Devenish Nutrition Ltd v Sanofi-Aventis SA (France) [2008] Int.Com.L.R. 10/14

CA on appeal from Chancery (Lewison J) before Tuckey LJ; Arden LJ; Longmore LJ. 14th October 2008.

Lady Justice Arden :

Introduction

1. On this appeal, Devenish Nutrition Ltd ("Devenish") seeks to set aside the decision of Lewison J ([2008] 2 WLR 637) on a preliminary point of law and to establish the principle that in an action for breach of statutory duty the court can in appropriate circumstances make a restitutionary award, that is, a sum of money assessed by reference to the gain which the wrongdoer has made as a result of the wrong, in place of compensatory damages, that is, damages which compensate the claimant for loss suffered as a result of the wrongdoing.

2. This appeal involves a fundamental issue for the purposes of the law of tort, which may be summarised as follows. The aim of the law of tort is to compensate for loss suffered. The courts have exceptionally also awarded damages (commonly called "*user damages*") by reference to the fair value of a right of which the defendant has wrongly deprived the claimant, and these awards have been made even if the claimant would not himself have sought to use that right and so incurred no loss. However, there is no question in this case of Devenish having been deprived of a proprietary right, that is, a right arising from property, to which such awards were formerly confined. Devenish relies on the recent case of ***Attorney General v Blake*** [2001] AC 268, in which a remedy of the type that it seeks in this case was awarded for a breach of contract not involving the deprivation of any property. It contends that compensatory damages will not be an adequate remedy. The respondents contend that this court cannot apply the principle established in *Blake* to a purely personal tortious claim, and in particular that this court is precluded by precedent, namely the decisions of this court in ***Stoke-on-Trent City Council v W & J Wass Ltd*** and ***Halifax Building Society v Thomas***, from holding otherwise. The respondents accept that a restitutionary award could be made for a proprietary tort. (By a "*proprietary*" tort I mean a tort for which a claimant entitled to property or a property right is entitled to sue for interference on the basis discussed by Lord Nicholls in *Blake*. Thus the expression includes trespass to land or for wrongful interference with goods. It is not necessary to be more precise than this. The only further point to be noted is that Devenish's claim is not on any basis a proprietary claim.) The respondents also contend that compensatory damages will be an adequate remedy.

3. I will call the issue, summarised above, "*the* ***Blake*** *issue*". I will refer below to a restitutionary award, compensatory damages and user damages in the sense already given, which is based on the meanings used by the judge ([14]). These meanings are not to be treated like statutory definitions. They are not terms of art. They are more like labels for concepts, which I will have to explain in more detail below. These meanings are not therefore comprehensive, and it will be seen that the various types of damages identified by these meanings are in certain respects overlapping. Moreover, the concepts which they reflect are in some respects fluid. Additionally, the term "*restitutionary award*" covers the case where the purpose of the award of damages is to strip the defendant of his profit and the case where its purpose is simply to cause the reversal of a benefit conferred by the claimant. In some cases, such as breach of confidence (an example of the former) or trespass (an example of the latter), this distinction is clear. In this case, although the point has not been fully argued, the purpose of the award sought is largely the former purpose as opposed to the latter. Different considerations may apply where the purpose of the order is one, rather than the other, purpose.

4. My essential conclusion on the *Blake* issue is this. The overall holding in ***Blake*** is that the law on remedies for interference with property, damages in lieu of an injunction, damages for breach of fiduciary duty and breach of contract should be coherent and that the same remedies should be available in the same circumstances, even if the cause of action is different. On that basis, a restitutionary award is available in tort unless it is precluded by ***Wass*** or ***Halifax***. In my judgment, it is precluded by ***Wass***. However, if I am wrong in that conclusion, it is a condition of a restitutionary award that exceptional circumstances of the kind described in *Blake* should be shown. That condition is not satisfied in this case, principally because on the assumed facts damages would be an adequate remedy.

5. Devenish also has alternative arguments based on Community law, which I will call the Community law issues. The respondents contend that Community law does not require a claim for a restitutionary award to be recognised. For the reasons given below, I consider that Community law neither prevents nor requires the recognition in domestic law of a restitutionary award as a remedy for breach of statutory duty for a breach of competition law.

6. Accordingly, for the detailed reasons given below, I would dismiss this appeal.

Background to the present case

7. The issue of principle identified above arises in the context of competition law, in which domestic law and Community law are interwoven. Art 81 of the EC Treaty prohibits cartels and other agreements or concerted practices that restrict competition. The European Commission has power to impose substantial fines on cartelists for breaches of art 81. In addition, victims of the cartel have a right to damages for breaches of art 81 (see ***C-453/99 Courage Ltd v Crehan*** [2002] QB 507). Under s 47A of the Competition Act 1998 as amended by the Enterprise Act 2002, a victim of a cartel may bring a follow-on action to claim personal relief. He may do so by relying on the findings of the Commission.

8. As to the facts, in 2001, the Commission found that certain vitamin manufacturers, including some of the respondents, had participated in eight cartels relating to the supply of various vitamin products, and imposed fines totalling €855.22 million (though the fines imposed on one cartelist, BASF AG, the sixth respondent, were subsequently reduced on appeal to the Court of First Instance). The decision of the Commission was published in

2003 OJ L 6/1 dated 10 January 2003 ("the 2001 decision"). The size of these fines is an indication of the seriousness of the cartels in this case.

9. During the cartels' existence, Devenish purchased vitamins, or products containing vitamins, from the respondents. In general it mixed these vitamins with other ingredients to make animal feedstuffs which it then sold on to customers. In these follow-on proceedings, Devenish seeks damages or a restitutionary award. Devenish's case is that the restitutionary award should be in a sum equal to the "*overcharge*" or amount of the respondents' wrongful net profit. (Thus, Devenish claims the amount by which the prices it was charged for vitamins exceeded the price that would lawfully have been charged if there had been no cartels.) There is no issue about the availability (subject to proof of loss at trial) of a claim for damages. Moreover, notwithstanding the form of its pleading Devenish does not rely on any claim for restitution otherwise than arising out of the respondents' wrongful conduct.

10. The following preliminary issue was ordered by Master Moncaster on 2 October 2006:
'on the facts as pleaded in the Particulars of Claim and as found in the Commission Decision of 21st November 2001 (OJ 2003 L6, p.1) . . . whether the Claimants would be entitled to all or any of the following heads of relief as pleaded in the Particulars of Claim (including any subsequent amendments thereto):
a) an account of profits
b) restitution of unjust enrichment
c) exemplary damages.'

11. This was the preliminary issue heard by the judge. The facts assumed for the purposes of the trial of this issue are those pleaded in the particulars of claim and are found in the 2001 decision. The parties also made reference to further information supplied pursuant to part 18 of the CPR and to the expert economist's reports of Dr Cento Veljanovski. We are not, of course, concerned with whether the facts were proved. Devenish contends that a restitutionary award is available in law on the assumed facts and that it should be left open to the trial judge to decide whether a restitutionary award is in fact available in the light of matters that emerge in the course of the trial.

The judgment of the judge

12. The judge gave a lengthy and lucid judgment. The points on which this judgment will need to focus are as follows.

13. With respect to Devenish's claim for damages, the judge cited the dictum of Lord Shaw in ***Watson Laidlaw & Co Ltd v Pott, Cassells and Williamson*** (1914) 31 RPC 104 at 117-118 that "*[t]he restoration by way of compensation is therefore accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe.*" ([27]) He took the view that the difficulties of calculation will not be insuperable:
"[32] I am not therefore persuaded that evidential difficulties of exact proof are insuperable difficulties to effective compensation as a matter of domestic law. Nor am I persuaded that the usual techniques by which the courts award damages in domestic cases are inadequate to produce a fair result."

14. The judge considered the circumstances in which a restitutionary award is made in English law. He considered *Blake* and subsequent cases. The judge notes that Lord Nicholls deals with the cases on user damages in tort and held that such damages were compensatory in character:
"In the price or hire cases, the damages have been assessed as user damages. This is an objective measure and is awarded where, in financial terms, the claimant has suffered no loss. It is not a case of a claimant having suffered financial loss but having evidential difficulties in proving it. It is precisely because he has suffered no loss that the law's response is to seek a different way to compensate him for the invasion of his rights." ([81])

15. The judge likewise characterised damages for loss of the opportunity to negotiate a fee for releasing a covenant (sometimes called "***Wrotham Park*** damages") in the same way, but adding (without comment) that Lord Nicholls had also treated them as damages measured by the gain obtained by the defendant:
"*He then considered the cases in which damages had been awarded in lieu of an injunction, including the* ***Wrotham Park*** *case. He said of these cases that:*
'The measure of damages awarded in this type of case is often analysed as damages for loss of a bargaining opportunity or, which comes to the same, the price payable for the compulsory acquisition of a right. This analysis is correct.' (See [2001] AC 268 at 281.)
…If analysed in the way that Lord Nicholls approved, these cases can be seen as cases in which the claimant is compensated for what he has lost, rather than cases in which the defendant is stripped of his gains. However, Lord Nicholls also said of these cases that:
'In a suitable case damages for breach of contract may be measured by the benefit gained by the wrongdoer from the breach. The defendant must make a reasonable payment in respect of the benefit he has gained.' (See [2001] AC 268 at 283–284.)" ([83]-[84])

16. The judge concluded that it was only available for proprietary torts. He held that the court was precluded by two decisions of this court from granting a restitutionary award or an account of profits:
"[106] ***Stoke-on-Trent City Council v W & J Wass Ltd*** *and* ***Halifax Building Society v Thomas*** *do, in my judgment, show that a restitutionary award is not yet generally available in all cases of tort. Both these cases are decisions of the Court of Appeal and hence binding on me.* ***Stoke-on-Trent City Council v W & J Wass Ltd*** *was not cited or referred to in* ***A-G v Blake*** *but since Lord Nicholls participated in Stoke-on-Trent City Council v W & J Wass Ltd (as Nicholls LJ) and gave the leading speech in A-G v Blake it would be odd if he had undergone a Damascene*

conversion about the availability of restitutionary awards across the board in tort cases and yet had not referred to his earlier judgment.

…

[108] On the basis of the decisions of the Court of Appeal in ***Stoke-on-Trent City Council v W & J Wass Ltd*** *and* ***Halifax Building Society v Thomas*** *I conclude that whatever the law ought to be, it is not (yet) the law that a restitutionary award is available in all cases of tort. In my judgment a restitutionary award is not an available remedy in an antitrust case. If the law is to be changed, it must be done by a higher court than this one. Moreover, even where a restitutionary award is available, it is generally awarded where an award of more traditionally-based compensatory damages would be inadequate to compensate the claimant for the invasion of his rights. Yet in the present case, Dr Veljanovski says that the measure of restitutionary damages is the same as the measure of compensatory damages. If that is so, then on the assumed facts compensatory damages would be an adequate remedy.*

[109] I conclude therefore that, on the assumptions I am required to make, a restitutionary award is not available in the present case.

ACCOUNT OF PROFITS

[110] The defendants' primary position is that ***Stoke-on-Trent City Council v W & J Wass Ltd*** *precludes an account of profits just as it precludes a restitutionary award. For the reasons I have given I consider that they are right."*

17. He therefore held that Devenish could not claim a restitutionary award in this case.

18. He also held that there was a problem of multiple claimants, which prevented the award of a restitutionary award:

"[107] *In addition there is (once again) the problem that there are multiple claimants and that the claimants before the court are only part of the class of persons injured by the tort. Goff & Jones, discussing the hypothetical case of a factory that creates a nuisance to a neighbourhood say (p 814 (para. 36-008)):*

'The difficulties confronting a court in measuring and valuing the benefit gained by the factory owner at the expense of the individual householder (possibly the value of an individual licence) in this example persuade us that, in some situations, where there may well be multiple claimants who suffer loss from a tortious act, a restitutionary claim should be denied. Legal problems apart, any judicial inquiry, with the possibly complex attendant evidence which will have to be introduced, may well be inefficient in economic terms.'"

19. Moreover, the judge was concerned about the procedural problems of a collective action and the potential unfairness if some cartel victims chose a restitutionary remedy and some an award of compensatory damages:

"[114] Second, the representative claimants (Moy Park and Devenish) occupy different levels in the supply chain. Each of them has downstream customers, and in the case of Moy Park upstream suppliers as well. But unless all relevant claimants are before the court, how is the profit made by the defendants to be allocated? There is no clear answer to that question. If no account is taken of whether a particular claimant passed through price increases to a downstream customer, then that claimant might itself be unjustly enriched. An avoidance of unjust enrichment of a claimant is a factor to which the ECJ drew attention in ***Courage Ltd v Crehan*** *[2002] QB 507. But if account is taken of 'pass through', then an account of profits hardly differs from the measure of compensatory damages which the claimants advocate (and which I must assume will succeed). Moreover, if the two measures differ one cannot exclude the possibility that, if an account of profits were to be available, some claimants with better evidence might choose an award of compensatory damages, while other claimants with worse evidence might choose an account of profits. I do not think that it would be fair for remedies to be mixed and matched."*

20. He said that was a further difficulty. The fines would have to be taken into account. Roche had sold its business and therefore there were difficulties in disclosure. He held:

"[115] Third, if an account of profits were available, the fact that all the defendants have been fined (even though the fine imposed upon Aventis has been commuted) would have to be taken into account. Mr Layton argues that part of the rationale for the award of an account of profits is deterrence. But as I see it the question of deterrence has already been dealt with by the imposition of fines and not to take those fines into account would be double punishment.

[116] Finally, the scale of the inquiry that would be required in the case of these defendants all of which are or are parts of multi-national groups must be taken into account. The evidence about this is contained in the witness statements of Mr McDougall, Mr Lawrence, Mr Brown and Dr Baechli. It is very likely that disclosure of documents would be both enormous and multi-lingual, would require consideration of taxation and accounting methods in differing jurisdictions and a difficult exercise in allocating profits as between vitamins that formed part of the cartels and other products. In addition in the case of the Roche defendants, the relevant vitamin businesses have been sold to a third party with the result that the Roche defendants no longer have access to the relevant documents. Mr Layton said that these concerns could be met by limiting the scope of the account, but no concrete suggestion was advanced."

21. The judge also rejected Devenish's claim for exemplary damages. There is no appeal from his ruling on the point and I need say no more about it.

Submissions

22. Mr Christopher Vajda QC, for Devenish, puts forward five basic propositions. First, he submits that English law recognises that in certain circumstances a wrongdoer should not profit from his wrong, whether the wrong is a breach of contract, tort or equitable wrong. In support of this proposition, he relies on the decision in *Blake*. Mr Vajda submits that *Blake* demonstrates that the existence and scope of a restitutionary award is a product of historical development and of the different approaches of common law and equity. In *Blake* this remedy is put upon a general principled basis, that is, whether compensatory damages are adequate, and whether in the circumstances the wrongdoer should be unable to retain profits from his breach. Mr Vajda submits that it makes no difference in principle whether the wrong relied on involves the invasion of a proprietary right or a personal right. Mr Vajda also relies on ***Experience Hendrix LLP v PPX Enterprises Inc*** [2003] 1 All ER (Com) 830 and ***Esso Petroleum Co Ltd v Niad*** [2001] EWHC 6 (Ch). Mr Vajda's second proposition is that in the light of *Blake* this case is one where a restitutionary award should be available as a matter of English law. The relevant factors are (1) the fact that compensatory damages are not an adequate response to the wrong in this case and (2) the conduct of the respondents. As to (1), it is sufficient to show on this application that it is arguable that damages are inadequate. The respondents allege that the overcharge was passed on, but this has to be shown and in any event, one of the motives of the secret cartel was to squeeze companies like Devenish out. As to (2), Mr Vajda relies on the fact that the conduct of the respondents was criminal and was cynically carried out in order to make a profit for the respondents at the expense of their customers. The cartels were kept secret from Devenish. The wrongs complained of were committed in a contractual context. The wrong affected the respondents' contractual performance to Devenish. The gain consisted of a payment by Devenish out of its assets to the respondents. Devenish has a legitimate interest in preventing their unlawful profit making activity. Mr Vajda submits that the wrongdoers should not be left with their ill-gotten gains. He submits that there will plainly be evidential difficulties in proving the cartel, given that it was a secret cartel.

23. Mr Vajda's third proposition is that English law does not preclude a remedy in terms of a restitutionary award in these circumstances. He distinguishes the decisions of this court in ***Stoke-on-Trent Council v Wass***, ***Halifax Building Society v Thomas*** and ***Forsyth-Grant v Allen*** [2008] EWCA Civ 505 (which applied ***Wass***). Again, I shall need to refer to these decisions below. Mr Vajda submits that ***Wass*** does not concern a proprietary tort and that in any event it must be taken to have been overruled by ***Blake***. ***Halifax*** turns on an election made by the building society which meant that they could not pursue a claim for the surplus on realisation of the property. Mr Vajda submits that if the court reaches the conclusion that as a matter of principle a restitutionary award should be available to a single claimant, the answer should be no different simply because there are multiple claimants in this kind of case. Such problems can be dealt with by case management, and, after judgment, directions for accounts and enquiries. He further submits that there are no other claimants in fact, and that the limitation period has expired.

24. Mr Vajda's fourth and fifth propositions relate to Community law. His fourth proposition is that there is nothing in Community law to prevent a restitutionary award in this case. His fifth proposition is that Community law positively requires a restitutionary award to be given in the circumstances of this case, and he draws the court's attention to the possibility of making a reference to the Court of Justice for a preliminary ruling on this point.

25. Mr Mark Hoskins, for the fourth and fifth respondents, submits that this court is bound by ***Wass*** to hold that there is no remedy for breach of statutory duty save in damages. Likewise, he submits that ***Halifax*** shows that the restitutionary remedy is not available for every wrong. ***Blake*** on his submission concerns an account of profits for a breach of contract. There was no suggestion that the House of Lords was developing the law across the board for tort. The information in question, which was contained in Mr Blake's autobiography, would have constituted confidential information in respect of which a fiduciary obligation was owed had it not been for the publication of information prior to the publication of the book. Mr Hoskins submits that likewise, ***Esso*** and ***Experience Hendrix*** were breach of contract cases. In any event, the guiding principle for the purpose of determining when a restitutionary award was available were those set out by Lord Nicholls in ***Blake***. A restitutionary award would only be made in an exceptional case, and where the remedies were inadequate.

26. Mr Hoskins also submits that in the light of the 2001 decision it is not open to the court to say that there has not been imposed a sufficient deterrent and that the same applies to the restitution of profits. He submits that the margin squeeze claim is not incapable of calculation using the approach of the "*broad axe*" principle applicable to the assessment of damages and referred to by the judge. Mr Hoskins further submits that there can be no account of profits because the Commission's fines have already taken into account the conduct of his client. He submits that it is not shown that compensatory damages will be inadequate, and that Dr Veljanovoski has been able to calculate the compensatory claim of Devenish. Mr Vajda seeks to limit the claim to the amount of the overcharge. Mr Hoskins submits that this is not a true account of profits claim.

27. Mr Hoskins submits that the requirements of Community law are satisfied by an award of compensatory damages. In *von Colson*, the point was that the compensation had to be adequate in respect of the damages claimed. To the extent that Devenish seeks to obtain a restitutionary award when it passed the overcharge on to its customers, it is going beyond obtaining compensatory damages for its loss.

28. Mr Hoskins submits that, even if the court takes the view that a restitutionary award is open in law to Devenish, it should not take that step in this case for the reason given by the judge at [114] of his judgment, namely that it might lead some claimants to claim a restitutionary award, and others to claim compensatory damages. The resulting mix would not be fair to the respondents. It could lead to double liability or inconsistent determinations. Devenish makes no submission as to how the problems of multiple claimants could be dealt with. A restitutionary

award should not be made where there are multiple claimants: see Goff & Jones, *The Law of Restitution*, (7 ed) (2007) para. 36-008.

29. Mr Mark Brealey QC, for the sixth to eighth respondents, including BASF, submits that damages on the ***Wrotham Park*** principle (so called after the decision of Brightman J. in ***Wrotham Park Estate Co v Parkside Homes Ltd*** [1974] 1 WLR 798) compensate the claimant for a loss of a bargaining opportunity. This was held to be the position by Sir Thomas Bingham MR in ***Jaggard v Sawyer*** [1995] 1 WLR 269. He submits that this type of award is by reference to the gains made, but it is not gains-based. Mr Brealey accepts that the margin squeeze claim is an additional claim. He submits that the calculation of damages is not so difficult as to make it impossible. He submits that in ***WWF-World Wide Fund for Nature (formerly World Wildlife Fund) and another v World Wrestling Federation Entertainment Inc*** [2008] 1 All ER 74 this court decided that *Wrotham Park* damages were compensatory and not gains-based.

30. As to the impact of ***Blake*** on ***Wass,*** Mr Brealey submits that there is a distinction between the expropriation of a person's right and the mere interference with it. In ***Wass,*** there could not be a notional bargain where the right in question is the right to hold the market.

31. Mr Tom de la Mare, for the first to third respondents, submits that Devenish is seeking the restitutionary award in order to avoid the passing-on defence. The contractual relationship of the parties was in reality irrelevant in the present case. Mr de la Mare makes a number of submissions on Community law to which I refer below. He goes so far as to say that for the courts to declare that a restitutionary award should be available in competition cases would "*conflict with basic notions of legal certainty*". That submission must be rejected at the outset as inconsistent with the common law system.

32. I have referred to counsel in the order in which they made their submissions. I have not set out all the submissions, and, in particular, I have not referred to arguments made by them that had already been put forward in other submissions. In the result, the submissions attributed by me to counsel give a disproportionate impression of their considerable contribution in this case, for which, together with the appellant's submissions, I would express my gratitude and admiration.

DISCUSSION AND CONCLUSIONS

(B) THE BLAKE ISSUE

1. ***Introduction***

33. The ***Blake*** issue involves a number of sub-issues:

i) Was the judge correct to hold that a restitutionary award cannot be awarded for a non-proprietary tort?

ii) Would a restitutionary remedy be available in the circumstances of this case? In particular, was the judge correct to hold that a restitutionary remedy would not be available because compensatory damages would have been adequate?

iii) Was the judge right to hold that a further difficulty, precluding the grant of a restitutionary award was that not all potential claimants were before the court?

34. Before I summarise and explain my reasoning on these issues, I need to say more about the nature of the concepts of compensatory damages, user damages and restitutionary awards, and about the nature of the account of profits sought in this case.

35. Each of these concepts describes a remedy for a wrong, be it a breach of contract, a tort or an equitable wrong. The remedies are not, however necessarily to be attributed to a single type of wrong. This point was graphically made by the late Professor Peter Birks in an article dealing with a proposed redraft of the American Law Institute's Restatement of Restitution:

"Usurping the Claims of Unjust Enrichment

Scott and Seavey, writing about Restatement in the 1930s, spoke of ***'the tripartite division of the law into contracts, torts and restitution'.*** *That is, by any standards, a horrible division. On the same level would be a division of animals between carnivores, herbivores and amphibians. The third term tells you the habitat, the first two the eating habit. It follows that the terms must cut across each other. Alligators are carnivorous and amphibious. In the same way restitution cuts across contracts and torts. If you promise to repay a sum which I gave you, I have a contractual right to restitution. Again, for many wrongs, be they torts or breaches of equitable duty or breaches of contract, I can get restitution (gain-based recovery)."* (*A Letter to America: The New Restatement of Restitution* (2003) 3 GJF 1 at 13)"

36. In general, the common golden thread that runs through each of these three categories of remedy mentioned above is that the claimant has suffered loss. But that is not always the case (see, for example, user damages discussed below). Similarly, in an action for breach of fiduciary duty, an account of profits can be awarded in circumstances where the claimant has suffered no loss, as in ***Regal (Hastings) v Gulliver*** [1967] 2 AC 134 (and a claim for an account of profits consequent on a breach of duty could arise even though there is no misuse of a property right, as where a director uses a power to make calls on shares for a collateral purpose). Moreover, user damages are not always assessed by reference to the fair price for what has been taken from the claimant. They may be assessed by reference to the profit that the defendant has made (see, for example, ***Ministry of Defence v Ashman*** [1993] EGLR 102). ***Wrotham Park*** damages likewise may be awarded even though there is no loss. But the user damages and ***Wrotham Park*** damages still have an element of compensation within them in this sense, that while there may be no actual loss they are clearly cases where the law takes the view as a matter of

policy that the claimants if they prove their claims are entitled to substantial compensation for the mere invasion of their rights.

37. It follows that the categories of damages identified above are not mutually exclusive. User damages can be restitutionary: they can be awarded where the claimant has suffered no loss and on the basis that the defendant is ordered to pay a sum by reference to the gain he would otherwise make. Damages for trespass to property, for instance, are awarded on the basis of market rent even if the claimant would not have let the property if vacant (see ***Swordheath Properties Ltd v Tabet*** [1979] 1 WLR 285). At the same time they can be described as compensatory. The view that they combine elements of both compensatory and restitutionary awards is supported by the decision of the Privy Council in ***Inverugie Investments Ltd v Hackett*** [1995] 1 WLR 713 at 718B. Damages for trespass to land, for instance, are intended to compensate the claimant for being kept out of his land on whatever basis they are assessed. I do not therefore agree with the judge that user damages or *Wrotham Park* damages are necessarily compensatory. Nor do I consider that Lord Nicholls so held. Lord Nicholls considered that user damages were probably best regarded as exceptions to the general rule that damages are assessed on the basis that they compensate the claimant for his loss or injury (page 279E). He also regarded *Wrotham Park* damages as "*payment [by the defendant] in respect of the benefit he has gained*" (page 284A). If user damages and *Wrotham Park* damages were purely compensatory, they would not have been stepping stones to the conclusion that the court could grant an account of profits for a breach of contract.

38. What, however, does distinguish user damages from other compensatory damages is the fact that they are in general awarded because the defendant has made improper use of an asset of the claimant. In economic terms, there has been a transfer of value for which the wrongdoer must account. But that is also a feature of the present case. Devenish seeks in economic terms, by means of its claim for an account of profits for breach of statutory duty, to recover the amount of the overcharge that it has paid to the respondents out of its assets and in diminution of its net worth. Not all non-proprietary torts share this feature: for example, this feature is not present in claims for damages for defamation or personal injury. It is, however, often present in claims for breach of contract and for invasion of a statutory right where rights of property in the broadest sense are invaded for the benefit of the wrongdoer. A contractual right is a form of property (though it lacks some of the qualities of a property right). If the law of remedies were to be required to be coherent in economic terms, and this were the critical factor, the same remedies ought to be provided in each of these situations. However, even so, they would under *Blake* be subject to strict judicial control through the requirement for exceptional circumstances.

39. Devenish claims an account of profits. Following ***Blake,*** it is clear that this can be made in claims for breach of contract as well as in the case of proprietary torts. There is no reason why an order that the defendant accounts for his profits to the claimant should necessarily be of the gross profit or of 100% of the profit: see, for example, ***Hendrix,*** considered below and ***Ministry of Defence v Ashman,*** per Hoffmann LJ. Where an account of profits is granted instead of an award of compensatory damages, and is compensatory in its objective, there is flexibility in the percentage of the profit that is awarded and in its calculation.

40. I bear in mind that in the recent case of ***WWF-World Wide Fund for Nature (formerly World Wildlife Fund) and another v World Wrestling Federation Entertainment Inc,*** this court had to consider whether the dismissal of an earlier claim for an "account of profits" (made on the *Blake* basis) in an action for breach of contract rendered *res judicata* a later claim for *Wrotham Park* damages. The contention was that the earlier claim was "*gains-based*", which was the basis on which the application for dismissal of the later claim had been made. As I read the judgment, this was taken to mean solely or substantially gains-based. In the alternative it was contended that the later claim was a juridically highly similar remedy to a gains-based claim. Chadwick LJ, with whom Maurice Kay and Wilson LJJ agreed, considered a large number of authorities, including ***Blake,*** in which the juridical basis of *Wrotham Park* damages has been considered. This examination shows there have been different views on this over time. At all events, Chadwick LJ recognised that the labels "*compensatory*" and "*gains-based*" did not really describe the basis on which the court acted, and he went on to accept that the account sought in that case was in any event a "*juridically highly similar remedy*" to a gains-based claim:

> "*59….To label an award of damages on the* ***Wrotham Park*** *basis as a* ***'compensatory'*** *remedy and an order for an account of profits as a* ***'gains-based'*** *remedy does not assist an understanding of the principles on which the court acts. The two remedies should, I think, each be seen as a flexible response to the need to compensate the claimant for the wrong which has been done to him.*
>
> *60. It follows therefore that, although I would reject the premise on which the contentions in para. 4 of the amended application notice are based—that an award of damages on the Wrotham Park basis is not an award of compensatory damages, but it is properly to be characterised as a gains-based award—I would accept that, on a true analysis, the allegation in sub-para. (d)—that the remedy now sought by the Fund (an award of damages on the Wrotham Park basis) is* ***'a juridically highly similar remedy to, the relief [an account of profits] previously sought'****—is well-founded."*

41. This is, I accept, a difficult case but I do not consider that the decision in this case affects the point that I have been making about user damages and *Wrotham Park* damages. I have proceeded on the basis that ***Wrotham Park*** damages are assessed on a basis that affords compensation to the claimant. That does not mean that such damages do not also deprive the defendant of a benefit that he has received, and that is clearly stated by Lord Nicholls. The judge, in my judgment, was in error to assume otherwise ([97]-[98]). Chadwick LJ, clearly recognized that the labels "*compensatory*" and "*gains-based*" did not comprehensively describe the basis of assessment of

damages in the circumstances where a restitutionary award is made. I do not, therefore, consider that the *WWF* decision removes the point I have made. I am, in any event, supported in my conclusion by the fact that Chadwick LJ considered that *Wrotham Park* damages were "essentially" (not necessarily entirely) compensatory and that they were a juridically highly similar remedy to a gains-based remedy. If I am wrong on what I have said about *Wrotham Park* damages, the conclusion I have reached on user damages is not affected.

2. General basis for assessing damages in tort

42. As Lord Nicholls explains in ***Blake,*** the basic principle is that the remedy for a tort is compensatory damages: *Livingstone v Raywards Coal Company* (1880) 5 App Cas 25. Lord Blackburn held that the general rule was that:

"*where any injury is to be compensated by damages, in settling the sum of money to be given to reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured or how has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. That must be qualified by a great many things which may arise –such, for instance, as by the consideration, whether the damage has been maliciously done…*"

43. In that case, user damages were awarded for the unauthorised removal of coal from beneath the appellant's land, even though the site was too small for the appellant to have mined the coal himself. The appellant was also awarded damages for the damage done to the houses on the surface.

44. But the rule about compensation for loss suffered is not an absolute one. It is noteworthy in the present context that a majority of the House would have made a different and by implication a higher award if the conduct had been deliberate: see per Lord Hatherley at 34, per Lord Blackburn at 39 and 42. Lord Hatherley obiter considered, however, that no damages should be awarded for the use that the respondents had made of the appellant's land by travelling across for in doing this they caused him no loss (at 38). This contrasts with the point made by Lord Halsbury in *The Mediana* and by Lord Shaw in *Watson Laidlaw*, considered by Lord Nicholls in *Blake,* as set out below.

3. The decision of the House of Lords in Attorney General v Blake

45. I shall need to consider this decision in detail, but the bottom line is that this case establishes that a restitutionary award is available for breach of contract. The leading speech was that of Lord Nicholls, with whom the three other members of the House agreed.

46. The facts are well known. Indeed, Lord Nicholls begins his speech with the memorable words:

"*My Lords, George Blake is a notorious, self-confessed traitor.*"

47. George Blake was a former member of the secret intelligence service, and he had agreed not to divulge any official information gained as a result of his employment. He was convicted of disclosing valuable secret information to the Soviet Union and sentenced to forty-two years imprisonment. He escaped and lived in Moscow. He wrote an autobiography, using information obtained in the course of his employment. This information was no longer confidential and no measurable loss was suffered by the disclosure. However, the Attorney General brought an action against the defendant claiming damages for breach of fiduciary duty and the payment of all monies received or to be received by him from his publisher with a view to ensuring that he should not enjoy the fruits of his treachery. The information was no longer secret or confidential, and so no substantial damages would be awarded for breach of confidence. There had, however, been a gross invasion of the Crown's rights. The House, by a majority, held that in exceptional cases where the normal remedies of damages, specific performance and injunction were inadequate compensation for breach of contract, the court could, if justice demanded it, grant a restitutionary award.

48. There are four sub-headings in part of Lord Nicholls' speech which contains his general analysis of the law: interference with rights of property, breach of trust and fiduciary duty, damages under the Chancery Amendment Act 1858 (referred to below as Lord Cairns' Act) and breach of contract. There is therefore no passage dealing with non-proprietary torts. Lord Nicholls uses the first three topics as stepping stones to his conclusion about breach of contract. His reasoning is analogical. The methodology is to expose the similarities and differences between torts and other wrongs and the differences between law and equity, with the aim of understanding those differences, identifying the underlying principles and ensuring where appropriate coherence in the law of remedies. The theme is thus coherence in the law of remedies. He makes it clear at several points that he is concerned with the principles that lie behind the case law. His conclusion on breach of contract claims is that no distinction can be drawn between the topics covered by the earlier subheadings and, there being no policy reason for not having an account of profits as a remedy for a breach of contract, that remedy was available for a breach of contract too.

49. Examples of the methodology which I have described can be found throughout Lord Nicholls' speech. For example, at 278D, Lord Nicholls compares the general approach regarding assessment of damages in contract and for proprietary torts. At 279D, he seeks to identify a way of aligning user damages within the basic compensatory measure. He concludes that where the claimant has suffered no loss but user damages are awarded, "[s]*uch awards, are probably best regarded as an exception to the general rule.*" At 279E, Lord Nicholls concludes that courts of equity went further than common law courts. At 280D, Lord Nicholls concludes that it is difficult to see why equity required a wrongdoer to account for all his profits whereas the common law required a wrongdoer merely to pay a reasonable fee the use of another's property. He concludes that the difference arose simply as an accident of history. At 281E, Lord Nicholls compares damages at common law from violation of a

property right and damages in lieu of an injunction. At 282, he turns to consider the remedies available for breach of contract "[a]*gainst this background*". At 282H, he considers ***Wrotham Park*** damages under the heading of breach of contract. At 285D, Lord Nicholls concludes that there is no good reason why an account of profits should be available for a breach of confidence but not for a breach of the contract that governs the parties' relationship.

50. At the outset of his discussion of the law, Lord Nicholls noted that the basic principle regarding assessment of damages is that they are compensatory for loss or injury:

"So I turn to established, basic principles. I shall first set the scene by noting how the court approaches the question of financial recompense for interference with rights of property. As with breaches of contract, so with tort, the general principle regarding assessment of damages is that they are compensatory for loss or injury. The general rule is that, in the oft quoted words of Lord Blackburn, the measure of damages is to be, as far as possible, that amount of money which will put the injured party in the same position he would have been in had he not sustained the wrong: ***Livingstone v Rawyards Coal Co*** *(1880) 5 App Cas 25, 39. Damages are measured by the plaintiff's loss, not the defendant's gain. But the common law, pragmatic as ever, has long recognised that there are many commonplace situations where a strict application of this principle would not do justice between the parties. Then compensation for the wrong done to the plaintiff is measured by a different yardstick. A trespasser who enters another's land may cause the landowner no financial loss. In such a case damages are measured by the benefit received by the trespasser, namely, by his use of the land. The same principle is applied where the wrong consists of use of another's land for depositing waste, or by using a path across the land or using passages in an underground mine. In this type of case the damages recoverable will be, in short, the price a reasonable person would pay for the right of user: see* ***Whitwham v Westminster Brymbo Coal and Coke Co*** *[1896] 2 Ch 528, and the "wayleave" cases such as* ***Martin v Porter*** *(1839) 5 M & W 351 and* ***Jegon v Vivian*** *(1871) 6 Ch App 742. A more recent example was the non-removal of a floating dock, in* ***Penarth Dock Engineering Co Ltd v Pounds.*** *[1963] 1 Lloyd's Rep 359.*

The same principle is applied to the wrongful detention of goods. An instance is the much cited decision of the Court of Appeal in ***Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd*** *[1952] 2 QB 246, concerning portable switchboards. But the principle has a distinguished ancestry. The Earl of Halsbury LC famously asked in* ***The Mediana*** *[1900] AC 113, 117, that if a person took away a chair from his room and kept it for 12 months, could anybody say you had a right to diminish the damages by showing that I did not usually sit in that chair, or that there were plenty of other chairs in the room? To the same effect was Lord Shaw's telling example in* ***Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson*** *(1914) 31 RPC 104, 119. It bears repetition:*

> *"If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: 'Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise.'"*

Lord Shaw prefaced this observation with a statement of general principle:

> *"wherever an abstraction or invasion of property has occurred, then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under the category or principle … either of price or of hire."*

That was a patent infringement case. The House of Lords held that damages should be assessed on the footing of a royalty for every infringing article.

This principle is established and not controversial. More difficult is the alignment of this measure of damages within the basic compensatory measure. Recently there has been a move towards applying the label of restitution to awards of this character: see, for instance, ***Ministry of Defence v Ashman,*** *[1993] 2 EGLR 102105 and* ***Ministry of Defence v Thompson*** *[1993] 2 EGLR 107. However that may be, these awards cannot be regarded as conforming to the strictly compensatory measure of damage for the injured person's loss unless loss is given a strained and artificial meaning. The reality is that the injured person's rights were invaded but, in financial terms, he suffered no loss. Nevertheless the common law has found a means to award him a sensibly calculated amount of money. Such awards are probably best regarded as an exception to the general rule."* (pages 278-9)

51. Lord Nicholls noted that, in some cases, the wrongdoer had to yield up all his gains, as in a patent infringement case. He held that in this type of case equity considered that the appropriate response to the violation of the plaintiff's right was that the defendant should surrender all his gains and that he should do so irrespective of whether the violation had caused the plaintiff any financial immeasurable loss. Gains were to be disgorged even though they were not shown to correspond with a disadvantage suffered by the other party.

"Considered as a matter of principle, it is difficult to see why equity required the wrongdoer to account for all his profits in these cases, whereas the common law's response was to require a wrongdoer merely to pay a reasonable fee for use of another's land or goods. In all these cases rights of property were infringed. This difference in remedial response appears to have arisen simply as an accident of history." (page 280)

52. Lord Nicholls referred to damages for breach of fiduciary duty and damages under Lord Cairns' Act and successor Acts, where damages are awarded in lieu of an injunction:

"The measure of damages awarded in this type of case is often analysed as damages for loss of a bargaining opportunity or, which comes to the same, the price payable for the compulsory acquisition of a right. This analysis is correct. The court's refusal to grant an injunction means that in practice the defendant is thereby permitted to perpetuate the wrongful state of affairs he has brought about. But this analysis takes the matter now under discussion no further forward. A property right has value to the extent only that the court will enforce it or award damages for

its infringement. The question under discussion is whether the court will award substantial damages for an infringement when no financial loss flows from the infringement and, moreover, in a suitable case will assess the damages by reference to the defendant's profit obtained from the infringement. The cases mentioned above show that the courts habitually do that very thing." (page 281)

53. Lord Nicholls referred to ***Wrotham Park Estate Co Ltd v Parkside Homes Ltd*** [1974] 1 WLR 789, where Brightman J awarded damages in lieu of an injunction for development of land in breach of a restrictive covenant based on the amount which the owner of the land could reasonably have demanded if he had been asked and agreed to release of the covenant. This award was made even though there was no diminution in value of the land due to the development. Lord Nicholls approved this case, observing:

"In reaching his conclusion the judge applied by analogy the cases mentioned above concerning the assessment of damages when a defendant has invaded another's property rights but without diminishing the value of the property. I consider he was right to do so. Property rights are superior to contractual rights in that, unlike contractual rights, property rights may survive against an indefinite class of persons. However, it is not easy to see why, as between the parties to a contract, a violation of a party's contractual rights should attract a lesser degree of remedy than a violation of his property rights. As Lionel D Smith has pointed out in his article "Disgorgement of the profits of Breach of Contract: Property, Contract and 'Efficient Breach'" (1995) 24 Can BLJ 121, it is not clear why it should be any more permissible to expropriate personal rights than it is permissible to expropriate property rights.

...

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. The defendant must make a reasonable payment in respect of the benefit he has gained. " (pages 283-4)

54. Lord Nicholls' conclusions were expressed in the following passage:

"My conclusion is that there seems to be no reason, in principle, why the court must in all circumstances rule out an account of profits as a remedy for breach of contract. I prefer to avoid the unhappy expression ***"restitutionary damages".*** *Remedies are the law's response to a wrong (or, more precisely, to a cause of action). When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract. In the same way as a plaintiff's interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract.*

The state of the authorities encourages me to reach this conclusion, rather than the reverse. The law recognises that damages are not always a sufficient remedy for breach of contract. This is the foundation of the court's jurisdiction to grant the remedies of specific performance and injunction. Even when awarding damages, the law does not adhere slavishly to the concept of compensation for financially measurable loss. When the circumstances require, damages are measured by reference to the benefit obtained by the wrongdoer. This applies to interference with property rights. Recently, the like approach has been adopted to breach of contract. Further, in certain circumstances an account of profits is ordered in preference to an award of damages. Sometimes the injured party is given the choice: either compensatory damages or an account of the wrongdoer's profits. Breach of confidence is an instance of this. If confidential information is wrongfully divulged in breach of a non-disclosure agreement, it would be nothing short of sophistry to say that an account of profits may be ordered in respect of the equitable wrong but not in respect of the breach of contract which governs the relationship between the parties. With the established authorities going thus far, I consider it would be only a modest step for the law to recognise openly that, exceptionally, an account of profits may be the most appropriate remedy for breach of contract. It is not as though this step would contradict some recognised principle applied consistently throughout the law to the grant or withholding of the remedy of an account of profits. No such principle is discernible.

The main argument against the availability of an account of profits as a remedy for breach of contract is that the circumstances where this remedy may be granted will be uncertain. This will have an unsettling effect on commercial contracts where certainty is important. I do not think these fears are well founded. I see no reason why, in practice, the availability of the remedy of an account of profits need disturb settled expectations in the commercial or consumer world. An account of profits will be appropriate only in exceptional circumstances. Normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit." (page 284-5)

55. Lord Goff and Lord Browne-Wilkinson agreed with Lord Nicholls. Lord Steyn gave a concurring judgment. He considered that practical justice strongly militated in favour of granting an order for disgorgement of profits against Blake ([292D).

56. The House by a majority (Lord Hobhouse dissenting) proceeded to grant an account of profits for the amounts due to George Blake from his publisher under his publishing agreement.

57. As I read the speech of Lord Nicholls, the making of a restitutionary award does not depend on whether a property right has been infringed or whether the award is compensatory for loss or not. Rather, it depends on whether damages alone would be a sufficient remedy in the eyes of the law for the wrong that has occurred. If this is right, and moreover an account of profits can be ordered for a breach of contract that, as in ***Blake,*** does not involve interference with a proprietary right, it would not, in my judgment, be inconsistent with the reasoning of Lord Nicholls in the passages cited above if it were not also available in the case of non-proprietary tort. This point can be supported by pointing to the fact that a claim for damages under Lord Cairns' Act may also be available for a non-proprietary tort. Lord Nicholls' speech does not suggest that an account of profits is not available on a like basis in the case of a non-proprietary tort. He draws on cases in which damages are assessed by reference to the benefit obtained by the wrongdoer. This can occur in cases in tort. However, this is not a line of thought which I can pursue if as the respondents submit this court has held that such an award can only be made in the case of a proprietary tort in a manner binding on, this court on this appeal. Therefore, I need to consider the decisions of this court in ***Wass*** and ***Halifax*** to which I turn below. Before I do so I offer some other observations on *Blake* and consider two cases that have followed.

58. In ***Blake,*** Lord Nicholls treats a restitutionary award as another arrow in the court's quiver of remedies. Lord Nicholls emphasises that this particular arrow in the court's quiver of remedies is only pulled out in exceptional circumstances. This harks back to a remark which he made earlier in his judgment:

"*The broad proposition that a wrongdoer should not be allowed to profit from his wrong has an obvious attraction. The corollary is that the person wronged may recover the amount of this profit when he has suffered no financially measurable loss. As Glidewell LJ observed in* ***Halifax Building Society v Thomas*** *[1996] Ch 217, 229, the corollary is not so obviously persuasive*." (page 278)

59. Lord Nicholls offers a general test, namely that the claimant has a legitimate interest in stripping the wrongdoer of his profit. There was no single feature which was requisite for the purpose of ordering an account of profits: it was the combination of the fact that the contract was clearly drafted with a view to protecting national security, the facts that the information in question had originally been confidential to the Crown and that Blake had been in breach of fiduciary duty in misusing it, the deliberate nature of the breach of contract, the fact that Blake intended to benefit from earlier treacherous conduct, and the absence of an appropriate remedy in compensatory damages that led the House to order an account.

60. Before I turn to ***Wass*** and ***Halifax,*** I will first consider two cases that have applied *Blake*. In each case, the claim was based on a breach of contract.

4. Cases applying Blake

4.1 Experience Hendrix v PPX Enterprises Inc **[2003] 1 All ER (Comm) 830**

61. The issue in this case was whether an account of profits or damages could be awarded for a breach of a settlement agreement between the two parties relating to the exploitation of musical recordings. The agreement did not permit the use of certain recordings that the defendant had in fact exploited. This had resulted in no loss to the claimant who was not the owner of the recordings, and indeed in certain circumstances envisaged the destruction of those recordings. The appellant amended its case to claim damages on the basis of what could reasonably have been demanded for a release of the contractual prohibition. In the alternative, the claimant claimed an account of profits. The judge had refused to award either form of relief.

62. The leading judgment was given by Mance LJ with whom Peter Gibson LJ (who delivered a concurring judgment) and Hooper J agreed. Mance LJ held:

"[16] *The inspiration for the appellant's amendment of its case was the House of Lords decision in* ***A-G v Blake (Jonathan Cape Ltd, third party)*** *[2001] 1 AC 268. This marks a new start in this area of law. The exposition by counsel before us of prior authority threw light on considerations which may still be relevant to its future development. But, as I see the decision in* ***Blake****'s case, it freed us from some constraints that prior authority in this court (particularly* ***Surrey CC v Bredero Homes Ltd****, [1993] 1 WLR 1361 and some of the reasoning in* ***Jaggard v Sawyer*** *[1995] 1 WLR 269) would have imposed. To apply Lord Steyn's words,* ***Blake****'s case leaves future courts with the task of 'hammering out on the anvil of decided cases' when and how far remedies such as the appellant now seeks should be available. The original Nibelungen produced a powerful image of restitution. The appellant invites us to fashion a modern and more deliberate equivalent on Jimi Hendrix's legacy."*

63. The case had certain similarities to ***Blake*** For instance:

"*As in* ***Blake,*** *we are concerned with a breach of a negative obligation, and PPX did do the very thing it had contracted not to do.*" (per Mance LJ at [36])

64. Mance LJ observed that it would be anomalous and unjust if the defendant could avoid paying royalties for the recordings in question when it had to pay royalties in respect of other recordings which they were permitted to exploit. However, the case itself did not justify the imposition of a full *Blake* account of profits as:

"…the breaches, though deliberate, took place in a commercial context. PPX, though knowingly and deliberately breaching its contract, acted as it did in the course of a business, to which it no doubt gave some expenditure of time and effort and probably the use of connections and some skill …An account of profits would involve a detailed assessment of such matters, which, as is very clear from Blake, should not lightly be ordered… I would confine any

financial remedy to an order that [the defendant] pay a reasonable sum for its use of material in breach of the settlement agreement. That sum can properly be described as being ***"such sum as might reasonably have been demanded"*** *by [the appellant] as a quid pro quo for agreeing to permit the two licences into which [the defendant] entered in breach of the settlement agreement, which was the approach adopted by Brightman J. in the* ***Wrotham Park case."*** ([44], [45])

65. This court was only concerned with questions of principle, but Mance LJ added that he would be surprised if the appropriate rate of royalty was less than twice that agreed in respect of the recordings for which permission to exploit had been given.

66. In his concurring judgment, Peter Gibson J. observed that:

"*Although the* ***Wrotham Park*** *case related to an infringement of a property right, there having been a breach of a restrictive covenant imposed for the benefit of an estate, it is noticeable that Lord Nicholls did not treat the significance of the case as so limited. He discussed the case in the section of his judgment (commencing at [2001] 1 AC 268 at 282) dealing with breach of contract. It is apparent that he regarded the case as a guiding authority on compensation for breach of a contractual obligation. True it is that the action was brought against the successor in title of the original covenantor; but it could hardly be suggested that the result would have been different if the parties had been the original contracting parties."*

67. Accordingly, the court directed that the damages for breach of contract should be assessed by reference to a notional fee for permission to exploit the recordings in question. This would represent all or some of the profits which the defendant had wrongfully earned. But the significance for this case of *Hendrix* goes beyond this point. I said in [2] of this judgment that the courts have awarded damages (commonly called "user damages") by reference to the fair value of a right of which the defendant has wrongly deprived the claimant, and these awards have been made even if the claimant would not himself have sought to use that right and so incurred no loss. It is now clear that the principle underlying user damages does not depend on there being some misuse of a property right of the claimant. It was awarded in the *Hendrix* case on the basis of a breach of a contractual obligation. This is an important point. It is paradigmatic of a cultural change in the law in favour of the classification of remedies on a coherent basis rather than on the basis of some formulaic division between different wrongs. As Lord Nicholls observed in *Blake*, in the context of contractual rights, "it is not clear why it should be any more permissible to expropriate personal rights than it is permissible to expropriate property rights."

4.2 Esso Petroleum Co Ltd v Niad Ltd [2001] 1 All ER (D) 324

68. The defendant ("Niad") had entered into a five year exclusive agreement with Esso, requiring Niad to buy all its requirements of motor fuels from Esso. A further agreement was entered into under a "*Pricewatch*" scheme whereby Niad agreed to match the fuel prices by charging the same as its lowest priced competitor in the area and Esso agreed to compensate it for doing so. In breach of this agreement Niad charged higher prices. The judge, Sir Andrew Morritt VC, held that if Esso so elected an account of profits should be made in this case. His reasons were as follows:

> "*[63] In my judgment the remedy of an account of profits should be available for breaches of contract such as these. First, damages is an inadequate remedy. It is almost impossible to attribute lost sales to a breach by one out of several hundred dealers who operated Pricewatch. Second, the obligation to implement and maintain the recommended pump prices was fundamental to Pricewatch. Failure to observe it gives the lie to the advertising campaign by which it was publicised and therefore undermines the effectiveness of Pricewatch in achieving the benefits intended for both Esso and all its dealers within Pricewatch. Third, complaint was made of Niad on four occasions. On all of them Niad appeared to comply without demur. It now appears that the breaches of its obligation were much more extensive than Esso at first thought. Fourth, Esso undoubtedly has a legitimate interest in preventing Niad from profiting from its breach of obligation.*
>
> *[64] I turn then to the restitutionary remedy. It is undoubted that Niad obtained a benefit, in the form of the price support, to which it was only entitled if it complied with its obligation to implement and maintain the recommended pump prices to be supported. In these circumstances it can hardly be denied that Niad was enriched to the extent that it charged pump prices in excess of the recommended prices. The enrichment was unjust because it was obtained in breach of contract. It was obtained at the expense of Esso because Esso was providing price support for a lower price than that charged by Niad. I can see no reason why this remedy should be unavailable to Esso if it wishes to pursue it. Indeed it appears to me to be the most appropriate remedy in that it matches most closely the reality of the case, namely that Niad took an extra benefit to which it was not entitled. It is just that it should be made to restore it to its effective source."*

69. Accordingly an account of profits was awarded in circumstances where the remedy of damages for breach of contract was inadequate.

5. Earlier decisions of this court relied on by the respondents as constituting binding precedent precluding this court from holding that Blake applies to non-proprietary torts.

5.1 Stoke-on-Trent Council v Wass

70. In this case, the council had a statutory right to licence markets in a particular area, which may well have been a property right by way of incorporeal hereditament. Be that as it may, in pursuance of this right it had licensed markets on Wednesdays, Fridays and Saturdays. The defendant operated an unauthorised market on Thursdays

within the area for which the council had a monopoly. At trial, the council obtained an injunction against the holding of an authorised market. The judge found as a fact that the council suffered no loss as a result of the holding of the unauthorised market. However, he made an award of user damages, that is, an award of damages calculated by reference to the licence fee that the council could reasonably have required for the operation of the defendant's market. The question on appeal was whether the council was entitled to damages. This court held that, while a person could obtain as damages a reasonable sum for the wrongful use made of his property, no damages would be awarded here because the council could not show that it had suffered loss by reason of the infringement. Therefore nominal damages only were awarded. Nourse and Nicholls LJJ both gave reasoned judgments, and the third member of the court, Mann LJ, agreed with both judgments. Accordingly this court is bound by the ratio of either of the reasoned judgments.

71. At the outset of his analysis, Nourse LJ identified two general rules, the first being the general rule that damages are compensatory. He held that user damages were not an exception to this rule but merely went to the manner in which damages were assessed. He held:

"The general rule is that a successful plaintiff in an action in tort recovers damages equivalent to the loss which he has suffered, no more and no less. If he has suffered no loss, the most he can recover are nominal damages. A second general rule is that where the plaintiff has suffered loss to his property or some proprietary right, he recovers damages equivalent to the diminution in value of the property or right. The authorities establish that both these rules are subject to exceptions. These must be closely examined, in order to see whether a further exception ought to be made in this case.

The first and best-established exception is in trespass to land. It originated in the wayleave cases, where the defendant trespassed by carrying coals along an underground way through the plaintiff's mine. Although the value of his land had not been diminished by the trespass, the plaintiff recovered damages equivalent to what he would have received if he had been paid for a wayleave: see ***Martin v Porter*** *(1839) 5 M & W 351, 151 ER 149;* ***Jegon v Vivian*** *(1871) LR 6 Ch App 742; and* ***Phillips v Homfray Fothergill v Phillips*** *(1871) LR 6 Ch App 770. ..*

The second exception is in detinue….

The third exception is in infringement of patents: see ***Meters Ltd v Metropolitan Gas Meters Ltd*** *(1911) 28 RPC 157;* ***Watson Laidlaw & Co Ltd v Pott Cassels and Williamson*** *(1914) 31 RPC 104 and* ***General Tire and Rubber Co v Firestone Tyre and Rubber Co Ltd*** *[1975] 1 WLR 819. ..To these exceptions to the general rules in tort must be added the decision of Brightman J in* ***Wrotham Park Estate Co v Parkside Homes Ltd*** *[1974] 1 WLR 798…*

As I understand these authorities, their broad effect is this. In cases of trespass to land and patent infringement and in some cases of detinue and nuisance the court will award damages in accordance with what Nicholls LJ has aptly termed 'the user principle'. On an analogous principle, in a case where there was a breach of a restrictive covenant the court has, in lieu of a permanent mandatory injunction to restore the breach, awarded damages equivalent to the sum which the plaintiffs might reasonably have demanded for a relaxation of the covenant. But it is only in the last-mentioned case and in the trespass cases that damages have been awarded in accordance with either principle without proof of loss to the plaintiff. In all the other cases, the plaintiff having established his loss, the real question has not been whether substantial damages should be awarded at all, but whether they should be assessed in accordance with the user principle or by reference to the diminution in value of the property or right. In other words, those other cases are exceptions to the second, but not to the first, of the general rules stated above." (pages 1410-4)

72. Nourse LJ went on to hold that the award of the user damages in trespass cases depended on the fact that the defendant's use of the claimant's land deprived the claimant of any opportunity of using it himself. By contrast, holding an unauthorised market did not deprive the council of the opportunity of holding one itself (page 1414). Nourse LJ accepted that there might be a logical difficulty in making a distinction between the present case, and the way- leave cases but held:

"I think that if the user principle were to be applied here there would be an equal difficulty in distinguishing other cases of more common occurrence, particularly in nuisance. Suppose a case where a right to light or a right of way had been obstructed to the profit of the servient owner but at no loss to the dominant owner. It would be difficult, in the application of the user principle, to make a logical distinction between such an obstruction and the infringement of a right to hold a market. And yet the application of that principle to such cases would not only give a right to substantial damages where no loss had been suffered but would revolutionise the tort of nuisance by making it unnecessary to prove loss. Moreover, if the principle were to be applied in nuisance, why not in other torts where the defendant's wrong can work to his own profit, for example in defamation? As progenitors of the rule in trespass and some other areas, the wayleave cases have done good service. But just as their genus is peculiar, so ought their procreative powers to be exhausted.

These considerations have led me to conclude that the user principle ought not to be applied to the infringement of a right to hold a market where no loss has been suffered by the market owner. If loss caused by the diversion of custom from one market to the other had been proved, I would have agreed with Nicholls LJ that the general rule ought to apply, so that the council would have recovered damages equivalent to the diminution in value of its right through the loss of stallage, tolls and so forth. But I rest my decision in this case on the simple ground that where no loss has been suffered no substantial damages of any kind can be recovered. Otherwise we would have to allow that the right to recover nominal damages for disturbance of a same-day market without proof of loss had become one to receive substantial damages on top. If we had to allow that, why not also in the case of another-day market where no loss had been proved? It is possible that the English law of tort, more especially of the so-called ***'proprietary torts'****, will in due course make a more deliberate move towards recovery based not on loss suffered by the plaintiff but on the*

unjust enrichment of the defendant: see Goff and Jones The Law of Restitution (3rd edn, 1986) pp 612–614. But I do not think that that process can begin in this case and I doubt whether it can begin at all at this level of decision." (page 1415)

73. The ratio of the judgment of Nourse LJ, with which Mann LJ agreed, is therefore that the user principle ought not to be applied to the infringement of a right to hold a market where no loss had been suffered by the market owner. He would, however, have awarded some loss of custom if some loss had been shown. In so far as Nourse LJ held that the trespass and other exceptions were not exceptions to the general rule that damages in tort are compensatory, it is necessary to bear in mind that in *Blake* Lord Nicholls considered that, when no loss was suffered but a right was invaded, the award of damages was probably best regarded as an exception to the general rule. He cited ***Ministry of Defence v Ashman***, which was not cited in ***Wass*** or ***Halifax***. In that case Hoffmann LJ held that a claim to recover damages for trespass on the basis of the value of the benefit conferred on the occupier was a restitutionary claim. He added:

"It is true that in the earlier cases it has not been expressly stated that a claim for mesne profit for trespass can be a claim for restitution. Nowadays I do not see why we should not call a spade a spade. In this case the Ministry of Defence elected for the restitutionary remedy."

74. Indeed, damages were awarded in *Livingstone* itself even though the appellant could not have worked the coal himself.

75. Nourse LJ regarded the underlying rule as a general rule only. It was not an absolute rule, but the exceptions to it are those that he specifies. It is of course necessary to read the analysis of the law through the lens of *Blake*. Nourse LJ expressly foreshadows the development of the law of restitution in his concluding remarks. It is a feature of the reasoning in ***Blake,*** which was described by this court in ***Hendrix*** as marking *"a new start in this area of law"*, that it does not analyse the law in terms of rules and exceptions but in terms of principles, whose substance has to be applied. Nourse LJ's concerns about revolutionising the law of tort are moreover taken into account to some extent at least by Lord Nicholls in ***Blake,*** in that the remedy of an account of profits is only to be awarded in exceptional cases where justice would not otherwise be done. Nonetheless, it was an essential part of Nourse LJ's reasoning that damages by reference to the benefit obtained by the defendant could only be awarded in those limited situations, and it would in my judgment have to be shown that his circumscription of the cases where damages were not assessed on a purely compensatory basis could not stand with ***Blake*** (see ***Young v Bristol Aeroplane Co Ltd*** [1944] KB 718 at 729). I do not consider that this can be shown. *Blake* does not discuss non-proprietary torts. In my judgment, while an extension of *Blake* to non-proprietary torts on the same basis would be likely to be consistent with ***Blake,*** and notwithstanding that, in ***Hendrix, Blake*** was applied to a breach of contract which did not involve a proprietary right, it cannot be said that a case that holds that damages assessed on a purely compensatory basis are the only damages available for the torts other than proprietary torts is necessarily overruled.

76. In ***Wass,*** Nicholls LJ held:

"It is an established principle concerning the assessment of damages that a person who has wrongfully used another's property without causing the latter any pecuniary loss may still be liable to that other for more than nominal damages. In general, he is liable to pay, as damages, a reasonable sum for the wrongful use he has made of the other's property. The law has reached this conclusion by giving to the concept of loss or damage in such a case a wider meaning than merely financial loss calculated by comparing the property owner's financial position after the wrongdoing with what it would have been had the wrongdoing never occurred. Furthermore, in such a case it is no answer for the wrongdoer to show that the property owner would probably not have used the property himself had the wrongdoer not done so. In ***Mediana (owners) v Comet (owners), The Mediana*** *[1900 AC 110 at 117, [1900–3] All ER Rep 126 at 129 the Earl of Halsbury LC made the famous observation that a defendant who had deprived the plaintiff of one of the chairs in his room for 12 months could not diminish the damages by showing that the plaintiff did not usually sit on that chair or that there were plenty of other chairs in the room."*

77. He continued:

"The common law, however, is constantly being developed and adapted as social conditions change, and novelty by itself is not an answer to the present claim. Indeed, for some time I was attracted by the analogy between infringement of a patent and infringement of a market right. The argument is to the following effect. The owner of a market right has a legal monopoly in respect of the holding of a market within a certain area. If, for the purpose of assessment of damages on the user principle, infringement of a patent is to be regarded as the invasion and abstraction by the infringer of the property which consists of the monopoly of the patented articles granted to the patentee, as Lord Shaw observed in the passage I have cited from the Watson Laidlaw case, so also is the disturbance of a market right to be regarded as the invasion and abstraction of the property which consists of the monopoly of the holding of a market in the place in question. In other words, if the infringement of a patent is to be regarded as the wrongful user of the property comprised in the patent, then by parity of reasoning the disturbance of a market right may properly be regarded as the wrongful user of the property comprised in the market right. If, in the one instance, damages may be awarded on the user principle in a suitable case, so may they be in the other instance.

I have, however, concluded that the analogy is unsound and that the application of the user principle in the case of the disturbance of a market right would not accord with the basic principles applicable to that cause of action. A market right confers a monopoly, as does a patent, but the protection which the law affords to the owner of a market right is limited to protecting him against being disturbed in the enjoyment of his right. If an unauthorised market is held

without disturbing the lawful market, the owner of the lawful market has no remedy, either for damages or otherwise. In such an event there is no place for an award of damages to be assessed on the user principle. Thus, for example, if and so long as the owner of the market right is currently not exercising or seeking to exercise his right, and is not holding a market at all, he has no cause of action against a person holding an unauthorised market, for in such a case he is not being disturbed in the enjoyment of his market right (cf ***Channell B in Dorchester Corp v Ensor*** *(1869) LR 4 Exch 335 at 339, where a market was not being held on one of the material days)."*

78. In my judgment, Nicholls LJ also decided this case on the basis that there was no loss. However, his reasoning is different. More precisely, he considered there was no disturbance in the enjoyment of the market right: in the absence of such a disturbance causing loss this would not be an appropriate case for the grant of an award of damages on the user basis. He did not hold that user damages were only available where a right of property was infringed: in any event in this context he held that *"novelty by itself is not an answer"* (page 1418). Nicholls LJ made it clear in his final paragraph (which I have not set out) that he was not deciding in which torts user damages were available and which they were not.

79. I disagree with the judge's observation that *"it would be odd if [Lord Nicholls] had undergone a Damascene conversion about the availability of restitutionary awards across the board in tort cases and yet had not referred to his earlier judgment"* ([106], quoted above). The availability of a restitutionary award for a non-proprietary tort as such was not in issue in ***Blake*** on Nicholls LJ's approach.

80. In the recent case of ***Forsyth-Grant v Allen*** (which was decided after the judgment of the judge), this court declined to award an account of profits against a defendant who was found liable in nuisance. The lead judgment was that of Patten J, with whom Mummery LJ agreed. Patten J refers to *Blake* and to ***Wass.*** He held that ***Wass*** had *"limited"* the possibility of an award of damages on a restitutionary basis (see [19]), meaning, as I read his judgment, that no such award would be made if no loss were shown. He went on to hold:

> *"32. An actionable nuisance does not involve the misappropriation of the claimant's rights in the same way, even as in a case of trespass, let alone as in a case of conversion or copyright or trademark infringement. The essence of the tort is that the claimant's rights to the reasonable enjoyment of her property have been infringed by the use which the defendant makes of his own land. On the face of it, this should not entitle the claimant, in my judgment, to more than compensation for the loss which she has actually suffered; but the highest that it could be put on the authorities is that the claimant can, in appropriate cases, obtain an award calculated by reference to the price, which the defendant might reasonably be required to pay for a relaxation of the claimant's rights so as to avoid an injunction. This, as already explained, falls a long way short of being awarded the whole profit for the development, which is far in excess and completely unrelated to the measure of loss suffered by the claimant.*
>
> *33. Mr Ley referred us to a passage in Lord Keith's speech in* ***A-G v Guardian Newspapers Ltd*** *[1990] 1 AC 109, [1988] 3 WLR 776, but that was also an action for breach of confidence where equity has always asserted a jurisdiction to order an account of profits; it is not authority for the making of such an order in a case of nuisance. It seems to me that the judge would have been entitled to reject the claim for an account of profits outright, simply on the basis that it was not an available remedy in an action for nuisance; but even if that is wrong, his acceptance that one needs to show exceptional circumstances is not, in my judgment, open to criticism."*

81. In my judgment Patten J did not rule out the possibility of a claim for user damages, and thus a claim for restitutionary damages, for nuisance but recognised that it might be made, though on a more limited basis than a full account of profits in equity. In the particular case, the claim was extravagant (nothing in *Blake* deals with the question of remoteness or mitigation). In any event the judge's assessment of the situation as not exceptional ruled out any possibility of an account of profits on the facts of the case. In his judgment concurring in the result, Toulson LJ left open the question whether a restitutionary claim might be available for a claim in nuisance. In summary, I do not consider that ***Forsyth-Grant*** takes the matter further than ***Wass.***

5.2 Halifax Building Society v Thomas

82. In this case, the first defendant had fraudulently obtained a mortgage from the appellant. The mortgage was enforced by sale and there was a surplus after repayment of the mortgage debt. The first defendant was convicted of conspiracy to obtain mortgage advances by deception. The court also made a confiscation order against him. The question was whether the building society could claim the surplus. The claim was rejected. The building society had elected to affirm the mortgage, and it had obtained repayment of all the sums due to it. This court held that the building society had no restitutionary claim against the first defendant. His unjust enrichment could not be treated as having been gained at the expense of the building society.

83. Peter Gibson LJ held:

> *"Attractively though Mr. Waters has argued the point, I remain wholly unpersuaded that in the circumstances of the present case the law should accord a restitutionary remedy to a secured creditor who has elected not to avoid the mortgage but to affirm it and has received full satisfaction thereunder. To my mind there is an inconsistency between a person being such a creditor and yet claiming more than that to which he is contractually entitled and which he has already fully recovered. Once the creditor has so elected and recovered in full, I do not see why the law should come to his aid to allow him to make a further claim. In* ***re Simms; Ex parte Trustee*** *[1934] Ch. 1 this court refused to allow a trustee in bankruptcy, who had elected to treat a receiver as a tortfeasor for converting to his own use the chattels of a bankrupt, to recover the profits made by the receiver as money had and received. The authority of that case is weakened by the reliance by this court on the now exploded implied promise theory, but I note that it is still cited in textbooks: see, for example, Chitty on Contracts, 27th ed. (1994), vol. 1, p. 1437, para. 29-052) and it serves to*

illustrate that not every action for an account of profits from a wrongdoer, even where there has been use of the plaintiff's property, will be allowed, and that it may be barred when there has been an election for another remedy.

*Further I am not satisfied that in the circumstances of the present case it would be right to treat the unjust enrichment of Mr. Thomas as having been gained "at the expense of" the society, even allowing for the possibility of an extended meaning for those words to apply to cases of non-subtractive restitution for a wrong. There is no decided authority that comes anywhere near to covering the present circumstances. I do not overlook the fact that the policy of law is to view with disfavour a wrongdoer benefiting from his wrong, the more so when the wrong amounts to fraud, but it cannot be suggested that there is a universally applicable principle that in every case there will be restitution of benefit from a wrong. As Professor Birks says (An Introduction to the Law of Restitution, p. 24): **"there are some circumstances in which enrichment by wrongdoing has to be given up. That is, the wrong itself is not always in itself a sufficient factor to call for restitution."** On the facts of the present case, in my judgment, the fraud is not in itself a sufficient factor to allow the society to require Mr. Thomas to account to it."* (pages 227-8)

84. Glidewell LJ held:

*"In order to succeed in this appeal, Mr. Waters is required to establish that the second proposition is correct, and that English law provides a mechanism by which it can be given effect. Despite his able argument, I cannot discern that there is any such general established principle. Indeed, Mr. Waters has to concede that there is no English authority upon which he can rely to establish his right to succeed either in the law of restitution, under the head of unjust enrichment, or in the law of constructive trusts. The sole American decision which appears to be directly in point, that of the U.S. District Court for the Southern District of New York in **Federal Sugar Refining Co. v. United States Sugar Equalization Board** (1920) 268 F. 575, is not sufficiently persuasive to secure a visa for admission into English jurisprudence. Like Judge Maddocks, in the passage from his judgment quoted by Peter Gibson L.J., I cannot conclude that the principle for which Mr. Waters contends is at present established as part of our law."* (pages 229-30)

85. The judge treated *Halifax* as an authority which precluded him from holding that a restitutionary award could be made in an action for breach of statutory duty for the reasons given in [106] set out above. In *Halifax*, the claimant had received repayment of all that was due to it. There was therefore no need for a restitutionary award, and such an award would have been inappropriate. This case does not decide that a restitutionary award cannot be made in a non-proprietary tort claim, but it does prevent Devenish from claiming the profits made by the respondents merely on the basis that they made their profits through violations of competition law.

7. The second sub-issue: would a restitutionary remedy be available in the circumstances of this case? In particular, was the judge correct to hold that a restitutionary remedy would not be available because compensatory damages would have been adequate?

86. This issue and the third sub-issue only arise if I am wrong on my conclusions thus far about *Wass*, and also *Blake* applies to non-proprietary torts, but as these issues were argued I will express some provisional conclusions on them.

87. As I have said, the theme of Lord Nicholls' speech in **Blake** is to ensure, so far as appropriate, that the same remedies are available in the same circumstances for different wrongs. It follows therefore that any account of profits should be available for a non-proprietary tort only in exceptional circumstances of the kind referred to in **Blake.**

88. I have already explained that in my judgment there was a combination of factors which enabled **Blake** to fulfil the criterion of being an exceptional case to justify an account of profits. The facts were of course very different. In that case, the Attorney General sued in the public interest for harm done to the community at large. It was not a mere breach of contract or tort committed in a commercial setting. However, **Hendrix** makes it clear that claims are not limited to claims brought by the Attorney General in the public interest, and can include claims arising from a commercial situation. So far as the conduct of the respondents is concerned, Devenish's case is that the respondents acted cynically in deliberate breach of competition law. The House in *Blake* did not determine whether the defendant's conduct had to be in deliberate breach of duty. On the facts of this case I do not have to decide whether that factor is always required. As Devenish points out, under the 2001 decision the Commission found that the respondents' conduct was so serious an abuse of competition rules that the respondents incurred very substantial fines. Some of them were increased on account of aggravated circumstances. Thus, having fixed the basic fines and increased them by 100% in the case of three of the respondents, the Commission further increased the fines on two respondents, stating:

"717. Both major European producers effectively formed a common front in conceiving and implementing the collusive arrangements with the Japanese and other European producers. Roche set out to implement a strategic plan to dominate and control the world market for all the vitamin products it produced, which constituted a very substantial part of all commercially available vitamins. Roche, in combination with BASF, set out to eliminate all effective competition between them in the Community and EEA across almost the whole range of important vitamins(81). Roche's particular role as prime mover and main beneficiary of these collusive arrangements is to be noted.

718. This aggravating circumstance justifies an increase of 50 % in the basic amount of the fines to be imposed on Roche and an increase of 35 % in the basic amount of the fines to be imposed on BASF for their infringements affecting the vitamin A, E, B2, B5, C, D3, beta-carotene and carotinoids markets"

89. Although the fines for some of the parties were reduced in certain respects on account of the leniency procedure as they had participated in the "*whistle blowing*" procedure with Aventis receiving the largest basic fine reduction of 100% as it was the first "*whistle blower*" (2001 decision, paras 746 – 768), in my judgment it is clear that the conduct of the respondents was sufficiently abusive to meet any need, as part of the overall requirement for exceptional circumstances for the purposes of *Blake*, to show that the defendants' conduct was deliberate. It was, for instance, far more serious than that of the defendant in ***Hendrix***. It does not necessarily follow that if exceptional circumstances were shown in this case that they would be capable of being shown in any cartel case. The fines in this case suggest that this case was out of the ordinary.

90. Moreover, given the direct effect on Devenish, I consider that Devenish has a legitimate interest in bringing these proceedings to make a claim attributable to its dealings with the respondents. This is subject to the question of the passing-on defence with which we are not concerned on this appeal.

91. In the light of my provisional conclusions made about multiple claimants, considered below, the fact that there are other potential claimants in respect of the same cartels, whom Devenish does not represent and who are not parties to these proceedings, does not affect my conclusion on this point.

92. Another feature of this case, which is relevant, is that as I have already explained there was a transfer of value by Devenish to the respondents and it is that transfer of value for which Devenish seeks recoupment. Moreover, as Devenish points out, that transfer of value was made in pursuance of a contractual relationship between the parties. These features strengthen the case for an account of profits. I do not have to decide whether they are also essential to a claim in tort for a restitutionary award.

93. There is strong support from the Commission and the Office of Fair Trading for private actions to enforce remedies for breaches of competition law. The point is well made in The Office of Fair Trading's discussion paper, "*Private actions in competition law: effective redress for consumers and business*" (recommendations from the OFT, 26 November 2007):

> "*2.10 A system which incorporates effective public enforcement and a real possibility of private actions will increase the likelihood that anti-competitive behaviour is detected and addressed (whether by way of a complaint to the competition authorities, an approach to the infringing undertaking(s), or through the issuing of legal proceedings). A more effective private actions system would increase the incentives of businesses to comply with competition law, since the potential incidence and magnitude of any financial liability to a competition authority and/or a claimant will increase. As these financial risks increase, so does (or should) the interest of those ultimately responsible for the governance of the business (especially supervisory boards and non-executive directors) or for supporting the business (including, for example, financiers and investor groups). In this way public enforcement and private actions are complementary.*"

94. Other important documents are the EC Commission's Green Paper on "*Damages Actions for Breach of EC Antitrust Rules*" (COM(2005) 672 final), the OFT's response to that Green Paper (OFT 844) (May 2006), the Department for Constitutional Affairs' consultation paper "*The Law of Damages*" (CP 9/07) (May 2007) and the European Commission's White Paper on *Damages* and accompanying staff working paper.

95. In its discussion paper referred to above, the OFT contemplated that in some cases there would be a restitutionary award:

> "*2.11 In terms of the type of damages that may be recoverable, it is well established that private actions involve claims for damages that are compensatory in nature. In certain circumstances, the courts may award restitutionary damages, which aim to strip away some or all of the gains made by a defendant which arise from a civil wrong. Furthermore, exemplary damages might be available in certain circumstances in England and Wales. Other forms of relief, such as the equitable remedy of accounting for profits, may also need to be considered in some cases. It will be for the courts to determine how the general principles for determining loss or damage in various types of case apply to actions for infringement of competition law.*"

96. Similar issues of policy arise in company law and environmental law. In company law, an account of profits may be awarded against a director for misappropriation of company property, including opportunities, but on the basis of breach of fiduciary duty. In both company law and environmental law, the ultimate victims (for example, small shareholders or residents of a particular area), may suffer little or no loss personally and this removes incentives for the private enforcement of claims. In this case, if damages are reduced by the amount of the overcharge which Devenish was able to pass on to its customers, and that loss was passed on to the ultimate consumer, a person who has a claim may both be unaware that he had claim and have no claim worth pursuing.

97. So far as the procedure for collective claims is concerned, there is experience in the personal injuries field on which an appropriate procedure could be based (see for example the collective action on vibration white finger against ***British Coal: AB and Others v British Coal Corporation (Department of Trade and Industry) and Others*** [2006] EWCA Civ 1357, after which a collective compensation agreement, which required affected persons to submit their claims, along with medical evidence, through authorised solicitors to be compensated on the basis of agreed damages formula, was introduced). But there may be special difficulties in this field due to the fact that consumers may not know that they have been victims of cartels or be unable to prove that they made any relevant purchase or have no incentive to bring any claim.

98. In addition, in February 2008 the Civil Justice Council published a research paper by Professor Rachel Mulheron entitled *Reform of Collective Redress in England and Wales: a Perspective of Need*. This report further

recommended proposals that private enforcement should be developed. In it some of the difficulties of private actions were highlighted. In particular the report describes alternative procedures, first the current *"opt-in"* procedure whereby claimants have to join an ongoing representative claim within a given period, and, in the alternative, a new "*opt-out"* procedure whereby a claim is brought by representative action on the premise that all affected parties are parties to it. At Chapter 9, Part F the problem of the "passing-on" defence is summarised as:

"Interaction with the substantive law. The paucity of follow-on actions for anti-competitive infringements in England, when compared with the number of infringement decisions given by the OFT and by the EC, is noteworthy.

However, one substantive law reason for the difficulty in bringing such actions, which must be remarked upon in the context of this Section, is the potential availability of the passing-on defence. This defence, where available, is a significant substantive law barrier to any party in the supply chain from bringing a follow-on action"

99. Mr Vajda in his reply referred to the collective action for the enforcement of violations of competition law. For example, after an investigation the OFT fined JJB Sports for overcharging on England and Manchester United football shirts in 2000 and 2001. Following this ruling the Consumers Association also brought an action on behalf of the overcharged consumers, ***The Consumers Association v JJB Sports PLC* Case Number:** 1078/7/9/07. In a settlement agreed between the parties, approved by the Competition Appeal Tribunal by an order of Lord Carlisle of Berriew QC dated 14 January 2008, JJB Sports agreed to compensate directly any customers who were parties to the action with £20. Other affected customers who were not parties to the Consumers Association's action could, on production of the relevant replica shirt, reclaim either £10 if the label was still intact or £5 if it was not. These customers were required to have their replica shirts indelibly marked and sign a document waiving the right to further legal action against JJB Sports.

100. Devenish makes the point that, if the pursuit of collective enforcement actions is too difficult, especially in the English legal system with its high costs and risks, private enforcement will not happen. It submits that the playing field is far from level when victims of cartels, typically small and medium-sized enterprises, face large multinational companies. Devenish submits that, by adopting a gains-based approach, rather than a loss-based approach, the focus would shift from the victims to the perpetrators, which is where in its submission the focus should be.

101. The objective of deterrence is important, and is one of the reasons why the law imposes on fiduciaries a strict duty to account: see, for example, per Lord Eldon LC in *Caffrey v Darby* (1801) 6 Ves 488; 31 ER 1159. When faced with a choice, the court may have regard to the desirability within limits of deterrence. (It is also recognised as a legitimate factor in the decisions of the Court of Justice referred to below). However, it is not particularly helpful in this case, because if it were a relevant factor it would apply to every breach of competition law. So to hold would go outside what was decided in *Blake*. The court would also have to bear in mind that the Commission had imposed fines on the respondents (so as to avoid the risk of double jeopardy for the respondents) and indeed that in its 2001 decision the Commission had increased the fines by 100% on three of the respondents (BASF, Roche and Aventis) because in its view deterrence was needed. Mr de la Mare argues that the court should also take into account that there is a detailed regulatory system for competition law but, while it is not necessary to reach a final view on this point, it is difficult to see how that could of itself justify ruling that the circumstances were not exceptional. The court is more likely to want to consider the way in which the regulatory system was operated. If the existence of a detailed regulatory system were an answer to a claim for a restitutionary award, it might be said that logically there should be no private rights of action by victims of cartels for recompense of any kind.

102. Moreover, it is clear from the various documents referred to above that the availability or otherwise of an account of profits is a matter for the courts.

103. But the fundamental difficulty in this case is that an account of profits is available only where it is necessary to do justice in the case. Accordingly, I agree with the judge that it is not an appropriate remedy in principle where damages are an adequate remedy (see the judge's judgment at [112]). I reject Devenish's submission that a claimant has a choice whether to seek compensatory damages or a restitutionary award and that an election need not be made until judgment or in some cases even satisfaction of the judgment.

104. On this point, the principal claim made by Devenish is for the overcharge. This point was confirmed in a document submitted after the hearing pursuant to the court's request.

105. The judge drew a distinction between claims for damages, which are unavailable on the facts, and claims for damages which could not be proved for evidential reasons (see eg [81]). He held this case fell in the latter description and that damages could not be said to be inadequate. The judge's distinction is useful, but I would not go so far as to say that damages could never be inadequate if the difficulty was one of proof: in my judgment it is at least arguable that the court should order an account of profits where the evidential difficulties were not the claimant's responsibility.

106. However, that is not this case. In his report dated 23 February 2006, Dr Veljanovski has given his estimate of the overcharge for three vitamins for 1998. He has had to make certain assumptions but the reasonableness of these assumptions will no doubt be a matter of proof. Mr Vajda has not referred us to any particular insuperable difficulties of proof. I note that Dr Veljanovski has not been able to make an estimate of the overcharge for certain vitamins "either due to insufficient price data or initial evidence the cartel was not able to effectively raise

prices". It has not been suggested that the necessary price data would not be available on disclosure, and there would of course be no overcharge if the cartel had not been able to raise prices. Dr Veljanowski does not appear to support the proposition that the fact that the cartels were secret has made it exceptionally difficult or impossible for Devenish to prove its claim.

107. Although the assumed facts do not include the passing-on defence that is yet to be adjudicated upon, Devenish submits that it faces extreme difficulties of causation and loss if a passing-on defence lies. The first skeleton argument states:

"Given the passage of time and difficulties of proof which Devenish faces in relation to the sales and purchases which it has made, it is faced with a real prospect that it may not be able to prove its losses in the face of an attack by the defendant to the effect that it must have passed on its losses to its customers, or failed, as a matter of law, to prove that it has mitigated its losses by passing them on." (para. 95).

108. It is on that basis that Devenish submits that the award of compensatory damages would be inadequate. It relies on the fact that the cartels were secret. However, the report of Dr Veljanovski filed on behalf of another claimant in these proceedings (Moy Park) suggests that direct purchases from BASF, which would include Devenish, passed on 100% of the overcharge to indirect purchasers. It would not be just to give Devenish a restitutionary award to enable it to avoid the consequences of its having passed on the overcharge.

109. Devenish also alleges that the effect of the breaches of art 81 has been to inhibit the development of its business so as to make it unable to compete with members of the cartel. This has been referred to as "*the margin squeeze*" claim. It was a first raised in a reply to a request for information served in February 2006 and it receives a little mention in the main skeleton argument in support of the appeal. In theory, the situation might not be far removed from the position of the Crown in ***Blake*** if the respondents, in carrying on the cartels, have destroyed or made in practice impossible to find the evidence which would show the effect or extent of the cartels. However, that is not the way the case appears to be put. What appears to be said on this aspect of the case is that there are considerable difficulties of proof: see, for example, [91] of the appellants' main skeleton argument in support of this appeal. The court is accustomed to dealing with those difficulties *" by the exercise of a sound imagination and the practice of the broad axe"* (see per Lord Shaw in ***Watson, Laidlaw v Pott, Cassells and Williamson***). Accordingly the fact that damages will be very difficult to prove is not in my judgment enough to justify a gains-based remedy, and the margin squeeze claim, which was not developed in oral argument in any great detail, cannot therefore lead to such a remedy.

110. Lord Nicholls considered that a restitutionary award could be made whenever the justice of the case requires it. He suggested as a general test the test whether the claimant has a legitimate interest in stripping the defendant of its profits. This test is not in my judgment met in, for instance, a case where a claim was incapable of clear proof because the claimant had not maintained effective records. The justice of the case must also relate to the measurement of the remedy. It is not enough that the claimant fails to prove his loss on conventional grounds (see *Wass*, above). Nor, in my judgment, is it enough to show that, because of the passing-on defence, Devenish could not prove that it was entitled to any compensation.

111. These conclusions make it unnecessary for me to consider the further submission by Mr de la Mare that a restitutionary award would be penal in nature and therefore offend the Community law principle of *non bis in idem*. I would, however, add that in my judgment it would be relevant to consider, in determining whether it was just to order an account of profits in the circumstances of this case, whether on its true interpretation the fines imposed by the 2001 decision had already required the respondents to account for their profits obtained as a result of the cartel. We did not hear detailed argument on the way in which the fines were calculated, and I would therefore leave open the question of the effect of the 2001 decision on this point. Taking the case of Roche and vitamin A as an example, the basic amount of the fine (before any increase for aggravating circumstances) appears on the face of it to have been fixed by reference to Roche's relative importance in the market for that vitamin and increased by 100% and then 90% to achieve sufficient deterrence and to take account of the duration of the infringements respectively, rather than by reference to the profits which Roche made.

8. (third sub-issue) multiple claimants

112. The judge was concerned that there might be insuperable procedural objections to making a restitutionary award in this case. He referred to the existence of multiple claimants.

113. It is unnecessary to express a final conclusion on this point but provisionally it seems to me that, if there were a possibility of conflicting claims by multiple claimants, the court should consider whether case management directions could deal with that problem. Such directions might afford a possible solution in this case if the passing on defence were also to apply to a claim for an account of profits (compare *Aggravated Exemplary and Restitutionary Damages* (1997) (Law Comm No 247) at para 3.80). The judge thought it was unfair that some claimants might seek restitutionary awards and others compensatory damages. I do not consider that this is of itself necessarily unfair or likely to lead to difficulties if in each case the award can be limited to each potential claimant's own loss. In those limited circumstances, in my judgment, Devenish is right to say that the claimant should not be denied a remedy it would otherwise have because of the possibility that the other claimants might be awarded different remedies. That possibility could occur now in cases where restitutionary awards can already be made.

114. I have expressed these provisional conclusions on the basis that the passing on defence would apply to a claim for an account of profits as it does to a claim for damages. Devenish, however, does not accept that this would be the case and that issue does not fall to be determined on this appeal.

115. On a separate point, it would not in my judgment be unfair if a single claimant sought different remedies against different respondents. Moreover, the risk of inconsistent factual determinations exists in any event and thus even if only compensatory damages are available.

(B) COMMUNITY LAW

116. The two questions of Community law argued in this court were not the subject of decision by the judge.

117. The background principles are common ground. Since Community law regulates competition, English law must provide remedies for breach to persons injured thereby. This follows from ***Courage v Crehan*** [2001] 1 ECR 1-6297. This case concerned the question whether English law was required to disapply the rule of English law that a party to an unlawful contract could not himself claim damages for its breach and provide a remedy in damages to a person if he was able to show a breach of art 85 in relation to a "beer tie" (whereby public houses were obliged to buy beer from their tied breweries at higher prices than independent public houses). The Court of Justice held:

"Any individual can rely on a breach of Article 85(1) of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision." ([24])

118. The Court of Justice also held:

"The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition." ([26])

119. However, the methods for the effective enforcement of this private action would be matter for national courts, subject to the proviso that:

"…such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see Case C-*261/95* ***Palmisani*** [1997] ECR I-4025, paragraph 27)." ([29]).

120. The Court of Justice continued:

"In that regard, the Court has held that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them… Similarly, provided that the principles of equivalence and effectiveness respected… Community law does not preclude national law from denying a party, who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party. Under a principle which is recognized in most of the legal systems of the member states and which the court has applied in the past… a litigant should not profit from his own unlawful conduct, where this is proven." ([30]-[31])

121. Contrary, however, to the submission of Mr Vajda, I do not read the final sentence that I have quoted as holding that it is a generally accepted principle of law in the member states that a gains-based remedy should be granted. We have no information as to whether such remedies are normally given in any of the member states. (As to the position in France, however, see generally: P. Arhel, *Practiques anticoncurrentielles (injonctions et sanctions)*, 2003 Dalloz Répertoire Commercial).

122. The first issue is whether Community law *prevents* a restitutionary award. Mr de la Mare submits that to make a restitutionary award in order to deter further breaches of competition law would run counter to the 2001 decision contrary to art 16 of the Modernisation Regulation. Art 16 of the Modernisation Regulation provides:

"where national courts rule on agreements… under article 81… they cannot take decisions running counter to the decision adopted by the Commission."

123. Mr Vajda's response is that a restitutionary award would not be penal. It would simply require the respondents to account for some or all of the profits they had actually made (see ***My Kinda Town v Soll*** [1982] FSR 147 at 156 (reversed on liability by this court [1983] RPC 407). He further submits that art 16 is not involved because there is no operative part of the Commission decision dealing with private remedies. Art 16 merely codifies the principles in ***Masterfoods Ltd v HB Ice cream Ltd*** [2000] ECR –11369.

124. *Masterfoods* concerned an exclusivity agreement whereby a fridge supplied by HB Ice Cream at a nominal rent could only be used for the storage of HB Ice Cream products and not those of its rival, Masterfoods. HB Ice Cream successfully defended a claim by Masterfoods in the Irish courts that its exclusivity contract was in breach of arts 85 and 86. However, HB Ice Cream's claim for damages was dismissed. The Commission ruled that the provision of freezer units for no or a nominal rent was in breach of art 86. The Court of Justice held:

"52. It is even more important that when national courts rule on agreements or practices which are already the subject of a Commission decision they cannot take decisions running counter to that of the Commission, even if the latter's decision conflicts with a decision given by a national court of first instance."

125. In any event, he submits that the argument of Mr de la Mare is contrary to *Manfredi v Lloyd Adriatico Assuricazione* [2006] ECR 1-6619. In this case, certain insurance companies had unlawfully agreed to increase

premiums. Advocate General Geelhoed, in his opinion, said that the principles in *Courage v Crehan* should apply to a breach of art 81, and that private enforcement and public enforcement co-existed. As regards compensatory damages, and damages which went further than providing compensation, he said:

"70. Ensuring the useful effect of article 81(1) EC does not, to my mind, necessitate the award of compensation greater than the harm suffered. On the other hand, where special forms of damages can be awarded under national competition law, they must also be available if the claims concerned are based on an infringement of Community competition law."

126. The Court of Justice applied the principles in ***Courage v Crehan***. Therefore, in the absence of Community rules governing the matter, it was for the domestic legal system of each member state to prescribe the detailed rules governing the exercise of the individual's right of action, including limitation periods, principles of causation and procedural rules, provided that the principles of equivalence and effectiveness were observed. (I would here note a further submission by Mr de la Mare that in the absence of Community rules domestic law could also determine whether a passing-on defence lay: Case 6/79 ***Just v Ministry for Fiscal Affairs*** [1980] ECR 501).

127. In ***Manfredi,*** the Court of Justice also held that the question whether an award of punitive damages "*greater than the advantage obtained by the offending operator*" should be made was one for the national courts:

"89. In accordance with settled case-law, the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals…

91. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, frequently covert, which are liable to restrict or distort competition. From that point of view, actions the damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community…

92. As to the award of damages and the possibility of an award of punitive damages, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages, provided that the principles of equivalence and effectiveness are observed.

93. In that respect, first, in accordance with the principle of equivalence, it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on the Community competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law (see, to that effect, Brasserie du pêcheur and Factortame, cited above, paragraph 90).

*94. However, it is settled case-law that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them (see, in particular, Case 238/78 **Ireks-Arkady v Council and Commission** [1979] ECR 2955, paragraph 14, Joined Cases C-441/98 and C-442/98 **Michailidis** [2000] ECR I-7145, paragraph 31, **and Courage v Crehan,** cited above, paragraph 30).*

95. Secondly, it follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (damnum emergens) but also for loss of profit (lucrum cessans) plus interest."

128. Mr Vajda submits that the Court of Justice in *Manfredi* accepted that there could be private enforcement and that it must have contemplated the possibility of a restitutionary award. Moreover, he relies on the Commission Staff Working paper which has similarly interpreted the *Manfredi* decision by accepting that punitive damages are permitted by it. Mr Vajda also relies on case law regarding unlawful charges, such as ***Test Claimants in the FII Group Litigation v IRC*** C-446-04, but this line of authority is not helpful given the jurisprudence under art 81 itself.

129. In my judgment, Community law does not prevent the making of a restitutionary award. I have already indicated that, if it were open to the Court to make such an award, it would be awarded only in exceptional circumstances that would not include the case such as this where a claimant in the position of Devenish (on the assumed facts) would in an appropriate case be able to prove its loss on conventional principles. There is no relevantly exceptional difficulty in this case in doing so. It is, therefore, unnecessary to go further into this Community law question for the purposes of this case. Provisionally, however, it seems to me that, if the award were permitted by domestic law to enable Devenish to recover profits made by the respondents where it had failed to show any harm, it would in my judgment be no more extensive a remedy than the punitive damages considered in ***Manfredi.*** If the award were in those circumstances available in domestic law, the principle of equivalence would apply. Since, if *Blake* applies, a restitutionary award could only be made in exceptional circumstances where the justice of the case required it, I do not consider that there is likely to arise any question of such an award offending the Community law principle that the claimant should not receive unjust enrichment.

130. In my judgment, Mr de la Mare's argument proceeds on the mistaken basis that a restitutionary award would require the respondents to account for profits on transactions where the overcharge was passed on. If the passing-on defence is available, then the profits to be accounted for would be adjusted accordingly (see above). If the passing-on defence is not available, but the subsequent purchasers have separate claims, issues of multiple liability arise in any event.

131. I do not need to deal with the further argument (based on *Van Colson*, referred to below, at [133]) that in considering the adequacy of remedies it uses to implement art 81 the court must have regard to the combined effect of both the civil remedy and the fine. I have already accepted above that the court needs to consider the impact of the fine. I do not read the jurisprudence cited to us as establishing that this court must refuse to grant a restitutionary remedy simply because the breach of regulatory rules is capable of resulting in a fine.

132. Mr de la Mare further submits that a remedy by way of a restitutionary award is impliedly excluded by the scheme of remedies provided by domestic law. He relies for this submission by analogy on cases such as ***Deutsche Morgan Grenfell Group plc v IRC*** [2007] 1 AC 558. This submission requires a detailed analysis of the domestic legislation. We were not taken to that legislation, as the submission was not fully pursued. In the circumstances, I do not consider that I need to deal with this submission.

133. The second question is whether the availability of a restitutionary award is necessary for the purposes of the effectiveness principle of Community law. Mr Vajda relies on Case 14/83 ***Von Colson v Land Nordrhein-Westfalen*** [1984] ECR 1891. This case concerned an application for damages pursuant to rights conferred by Directive 76/207/EEC for discrimination on the grounds of sex by a female applicant turned down for employment which was awarded to less qualified men. The Court of Justice held that, although the directive left member states free to choose between the different solutions suitable for achieving its objective if compensation for this kind of breach was awarded it must be "*adequate in relation to the damage sustained*" ([23]). This compensation, therefore, had to be more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application.

134. ***Van Colson*** was decided in a completely different context. Even so, it is clear that the remedy under national law need be no more than "*adequate in relation to the damage sustained*". (Mr Hoskins cited Case 271/91 *Marshall* [1993] ECR 1-4367, but that decision does not take the matter materially further for this purpose). It is also clear from cases such as ***Manfredi*** that purely compensatory damages are sufficient for the purposes of safeguarding the rights of private persons under art 81. The doctrine of effectiveness is therefore directed to ensuring sufficient remedies rather than the fullest possible remedies. An action for compensatory damages fulfils the requirements of sufficiency. Accordingly I would dismiss the appeal on this ground.

135. As to the question of a reference for a preliminary ruling to the Court of Justice, I consider that there is no doubt about the answer to the last question and moreover I do not consider that it is appropriate to make a reference while the question of domestic law remains subject to a further appeal. If Devenish were to appeal and to be successful on appeal, a reference on the basis sought would have been unnecessary.

Disposition

136. For the reasons given above I consider that this appeal should be dismissed.

Lord Justice Longmore:

137. Article 81 of EC Treaty prohibits cartels and in particular agreements between companies which directly or indirectly fix purchase or selling prices. The defendant manufacturers of vitamins operated just such a cartel and were found out. On 21st November 2001 the EC Commission adopted a decision that agreements made by the defendants had been in breach of Article 81 and they were fined accordingly. Those fines were at the time the highest fines which the Commission had ever imposed.

138. It is the duty of Member States to provide domestic causes of action to persons who claim to have suffered loss caused to them as a result of such agreements. In the United Kingdom that cause of action is for breach of statutory duty, see ***Sempra Metals Ltd v IRC*** [2008] 1 A.C. 561, 595 para. 69 per Lord Nicholls of Birkenhead. The question that arises on this appeal is how damages for breach of this statutory duty should be assessed.

139. Devenish, who have carried the burden of the appeal on behalf of the claimants, bought vitamins from the defendants either for immediate re-sale or for use in making up other products which were then re-sold. They purchased the vitamins at an artificially high price illegally set by the defendants. They were able, however, to re-sell at a reasonable profit and it appears likely that they did not themselves have to absorb that artificially high price. They fear (although it has not yet been so decided) that a court might say that they have suffered no loss since they have passed the artificially high price down to their sub-buyers. They have, therefore, brought before the court, by way of preliminary issue, the question whether they can claim from the defendants the gain which those defendants have wrongly made. In other words they seek an account of the surplus profit illegitimately made by the defendants and an order that that profit should be paid to them.

140. This novel claim was rejected by the judge who also decided that Devenish could not recover exemplary damages. There is no appeal against that latter decision but Devenish do continue to maintain a claim to what they have called "***a restitutionary award***" but which is in reality a claim for account of profits in the sense I have already explained. This claim requires the court to go back to first principles.

141. When a defendant has broken an obligation which he owes to a claimant, the normal rule of English law is that the claimant is entitled to compensation for any resulting loss to him. This is not an invariable rule since a claimant can sometimes recover for someone else's loss, although he will normally be accountable in respect of any sum recovered to the person who has actually suffered the loss, see the instances collected in ***The Albazero*** [1977] AC 774, 846.

142. There are also some instances when a claimant can recover more than his loss. The most obvious example is a case in which a claimant is entitled to exemplary damages which are intended to penalise a defendant for tortious

conduct, particularly if he has calculated that the profit he is likely to make from his wrongful conduct will exceed any damages for which he is likely to be liable to the claimant within the second category of such damages identified by Lord Devlin in ***Rookes v Barnard*** [1964] AC 1129, as further explained by the House of Lords in ***Kuddus*** [2002] 1 AC 122. In the current state of the law, exemplary damages are not available for breach of contract even if a contract – breaker has made a similarly cynical calculation that it will benefit him more to break a contract than to perform it, see ***The Siboen and Sibotre*** [1976] 1 Lloyds Rep 293. As I have already said, the original claim for exemplary damages in this case is not now pursued.

143. Another category of cases in which the claimant can recover more than his loss has been labelled "*restitution for wrongs*" or "*a restitutionary award*" and, as such, has found its way into text-books on restitution. Such a label is understandable because, in the cases where such damages are awarded, a defendant has undoubtedly been unjustly enriched but the label "*restitution*" is perhaps liable to mislead to the extent that it can imply the restoration to a claimant of money or other benefits he once had but has since lost. In cases where a claimant recovers more than he has lost he is usually depriving a defendant of a gain he has made; it may be that the law will require such a defendant to transfer to the claimant the gain he has made but it may perhaps be queried whether the word "*restitution*" is the most apt word to describe that process. It may be for these reasons that Lord Nicholls in ***AG v Blake*** [2001] 1 A.C. 268 at 284H described without further explanation the phrase *"restitutionary damages"* as *"unhappy*". He preferred to use the expression "*account of profits*". I shall do that also.

144. The most obvious case in which an account of profits is appropriately awarded is when a defendant has wrongfully used the claimant's property and made a gain from it. If a defendant has made a profit from trespassing on the claimant's land or interfering with his goods or his intellectual property rights, he may be required to account to the claimant for the profit he has made from using the claimant's property without his permission or authorisation. Before ***AG v Blake*** it was held in this court in ***Stoke-on-Trent City Council v Wass*** [1988] 1 WLR 1406 that such an award was not available in a case of public nuisance when a defendant interfered with the right of the claimant to hold a market. In the light of ***AG v Blake*** in which the House of Lords made a declaration that the Attorney General was entitled to be paid whatever amount was due to the notorious traitor ***Blake*** from his publisher under the agreement for publishing his account of his treacherous activities, I do not consider that ***Wass*** is authority for the proposition that the categories of cause of action in which it is permissible to order an account of profits are necessarily confined to tortious claims for breach of a proprietary right. Lord Nicholls was able to show that an account of profits had always been available where equitable rights (e.g. breach of confidence) had been infringed and considered that the claim for breach of contract in ***Blake*** was closely akin to a claim for breach of a fiduciary obligation where an account of profits was a standard remedy, see 287F.

145. It is sometimes said that another category of cases in which a claimant can be awarded more than his actual loss occurs when a claimant is awarded damages for loss of use. The best-known example is that of Lord Halsbury's chair in ***The Mediana*** [1900] AC 113.

"Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by showing that I did not usually sit in that chair or that there were plenty of other chairs in the room?"

With a little elaboration Lord Halsbury answered that question in the negative because one could always assess damages by reference to the amount it would cost to hire a chair for the length of time for which the claimant had been deprived of its use. In ***AG v Blake*** at 279E Lord Nicholls preferred to regard these cases as "*an exception to the rule*" but as Mance LJ pointed out in ***Experience Hendrix LLC v PPX Enterprises Inc*** [2003] All ER Comm 830 standard measures of assessing loss (e.g. by reference to an available market in case of sale or hire of goods) are not necessarily to be regarded as other than compensatory:-

"Whether the adoption of a standard measure of damages represents a departure from a compensatory approach depends upon what one understands by compensation and whether the term is only apt in circumstances where an injured party's financial position, viewed subjectively, is being precisely restored."

This group of "*loss of use*" cases can, however, be safely put to one side on this appeal because the claimants have made clear that their claim is confined to an account of the profits made by the defendants and an order that all (or some) of them be paid over to themselves.

146. Once one has cleared the legal ground and appreciated that the claim made in the present case is a claim that the defendants should disgorge the profit which they have made from their breach of statutory duty in operating the cartel the difficulties of the claim become apparent. No one suggests that, to the extent the claimant has in fact suffered a loss because it has paid too high a price which it has been unable (for any reason) to pass on to its own purchasers, that loss cannot be recovered. If, however, the claimant has in fact passed the excessive price on to its purchasers and not absorbed the excess price itself, there is no very obvious reason why the profit made by the defendants (albeit undeserved and wrongful) should be transferred to the claimant without the claimant being obliged to transfer it down the line to those who have actually suffered the loss. Neither the law of restitution nor the law of damages is in the business of transferring monetary gains from one undeserving recipient to another undeserving recipient even if the former has acted illegally while the latter has not.

147. It is right to say that Devenish also wish to mount a claim for the profit which they claim to have lost because they say that they have lost sales which they would have made but for the excessive prices imposed by the defendants. Devenish say with some force that, although such a claim is theoretically possible, it will be difficult to

prove. It follows, say Devenish, that damages are an inadequate remedy and that justifies an account of the profits illegitimately made by the defendants. The bald assertion that the fact that damages are difficult to prove justifies a claim for account of profits cannot be accepted for many reasons which include

i) difficulty of proof does not necessarily mean that no damages will be awarded;

ii) if no or few damages are awarded, that does not mean that such damages are inadequate; loss of a possible sale is less serious than actual out-of-pocket loss;

iii) the concept of damages being an inadequate remedy is a useful concept in the field of interlocutory injunctions but is a treacherous one if it is used as a supposedly principled reason for the disgorgement of profits made by somebody else;

iv) it is clear on the authorities that apart from cases of the misuse of the claimant's own property, an account of profits outside the established categories is only to be made in "*exceptional*" cases per Lord Nicholls in *AG v Blake* (no less than 3 times) at 284H, 285D and F). A traitor, seeking to profit from his treachery by making a self-justificatory book about it, is indeed "*exceptional*". Cartels are not "exceptional" in that sense. It is difficult to see how one cartel could be more "*exceptional*" than another. If the claim were allowed in the present case, it would quickly become the norm in all cartel cases that restitutionary awards should be made;

v) the claim as originally formulated is an all or nothing claim. It is thus different from the sort of award that is sometimes made in the form of the price that the defendant would have had to pay to obtain a claimant's consent to do what he has done. That was possible in ***Wrotham Park Estates Co v Parkside Homes Ltd*** [1974] 1 WLR 798 and in the *Experience Hendrix* case. Here that is not an available option. To the extent that it may be said that the claimant should be content with a proportion of the defendants' profits rather than all of it, it is not possible to see a principled way in which that could be done since there is no obvious way in which the claimant's loss can be related to the defendants' gain.

148. The only real argument in favour of an order for account of profits is the argument of policy that cartels are a notorious evil and the civil courts should in some way provide an incentive for their eradication by making such an order. Mr Vajda QC for Devenish made a sustained plea to this effect. But it does not seem to me to be right for the courts to take this step on their own initiative. Towards the end of his submissions Mr Brealey QC asked rhetorically whether a restitutionary system of damages was something which the courts would wish to encourage. I would for my part answer *"Not in general apart from proprietary or fiduciary claims and exceptional cases such as that of Blake"*. Lord Hobhouse of Woodborough made the same point even more eloquently than Mr Brealey in his dissenting speech in ***AG v Blake*** at page 299D-E:-

"... if some more extensive principle of awarding non-compensatory damages for breach of contract is to be introduced into our commercial law the consequences will be very far-reaching and disruptive. I do not believe that such is the intention of your Lordships but if others are tempted to try to extend the decision of the present exceptional case to commercial situations so as to introduce restitutionary rights beyond those presently recognised by the law of restitution, such a step will require very careful consideration before it is acceded to."

149. I agree with Arden LJ on all the European Community issues raised. I would dismiss this appeal.

Lord Justice Tuckey:

150. The facts of this case have been sufficiently set out in the judgments of Arden and Longmore LJJ for which I am grateful. But I think I should add that at the end of the hearing before us Devenish formulated its claim for the wrongful net profits made by the defendants from their breach of statutory duty as follows:

For the avoidance of doubt the wrongful net profits are the cartel-induced overcharges in selling vitamins to the Claimant. So, for example, if a unit of vitamins would have cost the Claimant £60 (on which the defendants lawful net profit was £15) and, as a result of the cartel, the unit of vitamins actually cost the claimant £100, the claimant seeks £40 (not £55). The £40 is the "*overcharge/wrongful net profit*".

In other words Devenish is claiming the overcharge as if it were the defendants' net profit so as to avoid having to take into account the fact (if true) that it passed on the whole of the overcharge to its customers. I can see no way in which it could avoid taking this "pass on" into account in any compensatory claim for damages.

151. Nevertheless the court has to decide whether an account of profits should be available in a cartel case, or at least in this case. I agree with Arden and Longmore LJJ that it should not.

152. The questions I have considered on the way to reaching this conclusion are:

1) Does community law compel an answer one way or another?

2) Are we bound by *Wass* to hold that an account of profits cannot be awarded on a claim for a non-proprietary tort?

3) Are damages an adequate remedy and is this an exceptional case?

153. Like Arden LJ I think the answer to my first question is No. Mr Vajda's proposition that community law positively requires a restitutionary award was not supported by the material upon which he relied. In ***Courage v Crehan*** (at para. 26) the ECJ held that the full effectiveness of the treaty would be put at risk if it were not open to any individual to "*claim damages for loss caused to him*" by conduct liable to restrict or distort competition. There is nothing in this case (or ***Von Colson*** for the reasons given by Arden LJ in para. 134) which suggests that anything more is needed to satisfy the community law requirement for effectiveness. Indeed I understand that restitutionary

remedies are not normally available in other states of the European Union. Such remedies would only be required here if prescribed by the principle of equivalence which is not invoked in this case.

154. I also reject Mr de la Mare's submission that community law prevents a restitutionary award. Such an award would not be a decision "*running counter*" to a decision of the Commission and would not therefore breach Article 16 of the Modernisation Regulation (see para. 122) and is contrary to what the ECJ said at paras. 89 - 95 in ***Manfredi*** (see para. 127).

155. My answer to the second question is that ***Wass*** is binding on us. I agree with what Arden LJ says at para. 57 that *Blake* suggests that an account of profits could be ordered for non-proprietary torts. But for the reasons she gives in para. 75 I do not think it can be said that ***Wass,*** which was not cited in ***Blake,*** has necessarily been overruled by it. It can stand with ***Blake.*** Non-proprietary torts do still therefore fall to be considered as an exception to the general principles articulated by Lord Nicholls in ***Blake*** unless and until ***Wass*** is overruled.

156. This conclusion makes my third question academic but my answer to it is that damages are an adequate remedy and this is not an exceptional case.

157. Devenish's expert has been able to calculate the amount of the overcharge using methodology typical in anti-trust cases. In calculating Devenish's loss he has not taken into account any pass-on, whereas in the case of one of the other claimants, a poultry producer further down the vitamins supply chain, he has been able to calculate the pass-on upstream and downstream of the claimant. If Devenish has suffered a loss it is recoverable as damages, but if it has not I do not see how this can be a reason for saying that damages are an inadequate remedy; they are adequate for anyone who has suffered a loss. An account of profits of the kind advanced would give Devenish a windfall. I can see no justification for this. As Longmore LJ says the law is not in the business of transferring monetary gains from one undeserving recipient to another.

158. Nor do I think that difficulty of proof means that damages are an inadequate remedy. The overcharge has been calculated without difficulty. A claim for what is described as "*margin squeeze*" was added by Devenish in further information given a year after it launched its claim for the overcharge. It has the appearance of an after-thought and played little or no part in argument before the judge although, as he notes, difficulty of proof was in the forefront of Devenish's case. Greater emphasis was placed upon this part of the claim by Mr Vajda before us, but like Longmore LJ I do not accept that the assertion that damages are difficult to prove justifies the claim for account of profits for the reasons he gives in para. 147. A judge wielding the broad axe is capable of doing justice in such a case.

159. For the same reasons and the reasons they give I agree with Arden and Longmore LJJ that this is not an exceptional case. Although not determinative I also find persuasive some of the reasons given by the judge and suggested in argument for saying that an account of profits is not an appropriate remedy. The difficulties caused by multiple claimants, (some perhaps claiming compensatory damages), attempting to allocate profits between claimants and taking account of fines cannot be underestimated.

160. For these reasons I too would dismiss this appeal. Devenish is entitled to be compensated for any loss it has suffered as a result of the cartel, no more and no less.

Mr Christopher Vajda QC & Mr Andrew Burrows QC (instructed by Messrs Irwin Mitchell) for the Appellant;Mr Tom de la Mare & Mr Brian Kennelly (instructed by Messrs Ashurst) for the 1st, 2nd & 3rd Respondents;Mr Mark Hoskins (instructed by Messrs Freshfield Bruckhaus Deringer) for the 4th & 5th Respondents;Mr Mark Brealey QC & Mr Stephen Brown (instructed by Messrs Mayer Brown International LLP) for the 6th, 7th & 8th Respondents.