 59.

36. See *ibid* at para 60.

37. *Ibid*.

'impossible to calculate' or where the plaintiff's interest in performance is not reflected by a purely economic measure".[38] With this prerequisite unmet, there is perhaps little need for the majority to have gone on to the second stage of their inquiry and weighed in on the second issue of whether a gain-based remedy was warranted. And in point of fact, they do not say much. What Brown J does say, however, is that the plaintiffs' claim is that they paid to play a gambling game and did not get exactly what they paid for, but that this cannot be said to give the plaintiffs a legitimate interest in ALC's profit-making activity.[39] My view is that the majority is correct with respect to the first issue if one considers it in light of the way that Brown J has described the plaintiff class' claim. The majority also appears to be correct with respect to the second issue if one continues to think of the plaintiff class' claim as being fundamentally about the plaintiffs having just received a "defective game". As I will explain though, the conclusions to these questions ought to be the opposite if one conceives of the plaintiff class' claim in the same terms as did Karakatsanis J writing for the minority. How exactly these opposite conclusions on these two issues can be reached will be explained in the penultimate part of this article when I will apply my framework to the facts of *Atlantic Lottery* itself. I must first set out this framework before applying it, of course, and that is what I will move on to next.

II. A Framework to House the Anvil of Concrete Cases

The two abovementioned broad issues or questions determining the availability of a disgorgement remedy (also referred to as a gain-based remedy) in response to a breach of contract raise related but distinct concerns and questions. As such, I will address each aspect separately before concluding overall.

A. The Inadequacy of Conventional Remedies

My observations in this section will focus upon what it means for "other forms of relief" to be sufficiently inadequate so as to potentially justify a disgorgement remedy. But first, I wish to clarify what is meant by terms such as other forms of relief, as used by the Court here, or what I describe as "conventional remedies".

38. *Ibid* at para 59.

39. See *ibid* at para 61.

The standard remedy for breach of contract is expectation damages, which are assessed on the basis of the expectation measure. These damages are intended to vindicate the plaintiff's "expectation interest", which is their interest in being in as good a position as they would have been had the contract been performed as expected.[40] Other types of monetary awards are also available at times, including reliance damages—although these are simply expectation damages assessed on a different footing—nominal damages,[41] punitive damages, and damages in lieu of specific performance (*Lord Cairns' Act* damages), for instance.[42] Each of these other types of monetary award is intended to fill a gap left by the standard

40. See Stephen A Smith, *Contract Theory* (Oxford, NY: Oxford University Press, 2004). The author states:

> According to orthodox law, damages for breach of contract are intended to put plaintiffs in the same position, so far as money is able, that they would have been in had their contracts been performed. This approach is often summarized by saying that the apparent aim of damages is to compensate plaintiffs' 'expectation' interest [on the basis that plaintiffs get the benefit they 'expected' to get from performance].

Ibid at 409; Stephen Waddams, *The Law of Damages*, 5th ed (Toronto: Canada Law Book, 2012) at para 5.30 (where the author states that the "the normal rule of contract damages [is that] the promisee is entitled to the full value of the promised performance").

41. See *Bowlay Logging Limited v Domtar Limited*, (1978) 87 DLR (3d) 325 at 332–35, [1978] 4 WWR 105 (BCSC), aff'd (1982) 135 DLR (3d) 179, [1982] 6 WWR 528 (BCCA). See also *Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd*, [2010] EWHC 2026 (QBD). Justice Teare states:

> I am not therefore persuaded that the right to choose or elect between claiming damages on an expectancy basis or on a reliance basis indicates that there are two different principles at work. Both bases of damages are founded on, and are illustrations of, the fundamental principle in *Robinson v Harman*, for the reasons explained by Chief Judge Learned Hand in *L. Albert & Son v Armstrong Rubber Co.*, by Berger J. in *Bowlay Logging v Donmar Limited*, by all members of the High Court of Australia in *The Commonwealth of Australia v Amman* and by the English Courts in *C&P Haulage v Middleton* and *CCC Films v Impact Quadrant Films Limited.* Thus, notwithstanding my unfeigned respect for any opinion of Professor Treitel, I am unable to accept that there are two principles, rather than one, governing the law of damages for breach of contract.

Ibid at para 55.

42. See Waddams, *supra* note 40 at paras 1.860, 11.250–11.260.

paradigm of expectation damages, but they too have their own limitations in turn and may likewise be unavailable or simply inapplicable to a plaintiff's particular circumstances when expectation damages are also apparently unavailable.[43] Specific performance or a prohibitory injunction may also be either unavailable or ineffective in the circumstances for similar reasons.[44]

Of the remedies referred to above, it is clear that the most commonly awarded, and the most important for understanding why disgorgement may be seen as necessary in certain circumstances, is expectation damages.[45] This is the starting point for the assessment of monetary relief in contract cases, and so synonymous with contract and its unique character,[46] that one may be tempted to think that if no expectation damages are payable in respect of a breach, it is because there is in fact nothing to remedy. Further, even though they are named and assessed differently, it is clear that the two most prominent alternatives to conventional expectation damages (reliance damages and *Lord Cairns' Act* damages) are in the end also geared towards vindicating the same underlying expectation interest.[47] As such, expectation damages and other remedies intended to vindicate the same interest are the obvious place to start in order to determine how we can know whether conventional remedies are really *inadequate* in a given case, or simply and rightly *unavailable*.

To understand when expectation damages and other damages meant to vindicate expectation interests may actually be inadequate as opposed to merely unavailable, one must start by understanding what these types of remedies actually respond to. Clearly, in all cases there must be at minimum a breach, and any breach must, by definition, involve the deprivation or diminution of

43. See *ibid*.

44. See *ibid* at 669–90.

45. See *Atlantic Lottery*, *supra* note 1 at paras 54, 108.

46. See Waddams, *supra* note 40 at 399, 410 (the "contract measure" is effectively synonymous with the expectation measure).

47. See *Commonwealth of Australia v Amann Aviation Pty Ltd*, [1991] HCA 54, (1992) 174 CLR 64 at 82. Chief Justice Mason and Dawson J posit that:

> *Hayes v Dodd* is a useful illustration of the statement that the expressions 'expectation damages', 'damages for loss of profits', 'reliance damages' and 'damages for wasted expenditure' are simply manifestations of the central principle enunciated in Robinson v Harman rather than discrete and truly alternative measures of damages which a party not in breach may elect to claim.

Ibid. See also Waddams, *supra* note 40 at para 1.97.

the contractual right or entitlement breached. This typically puts the injured party in a worse or a less advantageous position than they had hoped to be. Damages geared toward vindicating the expectation interest respond to that difference; that is, they attempt to bridge the gap left by the breach.[48] If one were to attempt to express this approach mathematically, one could set it out as: Expected Position – Actual Position = Damages. It must be said in fairness that this approach usually works. It could hardly be the presumptive paradigm of remedial relief in contract if it did not. I note that, on occasion, the answer produced is "0" or even negative. But this is hardly a problem because such answers are intelligible. They simply indicate that either the plaintiff's actual position is no worse than expected if the answer is nil, or better than expected if it is negative. However, there are clearly cases, such as *Blake*, where the approach does not appear to yield an answer at all, or one that appears at best intuitively incorrect. In such cases, one could argue that the unavailability of an answer owes to the inadequacy of the approach. In some cases, that may be true. In other cases, of course, such a conclusion may be entirely erroneous, but the dividing line between the two is not obvious. Fortunately, from here, I will go on to explain what this boundary really is, and how the difference between inadequacy and unavailability depends on the alignment of the particular scenario with the underlying assumptions underpinning expectation remedies.

The most obvious assumption underpinning the simple formula set out above is that the plaintiff's Expected Position and their Actual Position can be quantified in dollar terms, and thus, so too can the difference between them.[49] This difference is what a conventional contract damages figure usually amounts to. The assumption that contractual entitlements and expected benefits can be readily valued numerically is not the exact root of the problem, however, because it stems from and glosses over two further assumptions, the second of which is arguably an even more fundamental assumption about the nature of

48. See *Wertheim v Chicoutimi Pulp Co*, [1911] AC 301 at 307, [1911] CCS No 31. Lord Atkinson stated:

> And 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 . . . That is a ruling principle. It is a just principle.

Ibid.

49. This appears to be implicit in discussions of the availability of alternatives to expectation damages. See *Nunavut Tunngavik Incorporated v Canada (Attorney General)*, 2014 NUCA 2 at para 85 [*Inuit of Nunavut*]; *Bank of America Canada v Mutual Trust Co*, 2002 SCC 43.

contractual entitlements. The first of these assumptions is that there is some market that the court can resort to in order to understand what an entitlement is objectively worth, either directly or indirectly. The second requires more elaboration, but in short, it is the assumption that the value of an entitlement *can* be set by a market at all. These assumptions are different but related in that if they do not hold true in a given case, they create an epistemological obstacle to the assessment of damages as opposed to a mere evidentiary one.[50] Put another way, they create an impediment to our very ability to know what an entitlement or the injured party's expected position is worth, as opposed to our ability to investigate it. Having said this, I should point out that an evidentiary challenge can shade into an epistemological challenge. But I will say no more for the moment since I will explain this problem when I expand upon the significance of each of these assumptions next.

(i) There Must Be a Market

The assumption that there is some market for any given entitlement that can be turned to in order to determine what it is worth monetarily is understandable

50. Justice Brown highlights the significance of this distinction himself, albeit without directly speaking to the epistemological nature of the problem. See *Atlantic Lottery*, *supra* note 1 at para 60. Justice Brown held:

> More importantly, compensatory damages are not inadequate merely because a plaintiff is unwilling, or does not have sufficient evidence, to prove loss [*Inuit of Nunavut*, at para. 85; see also Morris-Garner, at para. 90]. Again, and as *Inuit of Nunavut* demonstrates, inadequacy flows not from the availability of evidence, but from the nature of the claimant's interest. There, the claimant's interest was in the Government of Canada's agreement to develop a general monitoring plan to support collection and analysis of 'information on the long term state and health of . . . the Nunavut Settlement Area' [para. 9]. While the Government of Canada's failure to do so resulted in an identifiable loss to the Inuit of Nunavut, it could not possibly be quantified in monetary terms.

Ibid. See also *OED Online*, 3rd ed (Oxford: Oxford University Press, 2022), sub verbo "epistemology" ("The theory of knowledge and understanding, esp. with regard to its methods, validity, and scope, and the distinction between justified belief and opinion; [as a count noun] a particular theory of knowledge and understanding"); *OED Online*, 3rd ed (Oxford: Oxford University Press, 2022), sub verbo "epistemological" (Oxford University Press) ("Of or relating to knowledge, understanding, or epistemology").

because many of the things (or things approximating them) that a given set of parties wish to contract for will have also been contracted for by other parties.[51] And this transaction history or transactional environment thus provides, in many cases, robust objective evidence as to what exactly a given pair of contracting parties' entitlements are worth in monetary terms because one can see from the market the amount that one would need if one had to go into the market to replace said entitlement.[52] Of course, as suggested above, the assumption that there will be some market for contractual entitlements of the type lost by a plaintiff in a given case does not always hold true. This has clear consequences for the potential availability or adequacy of the ordinary or default contractual remedy of expectation damages, as I will explain next.

Sometimes there will not be a market for a given thing simply because nobody wants it. One would struggle, for instance, to find a ready market for asbestos insulation. As such, if one were to try and put a market value on an entitlement to receive a quantity of such insulation and to assess expectation damages for the denial of that entitlement if the seller did not deliver, one would struggle. This, however, does not mean that there is anything wrong with expectation damages per se or the method by which they are assessed, as explained above. Frankly, it just means nobody wants asbestos and an entitlement to receive it is not really worth anything, even though it may have

51. This is the basis for the "usual method" of assessing damages in sale cases, and also the "breach date rule" as it is sometimes called. See *Chaplin v Hicks*, [1911] 2 KB 786 (CA) at 792. Lord Justice Vaughan Williams held that:

> In early days when it was necessary to assess damages, no rules were laid down by the Courts to guide juries in the assessment of damages for breach of contract; it was left to the jury absolutely. But in course of time judges began to give advice to juries; as the stress of commerce increased, let us say between the reigns of Queen Elizabeth and Queen Victoria, rule after rule was suggested by way of advice to juries by the judges when damages for breach of contract had to be assessed. But from first to last there were, as there are now, many cases in which it was difficult to apply definite rules. In the case of a breach of a contract for the delivery of goods the damages are usually supplied by the fact of there being a market in which similar goods can be immediately bought, and the difference between the contract price and the price given for the substituted goods in the open market is the measure of damages; that rule has been always recognized.

Ibid. See also *Redpath Industries Ltd v Cisco (The)*, [1994] 2 FC 279 (FCA) at para 71, 110 DLR (4th) 583; *Hussey v Eels*, [1989] EWCA Civ J1130-1, [1990] 2 QB 227 (CA) at 232–33.

52. See *AKAS Jamal v Moolla Dawood Sons & Co*, [1915] UKPC 51 at 179.

nominal legal value as a form of consideration if its sale is not prohibited. Thus, while expectation damages would not be available, they are hardly inadequate to respond to these circumstances. By contrast, in the early days of the satellite business, it was hard to obtain a contract of insurance for a commercial satellite in orbit around the earth, but that did not mean that an entitlement to be insured against common risks to a satellite was not worth anything.[53] It simply meant that the entitlement in question was too novel or unique to attract a market.[54] In some cases, such as with satellite insurance, a market develops over time and the problem self-corrects. In other cases, it does not correct simply because the pool of potential transactions remains too small. In these circumstances, the ordinary remedy of expectation damages may be inadequate because they cannot be sensibly assessed so as to respond to the wrong if the entitlement is diminished or denied. As mentioned earlier, this obstacle to assessment can be described as epistemological in nature because, in a sense, it pertains to our ability to know the value of the injured party's entitlement or expected position. It can also arguably be described as evidentiary in the sense that we know *how* the missing value in our damage assessment could be determined using transaction history within a market as our guide in the same way that we know how to measure temperature with a thermometer and how a thermometer works. We just do not have a "thermometer" in many circumstances where there is no market, and as such, our inability to investigate the value of the injured party's entitlement is tantamount to an inability to know what it is at all. But, to quote Vaughan Williams LJ in *Chaplin v Hicks*, "no one has ever suggested that, because there is no market, there are no damages".[55] As we will see, in such cases, disgorgement damages may be appropriate in lieu of damages assessed on the value of the loss.

53. See US, *Satellite Insurance and Space Commercialization: Hearing Before the Subcommittee on Science, Technology, and Space of the Committee on Commerce, Science, and Transportation*, 99th Cong (Washington, DC: United States Government Printing Office, 1986) at 90 [US, *Satellite Insurance and Space Commercialization*]. Any suggestion that the absence of a market for a given entitlement means, in and of itself, that the entitlement is not worth anything and that there are no damages payable for the deprivation of that entitlement as a result of the absence of a market was rejected authoritatively quite some time ago. See *Chaplin v Hicks*, *supra* note 51 at 792, Vaughan Williams LJ states that "Sometimes, however, there is no market for the particular class of goods; but no one has ever suggested that, because there is no market, there are no damages."

54. See US, *Satellite Insurance and Space Commercialization*, *supra* note 53 at 90.

55. *Chaplin v Hicks*, *supra* note 51 at 792.

The seminal English Court of Appeal decision in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* (*Wrotham Park*) is arguably an apt example of this problem in action.[56] In this case, a property developer had purchased land subject to a covenant to *not* build more dwellings on a given piece of land than a registered layout plan allowed.[57] The defendant developer built more than the maximum allowed number of dwellings on the land however, and this gave rise to a problem.[58] Obviously, it was a problem for the covenantee, an estate company belonging the family of the Sixth Earl of Strafford, whose land it originally was, because the developer had broken its promise and denied the plaintiff estate company its right to insist that no more dwellings be built on the land.[59] It was, however, also a problem for the Court because it was difficult to assess the value of buildings *not* being built.[60] The additional dwellings did not adversely affect the plaintiff estate company, or its economic interests necessarily in and of themselves. Nonetheless, the plaintiff had been *entitled* to insist that these buildings not be erected and in principle was entitled to damages for the developer having not honoured the covenant as expected.

Unfortunately for the plaintiff and the Court, there is (or at least in this case, was) no market for "non-events" and thus no obvious fee for what is but had not ought to be—i.e., the additional dwellings. And so, expectation damages could not be easily assessed using the Expectation Damages formula (Expected Position – Actual Position = Expectation Damages) because the first value could not be determined.[61] In these circumstances, it is fair to say that expectation damages and all other conventional monetary remedies for breach of contract were simply inadequate to redress the wrong. The Court's response to this problem was to order a partial disgorgement of the developer's profit assessed on the basis of the fee the public authority would hypothetically have negotiated as its price for relaxing its right to restrict further building, *if* the developer had asked and negotiated for permission before building the extra dwellings. Such an award can be described as "negotiating damages", but whatever one calls them, it is notable that before *Blake*, the *Wrotham Park* decision was regarded as the clearest indication that a gain-based remedy could

56. See *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*, [1974] 1 WLR 798, [1974] 2 All ER 321 [*Wrotham Park*].

57. See *ibid* at 803–04.

58. See *ibid* at 804.

59. See *ibid*.

60. See *ibid* at 815–16.

61. See *ibid* at 815.

in principle be awarded in response to a breach of contract.[62] It also supports the proposition that, where no ready market for the relevant entitlement exists, conventional monetary contract remedies are likely to be inadequate rather than merely unavailable and that a gain-based remedy may be appropriate in response.

(ii) Contractual Entitlements Must be Fungible Things

To understand the second assumption I referred to above, we must step back for a moment and consider the nature of contractual entitlements more broadly. There are clearly many ways to categorize contractual rights. One can group them by the remedies available for their breach, as with conditions, innominate terms, and warranties. One can also categorize them as negative or positive in terms of whether they are prohibitory or mandatory. The most important scheme of classification for present purposes though is one that is often overlooked, and that is to categorize entitlements according to the nature of their value to the plaintiff. Under such a scheme there are, generally speaking, two broad categories. The first category is extrinsically valuable, and the second is intrinsically valuable. I will explain what these categories mean below in turn to clarify what this has to do with the distinction between unavailable and inadequate, but for now I will note two important points. The first is that, whether wittingly or not, contract tends to assume across the board that all contractual entitlements are extrinsically valuable. The second is that even

62. I note that an argument can be made that awards of the sort made in Wrotham Park as well as the post-*Blake* decision in Experience Hendrix were made for the loss of the right to negotiate (thus the term "negotiating damages") and are therefore compensatory rather gain-based. However, it is clear that in both such cases that the plaintiff's deprivation of their right to negotiate did not leave the plaintiffs measurably worse off than they had expected to be under their contract, and that there was strictly speaking nothing to compensate. The normal approach in contract damages to such a scenario would be to award nominal damages in recognition of the fact of breach, but no more. As such, the fact of the awards being more than nominal, and having been assessed according to the gain in the defendants' hands rather than any loss (or loss of benefit) to the plaintiffs clearly indicates that these awards are something other than damages of the regular sort. See *Blake*, supra note 13 at 283–84, Lord Nicholls ("The *Wrotham Park* case, therefore, still shines, rather as a solitary beacon, showing that in contract as well as tort damages are not always narrowly confined to recoupment of financial loss. In a suitable case damages for breach of contract may be measured by the benefit gained by the wrongdoer from the breach").

though alternative terminology already exists, such as pecuniary and non-pecuniary, monetary and non-monetary, or objective and subjective, I have declined to use them because they do not appear to have been particularly helpful to courts grappling with their inability to assess expectation damages in a given situation and the potential need for a disgorgement remedy instead. This is of course not a reason not to use these alternatives to extrinsic and intrinsic now if they are simply unappreciated and could in fact be helpful. But these terms—pecuniary and non-pecuniary in particular—are far from unknown, and it seems to me that the issue is not that these terms and categories have been missed so much as it is that they do not tell us much or are not of any assistance in this context. Pecuniary, for instance, just means "consisting of money" and non-pecuniary, the opposite, but neither suggests a reason for that status.[63] As I will explain below though, extrinsic and intrinsic *do* have a meaning and afford a description of a contractual entitlement's character that does lend itself to understanding why one may or may not be able to adequately assign a dollar value to a given entitlement, which is key to understanding when and whether expectation damages are inadequate or merely unavailable.

In economic terms, a thing has "use" or what I will call "extrinsic" value to the extent that it has a use, and the degree of value the thing has corresponds with the extent to which it can be of use.[64] In other words, extrinsically valuable things are so valued because they have the capacity to satisfy some want or need, or to facilitate in some indirect way the satisfaction of some want or need.[65] An example of a thing that may satisfy a want or need directly is an apple. An example of a thing that may help to do so indirectly is a fertilizer that may nourish an apple tree. In a market economy, such things, whether they satisfy wants directly or indirectly, also have the further quality of being susceptible to valuation in dollar terms according to the price that purchasers are willing and

63. *OED Online*, 3rd ed (Oxford: Oxford University Press, 2022), sub verbo "pecuniary".

64. This concept of "use" value as contrasted with "non-use" value is particularly prominent within environmental economics, but has also been adapted and applied with respect to understanding the value cultural heritage and cultural institutions. See Bernardo A Bastien-Olvera & Frances C Moore, "Use and Non-use Value of Nature and the Social Cost of Carbon" (2021) 4:2 Nature Sustainability 101 at 101. See also Tommy D Andersson, John Armbrecht & Erik Lundberg, "Estimating Use and Non-use Values of a Music Festival" (2012) 12:3 Scandinavian Journal of Hospitality & Tourism 215 at 219–20.

65. See Wayne R Munns Jr & Anne W Rea, "Ecosystem Services: Value is in the Eye of the Beholder" (2015) 11:2 Integrated Environmental Assessment & Management 332 at 333 [Munns Jr & Rea, "Ecosystem Services"]. Resources that can be extracted for facilitative purposes such as fueling human activities can be included in the same category as goods that are directly consumable such as fish.

able to pay for them. Thus, when such things are traded by way of contract, a contractual right to receive such things, or to be paid for such things, can also be valued in dollar terms according to the value that others (i.e., the market) would be willing to pay for the same thing. In sum, one can say that extrinsically valuable things are means to ends, but not ends in themselves.[66]

Intrinsic value is a wholly different thing compared to extrinsic value. If one can say that extrinsic value depends on matters external to the thing itself (i.e., the things that can be done with it), then intrinsic value depends entirely on the opposite. It depends on what inherent worth a person or persons think a thing might have irrespective of what might be done with it.[67] If one could find the

66. When it comes to valuation of environmental or ecological resources there is room for disagreement as to what the limits of "use" are and whether we consider "non-market" use, such as simply knowing something like an endangered animal still exists, as also being extrinsically valuable, or useful simply because it pleases us to know that they exist even if one does not even see them. Similar problems may arise with respect to understanding the value of things traded via contract. For instance, is a piece of fine art intrinsically valuable because of its significance as a piece of cultural property, or could it be extrinsically valuable because its ownership confers prestige? These are challenging questions for which precise answers may not be possible because the answer may vary according to the eye of the beholder, but the imperfection of this lens of analysis that may lead to some blurring at the edges is in my opinion no more problematic than the general uncertainty of assessing damages, which prompts courts to remind us from time to time that mathematical precision is not the standard to be met. See *ibid*; Anne W Rea & Wayne R Munns Jr, "The Value of Nature: Economic, Intrinsic, or Both?" (2017) 13:5 Integrated Environmental Assessment & Management 953–55 [Rea & Munns Jr, "The Value of Nature"]; *Ojanen v Acumen Law Corporation*, 2021 BCCA 189 at para 62 [*Ojanen*], Goepel JA ("The law has long recognized that the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for a breach of contract"); *Chaplin v Hicks*, *supra* note 51 at 795, Fletcher Moulton LJ ("where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case").

67. I consider intrinsic value to be synonymous with any value that a contractual entitlement might have that does not depend on the use or uses to which it can be put, such as the value in simply knowing a thing exists, which can also be described as "non-use" value in the terms employed in environmental economics. I note though that there is some uncertainty as to whether non-use value is synonymous with intrinsic value in the environmental context, or whether the anthropocentric emphasis of many forms of suggested non-use value distinguishes them from what might be called true intrinsic value. The lack of watertight distinctions between categories of intrinsic vs extrinsic or use vs non-use does not critically undermine my purpose

tomb of Alexander, for instance, and recover his sarcophagus, it would be preposterous to think that it could be valued according to its use as a mere casket. Instead, it would have to be said that its value is something else entirely, defined not by what further use it could be put to, but by some intangible quality of importance that transcends the purely material and mundane. This is not to say that prices are not put on such things, but where price and worth are effectively synonymous with extrinsically valuable things, it is clear that price and worth of the intrinsically valuable are not commensurate. As such, one can say that despite the similarity in the way in which extrinsically valuable things and intrinsically valuable things may be traded or dealt with at times via contract, they are nonetheless clearly different in kind, and so too are contractual entitlements to them.

With the difference between extrinsically valuable contractual rights and intrinsically valuable contractual rights set out above, I can now move on to explain how this is the distinction that makes all the difference when it comes to inadequacy versus unavailability. In short, if a contractual right is extrinsically valuable, as contract assumes, then one can rely on the simple equation set out above in order to compensate the injured party in the event of breach by way of expectation damages. That equation is: Expected Position – Actual Position = Damages. Of course, this is assuming that any compensation is necessary and that the innocent party is in fact injured by the breach. If, however, the innocent party's actual position is no worse than their expected position, then the answer to the equation will be nil or negative and that no expectation damages should be payable. In such a scenario, the answer to the question as to whether other forms of relief or conventional remedies are inadequate or merely unavailable is that they are simply and rightly unavailable because there is in fact nothing to remedy. By contrast, if the contractual right in question is intrinsically valuable and derives its worth from sentiment rather than use, it is clear that the equation does not work simply because there is no reliable way to assign a dollar value to an intrinsically valuable thing, or the contractual right to such a thing. As with the absence of a market for even an extrinsically valuable entitlement, this is an epistemological obstacle, not only because we lack the means to know what the intrinsically valuable entitlement is worth, but also because we cannot even really conceive of the means to

here when it comes to contract however, because, as we know, absolute precision is not essential to the process of assessing what a contractual entitlement is worth, and in many instances my proposed classification will get us closer to that end than we might well be without it. See Tom Crowards, "Nonuse Values and the Environment: Economic and Ethical Motivations" (1997) 6:2 Environmental Values 143 at 143. See also Rea & Munns Jr, "The Value of Nature", *supra* note 66 at 954.

know.[68] Thus, where the thing contracted for is intrinsically valuable, and the right to it is denied or diminished in some way, we are more than likely faced with a situation where "other forms of relief" are inadequate rather than simply unavailable.

To clarify what the foregoing paragraph means in practice, I will take a page from their Lordships' book in *Blake* and offer examples to spell out the distinction in more concrete terms. I will begin with a situation in which expectation damages are unavailable but not inadequate and contrast it with the circumstances of *Blake* to illustrate the difference between unavailability and inadequacy more clearly. Turning to the example of unavailability, imagine a delivery firm called Everywhere Without Delay (EWD). They deliver parcels, they deliver boxes, they will deliver almost any inanimate thing that you desire. EWD is *the* market leader in delivery and freight logistics and has been almost since it was founded forty years ago. EWD's founder, Amit, began the company after time spent working as a bike courier during a PhD in computer science. The secret to EWD's success—the principle under which it organized its delivery operations—was unknown for the longest time. And this secrecy was a key source of EWD's competitive advantage. The principle or principles

68. In economic terms, and in other fields besides, the value of a thing is frequently conceived of in terms of its "utility" to a given person, which is its capacity to satisfy a human need or desire. On its face, there is nothing inherently objectionable about this, but it has been evident from almost the beginning that the concept of utility does not provide us with a direct unit of measurement or amount to a unit of measurement. It had been hoped for some time that someday some device to detect the extent of the utility experienced by a given person from the acquisition or consumption of a given good or service could be developed. But, to date, no such device has been devised, and the chances of it ever being done are slim. In the absence of a direct means of measurement, economists and others considering similar questions have, from early on, instead relied on markets as a proxy to provide evidence of relative utility inferentially through the price mechanism—i.e., higher utility begets higher prices. Like any indirect method of assessing a given quality however, this approach has its limits, and it is particularly ill-suited to assessing the utility that one has or might derive from anything intrinsically valuable because, even where prices exist, they may be understood to be unrepresentative of an intrinsically valuable thing's true value, or because such things are sometimes simply not for sale at any price. See Sampat Mukherjee, *Microeconomics* (Kolkata: New Central Book Agency, 2019) at 49; David Colander, "Edgeworth's Hedonimeter and the Quest to Measure Utility" (2007) 21:2 J of Economic Perspectives 215 at 215–16; Ivan Moscati, *Measuring Utility: From the Marginal Revolution to Behavioral Economics*, Oxford Studies in the History of Economics (New York, NY: Oxford University Press, 2019) at 29–30; Munns Jr & Rea, "Ecosystem Services", *supra* note 65 at 332; Richard A Posner, "Utilitarianism, Economics, and Legal Theory" (1979) 8:1 J Leg Stud 103 at 114.

underpinning EWD's methods were in reality, though, no more than simple observations about traffic movement. Observations that were coded into an algorithm, but in the end simply rules for getting the most parcels to the most people in the least time. Rules that anyone could implement if they knew them. For example, avoid left turns because on average three rights is faster. After establishing EWD as the market leader, Amit eventually sold his controlling share in the company ten years after it was founded. The buyers of his shares were fearful of their advantage being eroded however, and the terms of the purchase included a confidentiality clause that prohibited Amit from disclosing his rules. Amit dutifully abided by this restriction for the longest time. Recently, however, he has signed a book contract to tell the story of how he began a household name from the seat of his bicycle. This has angered EWD, to whom the buyers subsequently assigned the confidentiality right for consideration, but it is far from their only problem. A larger related concern is that competitors have used drones to track EWD vehicles and have in fact deciphered the many rules that Amit came up with. EWD nonetheless wishes to sue Amit for his breach of confidentiality. In reality, however, this would appear to be a situation in which only nominal damages would be available and in which expectation damages are not. At this point, it may be clear as to why this ought to be the case. To remove any doubt, I will compare the circumstances of EWD and *Blake* below.

Readers will recall that *Blake* also involved a contractual undertaking of confidentiality, and that the breach disclosure involved information that was also no longer strictly speaking confidential.[69] Nonetheless, and despite how extraordinary it appeared at the time, their Lordships awarded a profit-stripping remedy in response, and what is more, the common law world has come round to the idea that this was right.[70] Various explanations can and have been offered to support this conclusion, some of which the Court here in *Atlantic Lottery* considered.[71] None appear to be particularly compelling, however, and none appear to have received universal acceptance. My own view is that the best explanation is that the British government's right to the confidence of one of its spies simply does not fit the paradigm of expectation damages and could not be remedied that way because it is of intrinsic rather than extrinsic value. The British government more than likely has uses for the information it obtains

69. See *Blake*, *supra* note 13 at 275.

70. See *ibid* at 288, 290–93; *Harris v Digital Pulse*, [2003] NSWCA 10 at para 129 (*Blake* is at least implicitly accepted as correct in principle); *Moglin v Jo*, [2013] NZHC 2082 at paras 78–79 (scope for the plaintiffs to claim an account of profits with respect to breaches of contract in their case was accepted).

71. See *Atlantic Lottery*, *supra* note 1 at para 114.

through its intelligence services, but the real value of an undertaking of secrecy by those in its service is more likely to be the confidence and comfort, or peace of mind, it provides to the state when it must entrust sensitive information, potentially embarrassing, even damaging information to individuals in its employ. I would not embrace the language of Lord Nicholls who described it as "quasi-fiduciary",[72] but I would contend that such an obligation on Blake's part was simply not the run-of-the-mill kind of contractual entitlement that contract law is well prepared to deal with. It is not the kind of entitlement that has an obvious use and thus a readily ascertainable dollar value.[73] Its worth is closer to being a question of sentiment in a sense, if one can attribute such a quality to the state, rather than one of pounds and pence.

One can contrast the circumstances of *Blake* with the situation of Amit and EWD in the hypothetical above because it is clear that the information that EWD had wished to remain confidential had a use. It is, or was, evidently a means to an end (i.e., superior performance and thus profit). This is the essence of extrinsic value because there can be little doubt that the information in question, and thus the contractual entitlement, is a means to an end, but not an end in itself. Accordingly, there is nothing to prevent an ordinary assessment of expectation damage following any breach. Instead, the issue for the innocent party is that their expectations may have been so out of line with reality, or the infraction so trifling, that there is nothing to remedy. In the situation of EWD, their expectation of continued competitive advantage clearly had its limits, and it is clear that the expectation that the innocent party is entitled to have vindicated is to be in as good a position as they would have been had the contract been performed as required, which is not the same as putting the innocent party in the position they would have been had everything they hoped for happened.[74] With that in mind, one can say that EWD's expected position

72. See *Blake*, *supra* note 13 at 287.

73. The circumstances of this case would have been much more easily dealt with had the British Government acted in time to obtain an injunction, or seek *Lord Cairns' Act* damages in lieu, but as we know, the British Government acted too late for this and their Lordships specifically declined to award an injunction and/or damages in lieu retroactively. See *Blake*, supra note 13 at 294.

74. See *Bhasin v Hrynew*, 2014 SCC 71 at para 90. Justice Cromwell states: "Even if there were a breach of a broader duty of good faith by forcing the merger, Can-Am's contractual liability would still have to be measured by reference to the least onerous means of performance, which in this case would have meant simply not renewing the contract" (*ibid*). See also *Hamilton v Open Window Bakery Ltd*, 2004 SCC 9 at paras 19–20. Justice Arbour held:

> The trial judge erred in this case in engaging in a tort-like inquiry as to what would have happened if OWB had not breached its contractual obligations

would be to have maintained its competitive edge for as long as the information remained useful and undiscovered by anyone else independently, and its actual position was exactly that. EWD kept an edge until the secret was uncovered by others, and in that respect one can say that it fairly got what it bargained for from Amit. Therefore, even with disclosure by Amit: EWD's Expected Position – EWD's Actual Position = $0. Damages are nil here because there is simply nothing to remedy, not because regular contract damages are inadequate.

With the difference between inadequate and unavailable with respect to expectation damages explained above, we can now move on to consider when circumstances will justify a disgorgement remedy once inadequacy is established. Before moving on, I should reiterate that the remarks above pertain to expectation damages and that expectation damages are only one category of remedy under the umbrella of conventional remedies. If another conventional remedy, such as punitive damages or damages under *Lord Cairns' Act*, is *available* with respect to the relevant breach, then the inquiry as to whether other forms of relief are inadequate must be answered in the negative. As such, the availability of these other conventional remedies ought to be considered as well before reaching an overall conclusion under this limb of the two-part test before moving on to the next question. Given how comparatively rare these other conventional remedies are compared to expectation damages though,

there is a strong possibility that if expectation damages are unavailable, that other conventional remedies will not be available either for various reasons.

B. Whether the Circumstances Warrant such an Award

The current cases on disgorgement in contract are as unclear as to what facts or factors will influence whether or not a disgorgement award is warranted as they are with respect to what it is that makes conventional remedies inadequate in certain circumstances. Drawing on the discussion in the previous section, however, I argue that there are two sets of circumstances that strongly suggest

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> to Hamilton, and in concluding that OWB would not have terminated at the earliest opportunity. The assessment of damages required only a determination of the minimum performance the plaintiff was entitled to under the contract, i.e., the performance which was least burdensome for the defendant. The plaintiff agreed at the outset that she was entitled to no more by contracting for a contractual term that could be truncated with notice entirely at the discretion of the defendant.

Ibid. See also *Withers v General Theatre Corporation Ltd*, [1933] 2 KB (CA) 536 at 548–50.

that a disgorgement award is warranted. The first, unsurprisingly, is a situation in which the delinquent party's breach involves the diminution or denial of an intrinsically valuable entitlement. The second is any other situation in which the delinquent party has undermined the exchange embodied in the parties' bargain (the "equilibrium position") in a way that is not otherwise adequately compensable through ordinary contract remedies including expectation damages first and foremost. I will discuss each in turn.

In short, the reason for awarding disgorgement in response to the diminution or denial of an intrinsically valuable entitlement is because, unless mandatory relief is available, there is effectively no other way to vindicate the innocent party's interest in having their entitlement. As explained above, ordinary remedies will be ineffective because of our inability to quantify an intrinsically valuable entitlement's monetary value in an epistemologically certain way. And once that value is eliminated for the purposes of damage assessment, it is clear that what remains is not the value denied to the innocent party, but the value obtained by the party who is delinquent. Typically, contract ignores the value of any gains to the contract breaker for the reason that they are largely irrelevant to the task of putting the innocent party in as a good a position as they ought to have been. However, where no other value is available, it appears appropriate to have regard to such an amount for this purpose. It may be somewhat counter-intuitive, but if we cannot provide the injured party with the monetary equivalent of what they ought to have received and did not get, the closest we may come to bringing the innocent party to the position they ought to have been in is to transfer to them what the delinquent party got but ought not to have received. Undoubtedly, there will be some objection to this explanation, as much as there is at least to the practice of awarding disgorgement for breach of contract at all. However, the satisfaction of disgorgement may be the closest we can come to undoing the innocent party's deprivation, whether inflicted through diminution or outright denial of their entitlement, and it is by definition circumscribed in a way that appears appropriate. There is no punishment in redistributing an ill-gotten gain, strictly speaking. And what is more, even if there ever is a case in which one might argue that the disgorgement is disproportionate, one need only remember that there would be no claim but for the breach, and that contract law not infrequently awards large sums without any regard for fault.[75]

75. See *Del Giudice v Thompson*, 2021 ONSC 5379 at para 204. In relation to a multi-billion-dollar class action claim, Perell J stated that:

> [T]he Plaintiffs forswear the straightforward breach of contract claims that might have been available to them. From a policy perspective that cause of

Blake is an apt example of an instance that calls for the approach described in the preceding paragraph. As explained above, the British government's entitlement to Blake's confidentiality defied any attempt at valuation or quantification on a conventional contract basis because it lacked any extrinsic value whatsoever. It lacked such value though, not because it was worthless, but because its value was inherent. To vindicate the British government's interest in having such a commitment of confidentiality from its servant, Blake, thus evidently required an award assessed on some basis other than the expectation measure. If the entitlement's value to the British government could not be measured though, this left only one alternative basis for assessment, which was the value derived by Blake. Clearly, an award of Blake's profit would not strictly speaking put the British state in the same position as though the disclosure had never happened. However, to put Blake in the same position as though he had not made disclosure by depriving him of his gain, is in all likelihood the closest any award could come to putting the British government back in the position it ought to have been in had Blake properly performed.

The abovementioned second circumstance in which a disgorgement award may be appropriate is when the delinquent party has otherwise undermined the exchange embodied in the parties' contract perhaps by taking more or giving less than what was promised, or simply by diminishing the benefit of the transaction to the injured party in some sense such as by perhaps misappropriating a gain that the plaintiff had expected to make. To undermine the exchange in this way is significant because it *potentially* prevents the injured party from realizing a "surplus of value" in economic terms, which is arguably the whole point of contract. I note that I say acts undermining the exchange potentially prevent the realization of a surplus of value because the value a party derives from an exchange, that is the extent to which it makes them better off, is incapable of being measured directly.[76] Instead, at best, we can only assume inferentially that a transaction would leave a party better off if they freely agreed to it, assuming that contracting parties are rational and wish to maximize their overall surplus or store of value.[77] In the absence of such agreement, the picture is unclear, but

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> action would appear to be adequate for the immediate case, without inventing a new form of strict liability. And in this regard, it may be observed that breach of contract is already a strict liability regime that does not have proof of damages or any mental state as constituent elements.

Ibid.

76. See Colander, *supra* note 68 at 215–16; Moscati, *supra* note 68 at 29–30; Posner, *supra* note 68 at 114.

77. See Posner, *supra* note 68 at 114.

it is at least possible, if not probable, that the new parameters of a unilaterally altered exchange would leave the injured party (who has not gotten the bargain that they expected) worse off because what they are left with is worth less to them than what they had in the first place.

A delinquent contracting party can undermine their exchange with their opposite in more ways than one. First, an ordinary breach of contract may have this effect as in cases of skimped performance. *Dolly Varden Mines Ltd (NPL) v Sunshine Exploration Ltd* (*Dolly Varden*) is an apt example because, even though work that was not done by the defendant in developing the mining property (in breach of the parties' contract) did not adversely affect the value of the property, the cost of the work was nonetheless awarded to the plaintiff, Dolly Varden, on the basis that the work would need to be done at some point and Dolly Varden would otherwise presumably have to pay for it.[78] The famous example of a contractor using the wrong brand of pipe in the construction of a house and being liable only for the difference in value between the brand of pipe required (Reading) and the brand of pipe actually used (Cohoes) is similar.[79] I note that

78. See *Sunshine Exploration Ltd et al v Dolly Varden Mines Ltd (NPL)*, [1970] SCR 2 at paras 10, 19–20, 8 DLR (3d) 441. See also *Cunningham v Insinger*, [1924] SCR 8 at paras 14–15, [1924] 2 DLR 433. Justice Duff held:

> It would be inadvisable, I think, to attempt to lay down any general rule for ascertaining the damages to which a mine-owner is entitled for breach of a covenant to perform development work or exploratory work by a person holding an option of purchase. Cases may no doubt arise in which the test suggested by Mr. Lafleur's argument would be the only proper test, and difficult and intricate as the inquiry might be, it would be the duty of the court to enter upon an examination of the effect of doing the work upon the value of the property. On the other hand, cases must arise in which the plaintiff's right is plainly to recover at least the cost of doing the work. If it were conclusively made out, for example, that the work to be done formed part and a necessary part of some plan of exploration or development requisite, from the miner's point of view, for developing the property as a working mine, and necessary, from the point of view of businesslike management, so that it might fairly be presumed that in the event of the option lapsing the owner would in the ordinary course have the work completed, then the damages arising in the ordinary course would include the cost of doing the work and would accordingly be recoverable under the rule.

Ibid.

79. See *Jacob & Youngs, Inc v Kent*, 230 NY 239 (Ct App 1921).

in the pipe case and *Dolly Varden*, expectation damages are and were inadequate because the expected and actual positions of the plaintiffs do not differ greatly in one sense because the defendant's failure to perform as promised does not change the market value of the relevant property much at all, and the market value of the property is what is frequently looked to in order to assess the monetary value of the plaintiff's expected and actual position.[80]

I note that Lord Nicholls, in the leading speech in *Blake*, rejected skimped performance as a basis for awarding an account of profits for breach of contract. This rejection was predicated on his Lordship's supposition that any cost saved by the defendant must reflect a diminution in the value of the performance provided as compared with the performance promised.[81] However, this presupposes that a cost saved, for instance through the substitution of a more expensive input for a less expensive input, inevitably begets a reduction in the quality of actual performance as compared with promised performance that could be assessed under the expectation measure and compensated in damages accordingly. But cost and worth are not always co-extensive, and "cheaper" will not always mean "inferior" as Lord Nicholls suggests.[82] And where the cost of performance to the defendant is reduced (in breach) without a reduction in the quality of performance for the plaintiff, expectation damages appear ill-suited to redress the "wrong". This is because the expectation measure is assessed from the plaintiff's perspective in terms of making up the difference between the plaintiff's position post-breach and the position they would have been in had the contract been performed as promised.[83] In other words, expectation damages are assessed so as to make up for any shortfall in the benefit or value received by the plaintiff, but strictly speaking this has nothing to do with the cost to the defendant of *providing* said benefit or value through its performance. So, even if the defendant has reduced their cost of performance, there is nothing obvious for expectation damages to compensate as long as the value of the performance to the plaintiff has not been diminished. And given that value for the purposes of expectation damages is typically assessed on the basis of market value, at least as a starting point,[84] it is conceivable that expectation damages will in some

80. Although difference in market value is not always the final word, it does typically appear to be the first. See *Ruxley Electronics and Construction Ltd v Forsyth*, [1995] UKLH 8 [*Ruxley*].

81. See *Blake*, *supra* note 13 at 286.

82. See *ibid*.

83. See Waddams, *supra* note 40 at para 5.30 (where the author says that "the normal rule of contract damages [is that] the promisee is entitled to the full value of the promised performance").

84. See *Chaplin*, *supra* note 51 at 792; *Ruxley*, *supra* note 80.

instances be prima facie unavailable despite a plaintiff's disappointment with a substitution or other cost saving by a defendant resulting from a breach. Where such a cost saving occurs, one could perhaps ignore the market value of the defendant's performance as a product or service in the plaintiff's hands and attempt to rationalize an award of expectation damages equivalent to the defendant's cost saving on the basis that the value received by the plaintiff is equivalent to the cost incurred by the defendant, meaning that any reduction in cost incurred by the defendant must be equivalent to a shortfall in value provided to the plaintiff. However, in my view, this would be tantamount to conjuring up a loss (of benefit) to the plaintiff to justify an award, and I suggest it would be better instead to openly admit that the focus of our assessment is the defendant and the effect of their breach on their position in these circumstances and not the plaintiff's.

The English decision in *Experience Hendrix LLC v PPX Enterprises Inc* (*Experience Hendrix*) affords a different example of an ordinary breach that may call for disgorgement (similar to *Wrotham Park*) because instead of a positive obligation such as that violated in *Dolly Varden*, *Experience Hendrix* involved the breach of a negative or prohibitory obligation like that in *Wrotham Park*.[85] In particular, it entailed the defendant issuing licenses to use certain recorded works of Jimi Hendrix in contravention of a settlement agreement between it and the estate of Jimi Hendrix (under which it had promised precisely not to do this) and profiting thereby.[86] The English Court of Appeal declined to award a full account of the profits made by the defendant but did award damages equivalent to the royalty that might have been negotiated by the defendant for the right to issue the further licenses (i.e., disgorgement of a portion of the defendant's profit).[87] This can be described as a situation in which the defendant has undermined the parties' exchange of rights by invading a right of the

85. [2003] EWCA Civ 323 at paras 11–12 [*Experience Hendrix*]; *Wrotham Park*, *supra* note 56. I note that Lord Nicholls in *Blake* took the position that "doing the very thing he contracted not to do" was too wide a category to be helpful, as it was apt to embrace all negative obligations, *Blake*, *supra* note 13 at 286. I tend to agree that not every breach of a negative obligation ought to lead to disgorgement. However, as *Wrotham Park* and *Experience Hendrix* demonstrate, there will be some situations involving the breach of a negative obligation in which expectation damages will not be adequate because there is no meaningful way to assess the impact of the breach upon the plaintiff. In these circumstances, disgorgement may be appropriate. Where the impact of the breach of a negative obligation can be assessed or is otherwise obliviously negligible though, it is clear that disgorgement should not be granted.

86. See *Experience Hendrix*, *supra* note 85 at paras 11–12, 36.

87. See *ibid* at paras 43–45.

injured party or taking something that it had no right to. And an award for disgorgement for a portion of the profits made thereby can be understood as an attempt to return the parties to the status quo of their contractual exchange by granting the injured party at least the amount that they would have negotiated for in exchange for relaxing or giving up their right to demand that the defendant not perform the particular act that they did. In these circumstances, the award could be described as "negotiating damages" as mentioned above, but they have also been awarded in circumstances where the injured party would never have negotiated with the defendant to permit the defendant's actions as in the *Wrotham Park* case discussed earlier.[88] In such a situation, despite the injured party's unwillingness to have actually negotiated for a relaxation of its right, a fictionally negotiated amount may still be the best and perhaps only way to attempt to return the parties to the status quo ante (or equilibrium position reflected in their bargain) and to thus ensure that their contract's economic function is not undermined.

Aside from "ordinary" breaches of contract that might undermine the parties' exchange, a second possibility may be breaches of more extraordinary "good faith" type obligations such as the duty of "honest performance", even though such obligations are extra-contractual and not strictly speaking part of the parties' bargain or their exchange at all.[89] I hasten to add that I say "may" because it depends on our understanding of what good faith in contract is. I have written elsewhere that good faith type obligations and their enforcement are necessary and justifiable to the extent that they prevent and sanction behaviour that is against the "spirit of the rules", and that the best candidate to be said spirit is "economic efficiency" and the promotion of gains and surpluses from trade of the kind discussed above.[90] On this view, any breach of a good faith duty must be some attempt to subvert the achievement of contract's institutional function, which is to promote the realization of surpluses from trade (i.e., each party being better off on the basis of getting something worth more to them than that which they are giving up). Such subversion can take many forms and may often be surprisingly subtle if it does not otherwise constitute a breach of the parties' explicitly or implicitly agreed terms. Nonetheless, one can say generally that any such activity will amount to disturbing the balance of the bargain struck by either taking more, or giving less, or otherwise undermining the value of what was promised.

88. See *Wrotham Park*, *supra* note 56 at 815.

89. See *Bhasin*, *supra* note 74 at paras 74–75.

90. Krish Maharaj, "Good for Everyone or Not Good at All: Clarity and Commitment in Contractual Good Faith" (2020) 96 SCLR (2d) 107 at 121.

In circumstances where the breach of a good faith obligation has undermined the parties' exchange, a conventional remedy may well be appropriate if the good faith breach amounts to the misappropriation of value by the delinquent party and that misappropriation can be assessed appropriately. If the value misappropriated cannot be assessed because it is epistemologically impossible to do so, a claim for disgorgement of any gain made by the defendant appears compelling. Likewise, if the value is not misappropriated per se, but otherwise simply denied to the injured party, disgorgement of all or part of any profit made by the defendant would seem to be the obvious answer, since there is not likely to be any other appropriate way to vindicate the innocent party's interest.[91] I note, though, that in situations of misappropriation, the label disgorgement for an award assessed by way of the delinquent party's gain is arguably inaccurate. As James Edelman points out in his monograph *Gain-Based Damages Contract, Tort, Equity and Intellectual Property*, and as the Court in *Atlantic Lottery* itself notes, such an award is more accurately described as "restitution" since there is a corresponding enrichment and deprivation.[92] Although, this position assumes equivalence between the value denied to the innocent party and the value ultimately received by the delinquent party. Should the delinquent party have been more successful than the innocent party would have been even had the delinquent party not carried out the good faith breach, it is arguable that a gain-based remedy would not be strictly returning value to the innocent party. The distinction in many circumstances may be uncertain though, and in many instances, it may be one without a difference. And, more importantly, a gain-based remedy in such circumstances, however it is described, may be the only way to appropriately respond to the breach of the particular good faith obligation.

An apt example of a breach of a good faith obligation whose remedy fits with the explanation above is *Bhasin v Hrynew*.[93] Readers are likely familiar with the decision, but in brief it involved a breach of the newly minted duty of honest performance by the defendant, Can-Am.[94] Can-Am had breached the duty by misleading the plaintiff, Bhasin, about its intention to trigger a

91. The value of the restrictive covenant that the defendants violated in *Wrotham Park* was arguably denied rather than misappropriated because the value of the restriction was the fact of it being observed rather than the value that the plaintiffs might have been able to realize from it by way of negotiating for its relaxation. See *Wrotham Park*, *supra* note 56 at 815.

92. See *Atlantic Lottery*, *supra* note 1 at paras 23–24; James Edelman, *Gain-Based Damages: Contract, Tort, Equity, and Intellectual Property* (Portland: Hart, 2002) at 65–93.

93. See *Bhasin v Hrynew*, *supra* note 74.

94. See *ibid* at para 94.

non-renewal provision in an agency agreement that would otherwise have automatically renewed for a further three-year term.[95] Under said agreement, Bhasin worked as an enrolment director marketing education savings plans for them, effectively running a small business akin to a franchise.[96] Can-Am's decision not to renew the agreement was driven by the demands of a competing enrolment director, Hrynew, who wished for Can-Am to help him force a takeover of Bhasin's business.[97] Can-Am's deception and last-second notice of non-renewal facilitated that end by leaving Bhasin with little time to find an alternative financial product for his business to sell or to sell his business and salvage some of its value.[98] This led to Hrynew being able to attract Bhasin's employees as the collapse of Bhasin's business loomed and to effectively acquire Bhasin's book of business, and all of this without Hrynew having to pay for either.[99]

The award made by the Court in response to the breach of the duty of honest performance by Can-Am that facilitated the unfortunate outcome described above, was approximately $87,000.[100] This amount reflected the sum that the Court concluded Bhasin might have been able to realize from the sale of his business if Can-Am had been honest with him when questioned about its intentions on renewal—i.e., it was the value that Bhasin might have been able to salvage if he had more than the last-minute notice of non-renewal that he ultimately received.[101] Although Can-Am was not the recipient of the value in Bhasin's business per se, this award is reminiscent of restitution given that it is equivalent to what was taken from Bhasin. And if Can-Am had been the recipient of the value in Bhasin's business instead of Hrynew, the Court's award would have been effectively indistinguishable from restitution. Restitution of this sort also appears as though it would have been appropriate in the circumstances according to my explanation above. Can-Am's dishonesty undeniably undermined the economic exchange reflected in the parties' bargain, which likely would not have contemplated Can-Am being able to unilaterally appropriate the value that an enrolment director, such as Bhasin, had built up in their business.

95. See *ibid* at paras 94–103.

96. See *ibid* at paras 3–5.

97. See *ibid* at para 97.

98. See *ibid* at paras 13–15.

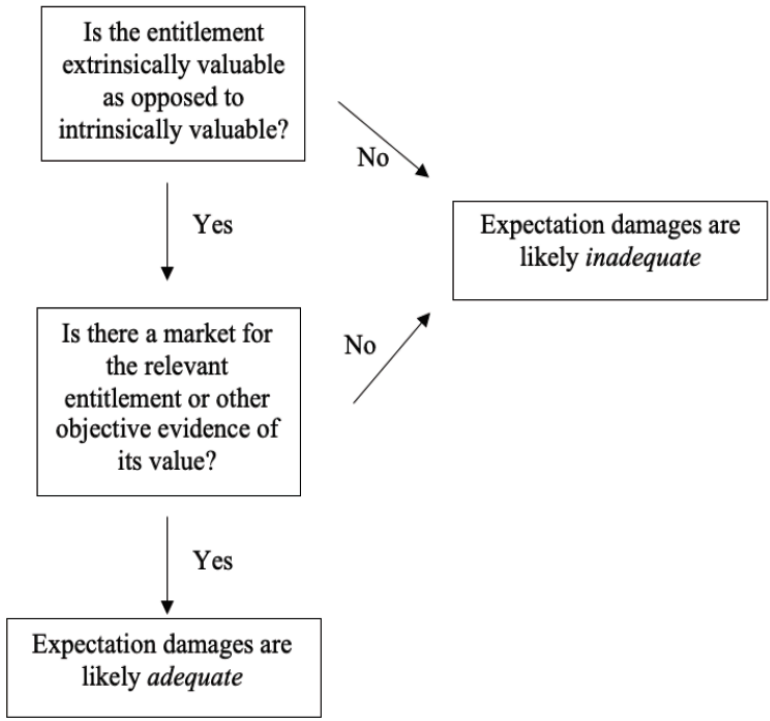
99. See *ibid*.

100. See *ibid* at paras 110–11.

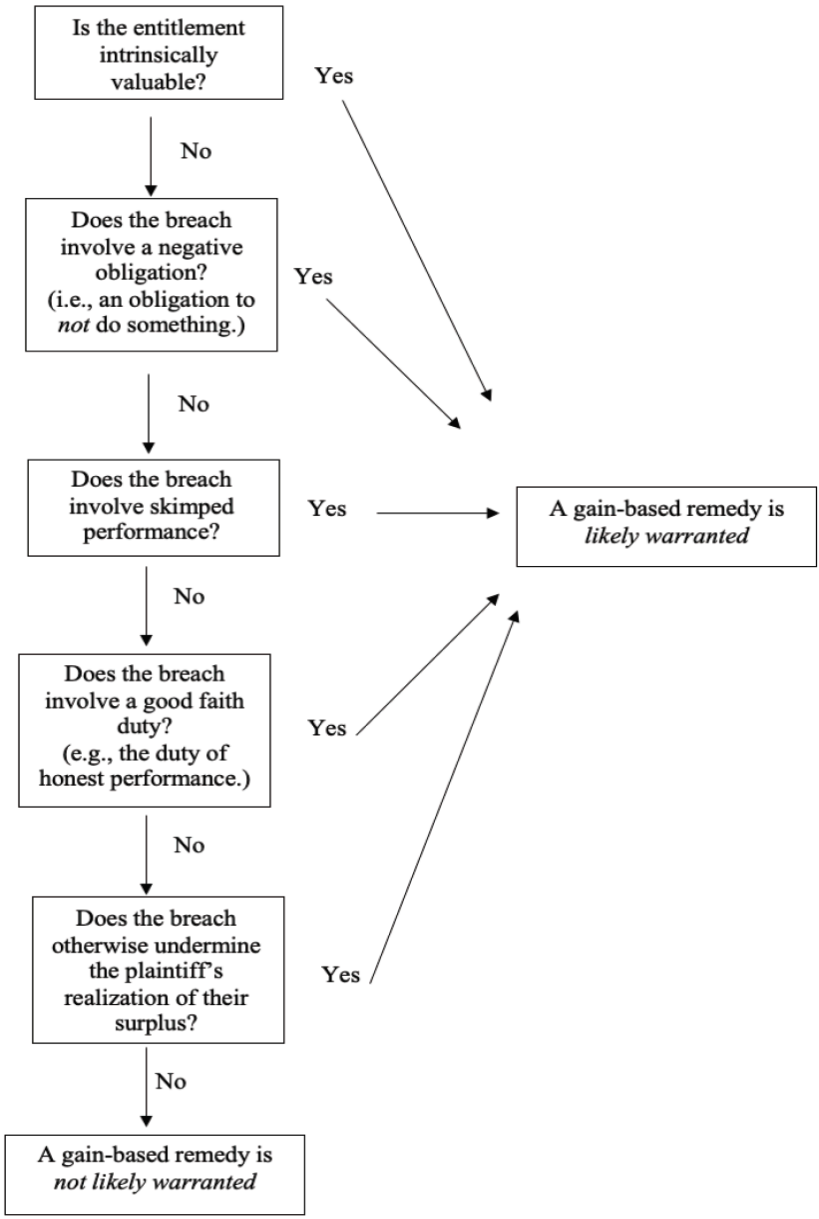
101. See *ibid*.

For the convenience of the reader, I conclude this section with two flow charts on the following two pages setting out my approach to determining whether expectation damages may be inadequate with respect to any particular breach and whether or not a gain-based remedy is warranted. I have also included a list of contractual entitlements that I suggest may be of the intrinsically valuable variety in a number of cases.

(i) Are Expectation Damages Inadequate?



(ii) Is a Gain-Based Remedy Warranted?



(iii) Examples of Potentially Intrinsically Valuable Entitlements

The following is a non-exhaustive list of the kinds of contractual entitlements that may constitute intrinsically valuable contractual entitlements as opposed to extrinsically valuable contractual entitlements. Other categories may also exist, and in some cases contractual entitlements corresponding with one of the following categories may not be intrinsically valuable in the context of the contractual relationships from which they arise:

1. Sentimental value;

2. Confidentiality or secrecy for its own sake;

3. Honour or pride;

4. Peace of mind;

5. Trust and confidence including the duty of honest performance and other good faith obligations; and

6. Uniqueness or completeness if the thing to which the plaintiff is entitled forms part of some set that is difficult to obtain.

III. How Does This Framework Apply to *Atlantic Lottery*?

In the second part of this article, I set out the pertinent facts of *Atlantic Lottery* and the majority's remarks in relation to the remedy issues in play. As explained there, the majority concluded that two issues had to be resolved in order to determine whether or not a gain-based remedy would be available in relation to a given breach of contract.[102] The first was whether other remedies

102. See *Atlantic Lottery*, *supra* note 1 at para 53. Justice Brown states that: "In particular, and again as was held in *Blake*, disgorgement for breach of contract is available only where other remedies are inadequate and only where the circumstances warrant such an award" (*ibid*, 53).

were inadequate to address the alleged breach.[103] The second was whether or not a gain-based remedy was warranted in the circumstances if other remedies were in fact inadequate.[104] I will work through each of these two issues below on the basis of the framework set out above.

A. Were Other Remedies Inadequate?

According to the majority, "the plaintiffs' claim is simply that they paid to play a gambling game and did not get exactly what they paid for."[105] The single biggest difference between what was ostensibly contracted for, and what was provided by ALC, were the odds of winning the games that ALC provided.[106] One could conceive of the claim then as perhaps being for a defect in quality that led to class members losing more money, or making less money, than they otherwise might have had the odds been as advertised. If that is the case, then it does not look as though ordinary expectation damages would be inadequate if one turns one's mind to the basic method of assessment: Expected Position – Actual Position = Expectation Damages. As explained above, situations of inadequacy typically involve circumstances in which the plaintiffs' expected position is incapable of principled assessment, often because some common assumption about the nature of contractual entitlements simply does not hold true, leading to an insurmountable epistemological challenge. Neither of these assumptions appears to present a particular challenge here. But for the sake of completeness, I will draw them out in some greater detail.

Readers will recall that the assumptions referred to in the preceding paragraph include first, the existence of some market to turn to in order to estimate the replacement value of similar entitlements, and second, the nature of the entitlement itself actually being amenable to measurement by way of comparison to other transactions within a market. In the circumstances of the ostensible breach in *Atlantic Lottery*, the second assumption appears to hold true because the entitlement would, in all probability, have to be extrinsically valuable to the participants rather than intrinsically valuable. I suppose one could argue that many punters play games of chance for the thrill rather than potential profit, but if that is the case, it does not make sense for such a person to sue because of defective odds because they still got the thrill they sought. Satisfaction of the first assumption appears somewhat trickier, but in substance

103. See *ibid.*

104. See *ibid.*

105. See *ibid* at para 61.

106. See *ibid* at paras 4, 93, 133.

it does not appear to be an issue either because even if a market does not appear obviously available, one does not really need a market in order to assess the value of an entitlement that is itself already monetary. By this I mean the value of a gambling game with better odds can simply be multiplied by the dollar value of the wager, and the same can be done with the game actually provided by ALC that had poorer odds. This leads to a simple assessment of damage as follows: (Promised Odds x $ Wager) – (Provided Odds x Wager) = Expectation Damages.

The only potential problem with the assessment of expectation damages in these circumstances is the fact that records of bets and particular games and/or odds for each class member would be a considerable challenge from a fact-finding perspective. Courts are notably not deterred from the assessment of damages by such evidentiary difficulties if the alternative is inaction,[107] but mere difficulty alone is not an excuse to avoid gathering evidence.[108] As such, it does not appear that expectation damages (as the ordinary remedy for breach of contract) are inadequate in these circumstances because the obstacle inhibiting

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107. See *Ojanen*, *supra* note 66 at para 62; *Chaplin*, *supra* note 51 at 792. Lord Justice Vaughan Williams held:

> Sometimes, however, there is no market for the particular class of goods; but no one has ever suggested that, because there is no market, there are no damages. In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract.

Chaplin, *supra* note 51 at 792.

108. See *Ratcliffe v Evans*, [1892] 2 QB 524 (EWCA) at 532–33. Lord Justice Bowen held:

> In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.

Ibid. See also *Wood v Grand Valley R Co*, (1915) 51 SCR 283 at 303; *Inuit of Nunavut*, *supra* note 49 at para 85; *Morris-Garner and another v One Step (Support) Ltd*, [2018] UKSC 20 at para 90.

the claimant class' ability to access them was merely evidentiary as opposed to epistemological. Put another way, to assess expectation damages in these circumstances was if anything difficult, but not practically or literally "impossible" to borrow from the Court's own comments in the case, and therefore expectation damages were simply not inadequate according to the framework I have laid out.[109] Given my conclusion in the preceding paragraph in relation to the adequacy of expectation damages in response to the class plaintiff's claim for having been provided with a "defective game", as the majority described it, one would think that is the end of the matter. However, the dissenting judgment from Karakatsanis J suggests that there is more to the story. Specifically, Karakatsanis J raises the potential for a claim that ALC had breached its duty of honest performance when it misled gamblers about the real conditions under which they were operating.[110] Assuming that a breach of the duty of honest performance could be proven, or that it did occur in these circumstances, as the adjudicator must in certification proceedings, this gives rise to a rather different claim than that addressed by the majority even though both are ostensibly contractual.[111] The significant difference for present purposes is that awards for a breach of the duty of honest performance appear to conform to a reliance rather than an expectation measure.[112] The Court in *Bhasin* and the majority in *CM Callow Inc v Zollinger (Callow)* deny this, but it is difficult to see how the court's remedy is not focused on undoing the plaintiff's change of position by undoing the consequences of the plaintiff's actions (inactions) carried out on the faith of the defendant's deception (i.e., acts or omissions of the plaintiff carried out in reliance on the defendant's deceptive communication).[113] As such, I take the position that breaches of the duty of honest performance are simply not remedied under the ordinary measure of contract damages. It is also noteworthy that the Supreme Court of Canada's approach to the assessment of damages for a breach of this duty is also particularly forgiving to the plaintiff from an evidentiary perspective and considers the challenge of proving what the plaintiff might have done differently had they not been deceived.[114]

109. See *Atlantic Lottery*, *supra* note 1 at paras 59–60.

110. See *ibid* at paras 129, 133–34.

111. See *CM Callow Inc v Zollinger*, 2020 SCC 45 at para 106 [*Callow*].

112. See Joseph T Robertson, "Good Faith as An Organizing Principle in Contract Law: *Bhasin v Hrynew* – Two Steps Forward and One Look Back" (2016) 93:3 Can Bar Rev 809 at 861; Krish Maharaj, "An Action on the Equities: Re-Characterizing Bhasin as Equitable Estoppel" (2017) 55:1 Alta L Rev 199 at 215; *Callow*, *supra* note 111 at para 145, Brown J (in dissent on this point).

113. See *Callow*, *supra* note 111 at paras 105–09; *Bhasin*, *supra* note 74 at para 88.

114. See *Callow*, *supra* note 111 at paras 116, 149; *Bhasin*, *supra* note 74 at paras 108–11.

If the foregoing is correct, it is arguable that ordinary reliance damages may be inadequate to some extent, given that the evidentiary difficulty of assessing the class' reliance losses by reconstructing an alternative present based on how class members may have acted differently. Especially with likely disorganized and possibly non-existent betting records in some cases. It is also arguable that the difficulty, even if one could in theory reliably determine what each member of the class might have done differently, ought not be visited upon them. After all, it ill lies in the mouth of a defendant to complain of a difficulty they themselves have contributed to or created.[115] As such, the answer to this stage of the inquiry arguably ought to have been different if the majority had considered the potential claim for a breach of ALC's duty of honest performance.

B. Was a Gain-Based Remedy Warranted?

If the majority here have conceived of and considered the nature of the class' claim correctly, there is relatively little to say at this stage. The majority certainly do not say much, except that the class does not have a legitimate interest in ALC's profit-making activity.[116] This is more of a conclusion than a reason, but it is not necessarily wrong if one thinks that ALC's wrong was only to provide a defective product. The outcome arguably ought to be very different however, if one takes the perspective of Karakatsanis J.

If one does take Karakatsanis J's perspective and conceives of the class' claim as being for a breach of the duty of honest performance, the legitimacy of the class' claim begins to more closely resemble several of the cases in which redistribution of some or all of the profit derived was deemed warranted. This is because the nature of the obligation breached by ALC looks a lot more like the obligations breached in those cases. In particular, the obligation looks a great deal like those in *Wrotham Park*, *Experience Hendrix*, and *Blake* in that it is a negative obligation (i.e., do not lie), and the defendant's departure therefrom appears to be only compensable by undoing some or all of the benefit derived by the defendant rather than by replacing the benefit denied to the plaintiff because it may be practically impossible.[117] The good faith obligation not to lie also appears to be intrinsically valuable as far as the plaintiff is concerned. The Court in *Bhasin* and *Callow* certainly seems to treat it as such because reliance damages were awarded in each case, despite the fact that the ultimate outcome for the plaintiff in terms of their "loss" could or even probably would have been

115. See *Lamb v Kincaid*, (1907) 38 SCR 516 at 539–40, 27 CLT 489. See also *Harlow & Jones, Ltd v Panex (International), Ltd*, [1967] 2 Lloyd's Rep 509 at 530, [1967] 7 WLUK 118.

116. See *Atlantic Lottery*, *supra* note 1 at para 61.

117. See *Blake*, *supra* note 13 at 282–85.

the same in either case even if the defendant had not deceived the plaintiff. And, if the obligation to be honest (i.e., not lie) is simply valuable in and of itself much like the obligation of secrecy in *Blake*, it is arguable that the defendant cannot be allowed to profit from it at all (and not just in part as in *Wrotham Park* and *Experience Hendrix*) without undermining the whole purpose of the obligation and by extension the parties' contract, and that a gain-based remedy is thus warranted.

Conclusion

In this article, I have set out a framework for understanding why the most common remedy for breach of contract may be inadequate to respond to certain breaches of contract as opposed to simply unavailable, and what factors may warrant a gain-based remedy if expectation damages are in fact inadequate in the circumstances. It may well be that the second half of the assessment will require much more case law before it can be considered settled to any extent. With respect to the adequacy of expectation damages, the ultimate question does appear to be whether or not the breach has disturbed the balance of the bargain or whether it leaves the plaintiff no better or worse according to the value of the relevant entitlement breached to them.