Page 2769 - 2779

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Disgorgement of Profits as a Restitutionary Contractual Remedy

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ABSTRACT

Disgorgement of profits is a form of gain-based contractual remedy that is considered equitable and is infrequently invoked in comparison to other contractual remedies such as specific performance and damages across jurisdictions. This paper explores the nature of disgorgement of profits as a form of contractual remedy both under English law as well as Indian law, in addition to other common law systems. It attempts to ascertain the principles involved in determining the scope and award of gain-based equitable remedies by analysing landmark judgements in this field. The focal point of disgorgement is essentially the reversal of undeserved enrichment of the defendant rather than the plaintiff's compensation.

The Indian context has also been examined, where disgorgement as a form of contractual remedy has largely not been awarded by Courts despite the existence of Sections 65 & 70 of the Indian Contract Act 1872 that deal with restitutionary remedies for breach of contract. However, gain-based remedies have been awarded by Indian courts in the sphere of securities law akin to American law, through SEBI orders for unjust profit-making activities and the enforcement of foreign arbitral disgorgement awards. Thus there still exists scope for the development of this sphere. While there is no definitive rule regarding the criteria for invoking disgorgement awards, the same may be taken recourse to under equitable considerations in exceptional circumstances.

The first two parts of this paper analyse the nature of disgorgement-based remedies as incorporated under English law and Indian law. The subsequent part provides a brief comparative analysis of disgorgement remedies under various legal systems. The conclusion emphasises the lack of clear precedents or definitive rules in determining a disgorgement-based remedy and underlines the need for further development of this sphere through legislative and judicial action.

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 [ISSN 2581-5369]

I. INTRODUCTION

Contract remedies are awarded to protect the claimant's interest in the performance of contract, with compensatory damages being the primary remedy in the event of a breach. The need for gain-based damages arises in situations wherein alternative remedies are determined to be inadequate, and the interest in performance may not be accurately quantified. In a case where the claimant suffers limited or no loss while the defendant is enriched from the breach of contract, recourse cannot be taken to specific performance, compensatory or punitive damages. Disgorgement awards are commonly made by courts by invoking the maxim *commodum iniuria sua nemo habere debet*: "a man shall not be allowed to profit from his own wrong."[2]

Restitutionary damages arise where the commission of wrong results in accruing of benefit to the wrongdoer in excess of the loss suffered by the wronged person who suffers a lesser loss, or frequently, no loss at all.[3]The law of restitution deals with the principle against unjust enrichment, and the remedy may take two forms: Wherein, the claimant, seeks restoration of the benefit conferred upon the recipient and benefit emerging from a third party with no loss caused to the claimant. The restitutionary remedy of disgorgement primarily seeks to 'prevent the defendant's unjust enrichment by recapturing the gains the defendant secured in a transaction.'[4]When a greater profit margin is extracted by the wrongdoer, the unlawful gain cannot be retained, and the principle of disgorgement of profits comes into application.

However, there exists equivocality regarding awarding of disgorgement-based remedies under contract law for breach of contracts. The primary contention concerns whether a disgorgement claim constitutes an independent cause of action under "unjust enrichment" or as an alternative remedy to compensatory damages. A claimant may be entitled to remedy on both grounds in cases defendant on the facts of the same. The concept of restitutionary damages is an oft challenged one – given the exceptions of exemplary and nominal damages, damages are considered to be solely restricted to compensation for loss or damnum suffered. Restitution deals unjust enrichment of the defendant that arises from circumstances wherein no loss is suffered by the claimant. While the lexical semantics of the concept of restitutionary damages remains a disputed domain, the aim of reversal of unlawful gains of the defendant is in consonance with the contractual principle against unjust enrichment. Thus, this brings gain-based restitutionary remedies in the form of disgorgement of profits within the ambit of

[2] James J. Edelman, *Unjust Enrichment, Restitution, and Wrongs* 79 TEX. L. REV. 1875 (2001).
[3] HARVEY MCGREGOR, MCGREGOR ON DAMAGES 491 (19th ed. 2014).
[4] DAN B. DOBBS , LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 4.1(1) (2nd ed. 1993).

 [ISSN 2581-5369]

contract law.[5]

Both English law and Indian law have not ascertained a definitive rule of determining circumstances wherein awards in the form of disgorgement of profits arise. The provision of disgorgement as a remedy has primarily emerged as one of subjective application by courts and has led to differing interpretations regarding required circumstances for the same. This paper seeks to establish that there exist no predetermined circumstances warranting the award of disgorgement-based damages as evidenced by case law analysis. Despite the lack of clear precedents in this sphere of contractual damages, courts have not been averse to awarding gain-based remedies; hence there remains a lot of potential for further refinement and incorporation of the same with respect to civil cases.

II. DISGORGEMENT UNDER ENGLISH LAW

English law is primarily based on the harm-based approach that seeks to protect the claimant's interest in the performance of the contract.[6] The measure of damages subsequently determined for breach seeks to put him in the same position as he would've been had the contract been performed. In line with this approach, courts have primarily awarded compensatory damages in cases of contractual claims for breach. The rationale for the same is aptly stated in *Tito v Waddell* [7]– "the question is not one of making the defendant disgorge what he has saved by committing the wrong, but one of compensating the plaintiff".

The concept of gain-based damages was one that came into being under English law post the decision in *Wrotham Park Estate Co. v Parkside Homes*.[8] The judgement emerged as the first instance of award of damages that were not confined to financial loss under contract or tort law. The decision in *Attorney General v. Blake*[9] introduced the notion of an account of profits within the sphere of restitutionary damages. Subsequently, the judgements delivered in *Experience Hendrix v PPX Enterprises Inc*.[10] and *WWF World Wildlife Fund for Nature v. World Wrestling Federation Entertainment Inc.*[11] provided a series of factually differing cases of gain-based awards that help determine the scope of contractual disgorgement based damages.

[5] HARVEY MCGREGOR, MCGREGOR ON DAMAGES 493 (19th ed. 2014).
[6] Mathias Siems, *Disgorgement of profits for breach of contract: a comparative analysis*, 7 EDINBURGH L. REV. 27 (2003).
[7] Tito v Waddell (No 2) [1977] Ch 106.
[8] Wrotham Park Estate Ltd v Parkside Homes Ltd [1974] 1 WLR 798 (Ch).
[9] HM ATTORNEY GENERAL V BLAKE [2001] 1 AC 268.
[10] Experience Hendrix LLC v PPX Enterprises Inc and Another [2003] EWCA (Civ) 323 (CA).
[11] World Wide Fund for Nature v. World Wrestling Federation Enterprises Inc. [2007] EWCA (Civ) 286 (CA).

 [ISSN 2581-5369]

Wrotham Park Estate Co. v Parkside Homes[12]***:*** The case involved sale of a piece of land by the owner to the developer along with the covenant barring successors from developing land in a manner other than the lay-out plan approved by the owner. An injunction was filed for following the breach of the covenant, which was refused on the grounds of economic loss leading to the consideration of awarding nominal damages as there was no fall in the value of land due to erected buildings. Justice Brightman awarded damages in lieu of a mandatory injunction in the form of a quid pro quo for relaxation of the covenant. The aspect of gain-based damages for lost opportunity to bargain was considered as well though the theory was subjected to criticism as being fictional in subsequent cases. While this was initially regarded as a form of compensatory damages, in light of the following judgements, it has come to be regarded as an important example of a restitutionary award due to the requirement of the inadequacy of alternative remedies.

Attorney General v Blake[13]***:*** The House of Lords recognised the availability of gain-based damages for breach of contracts for the first time in Attorney General v Blake. The facts of the case were as follows – The defendant, George Blake, a former Secret Intelligence member for the Crown, later turned into a spy for the Soviet Union and subsequently published a book regarding his experiences. The Crown sought to ensure the prevention of royalties from the same as the defendant had divulged secrets in violation of his contractual undertaking pertaining to confidentiality of official information. Post rejection of the petitioners' claim for breach of fiduciary duty, a private law claim for restitutionary damages was filed. While the conception of gain-based damages wasn't expressly invoked, Lord Nicholls was able to avoid the usage of the phrase restitutionary damages due to his awarding of "an account of profits" as the suitable remedy for breach of contract.[14] With regard to determining the factor necessitating disgorgement-based remedies, two criteria were arrived at –

1. Proof of inadequacy of alternative remedies in the form of injunctions, specific performance and damages
2. Establishment of a legitimate interest on the part of the claimant in preventing the defendant's profit-making activity and hence, in deprivation of gains thus made.

The reasoning adopted by Lord Nicholls in arriving at this criteria was along the lines of "reasonable fee" cases regarding infringement of proprietary rights and provision of an

[12] WROTHAM PARK ESTATE LTD V PARKSIDE HOMES LTD [1974] 1 WLR 798 (CH).
13 Ralph Cunninghton, *The Measure and Availability of Gain-based Damages for Breach of Contract* in Contract Damages: Domestic and International Perspectives (Djakhongir Saidov & Ralph Cunnington eds., 2008).
[14] *Id*. at 493.

"account of profits" gained from breach of fiduciary obligations. The case of *Wrotham Park* v. *Parkside Homes*[15] was referred to highlight the wider scope of contractual damages beyond the restoration of financial loss.

***Experience Hendrix LLC* v. *PPX Enterprises Inc*[16]:** The case involved commercial use of music recordings by the defendant in breach of contract. Though no financial loss was suffered by the plaintiff, the English Court of Appeal held that the defendant was liable to pay a reasonable sum in respect of wrongful use of recordings. Justice Mance recognised that the law of damages includes objective measures as well, which do not correspond with the quantum of damages suffered by the claimant. Unlike Blake, a reasonable fee was determined in place of an account of profits in respect of unlawful gains. The Justice determined the additional criteria of "integral breach of contract" and "direct profit from breach" to the two-stage legitimate interest test laid down by Lord Nicholls. Thus the criterion of causation was established as a necessary limitation of the availability of disgorgement remedies. Blake was thus distinguished on the grounds of non-fulfilment of these criteria by the facts of the case in Hendrix.

***WWF-World Wide Fund for Nature v. World Wrestling Federation Enterprises Inc.*[17]:** This case further highlighted the implausibility of categorising disgorgement awards under a particular contractual category. The case involved a question of characterisation regarding the usage of the abbreviation *WWF*. The settlement agreement to limit the usage of the initials by the Federation was subsequently breached, leading to a contractual claim for damages. While the claim for an account of profits on the grounds of the decision in Blake was refused by the court due to the absence of required exceptional circumstances, a measure of damages on Wrotham Park basis was allowed.[18] The need for compensation in cases where an identifiable financial loss was not possible was reiterated, and the award was in the form of a license fee or *quid pro quo* for relaxation of claimant's rights under the agreement. Gain based damages awarded in the form of an account of profits in Blake were also distinguished by Chadwick L.J, who held the same to fall within the realm of compensatory remedies. Thus, the damages granted in this case cannot be categorised exclusively under gain-based awards or compensation but rather a combination of both.

Thus, an analysis of the key cases gives rise to the determination of specific situations for considering the award of restitutionary damages. The primary circumstances include those of

[15] WROTHAM PARK ESTATE LTD V PARKSIDE HOMES LTD [1974] 1 WLR 798 (CH).
[16] EXPERIENCE HENDRIX LLC V PPX ENTERPRISES INC AND ANOTHER [2003] EWCA (CIV) 323 (CA).
[17] World Wide Fund for Nature v. World Wrestling Federation Enterprises Inc. [2007] EWCA (Civ) 286 (CA).
[18] *Id*. at 239.

benefit arising from underperformance of contract , benefit resulting from a negative contractual stipulations in the case of restrictive covenants and benefit arising from a more profitable contract with a third party.

On the other hand, the accounting for the deliberateness in breaching contracts while awarding gain-based remedies leads to the contention of disgorgement falling under the head of punitive damages as well. While Lord Nicholls in *AG v Blake* held deliberateness as an insufficient factor in itself to warrant a gain-based award, it was subsequently emphasised as a significant determining factor in *Experience Hendrix* thus leading to the development of gain-based remedies in the sphere of punitive damages for breach of contract as well.[19]

III. DISGORGEMENT UNDER INDIAN LAW

Restitutionary damages in the form of disgorgement awards is a form of remedy rarely chosen by courts over compensatory damages in Indian contract law. Damages provided under the Indian Contract Act 1986 fall primarily under four heads – general damages, nominal damages, special damages and punitive damages. There exist no specific provisions under the Act facilitating disgorgement remedies under contractual claims. However, Sections 65 and 70 of the Act address the principle against unjust enrichment in the form of restitutionary remedies to compel forfeiture of unlawful gains due to breach of contract.

Section 65 deals with the obligation of person who has received advantage under void agreement, or contract that becomes void.[20] It requires the benefitting party to restore or compensate the other party who delivered the same to the recipient. The accompanying illustrations outlined in the Act deal with obligations to restore profits made from rescinding of contract by breaching party. The section deals with the principle against unjust enrichment and seeks to prevent the breaching party from retaining gains received under an abrogated agreement. It was held as a "compensatory principle for the prevention of unjust enrichment by the Calcutta High Court in *Ram Nagina Singh* v. *Governor-General in Council*[21] thus invoking the principle of *restitutio in integrum*. This Section also deals with the principle of *quantum meruit* and is not wider in scope than the common law doctrine of restitution. *Quantum meruit*, as a doctrine under contract law, refers to the actual value of unstipulated services rendered under a contract and involves a determination of a reasonable amount to monetarily compensate for the same. Section 65 only applies in cases where there exists a

[19] Solène Rowan, *Reflections on the Introduction of Punitive Damages for Breach of Contract*, 30 Oxf. J. Leg. Stud. 495, 510 (2010).
[20] POLLOCK & MULLA , THE INDIAN CONTRACT ACT 1872 1000 (14th ed. 2016).
[21] Ram Nagina Singh v. Governor-General in Council , AIR 1952 Cal 306 (1949)(India).

contract or agreement between competent parties. It arises as a restitutionary remedy when the original contract comes to an end or becomes void at a subsequent stage. But a cause of action under Section 65 cannot co-exist with the original cause of action, with the right under the latter being waived before a remedy is pursued under the Section.

Section 70 of the Indian Contract Act pertains to the obligations of individuals enjoying the benefit of a non-gratuitous act. The requisite conditions to invoke Section 70 were laid down in *State of West Bengal* v. *B.K. Mondal and Sons* as follows :

1. A lawful act or deliverance by one party to another
2. Non-gratuitous nature of the act or deliverance undertaken
3. Enjoyment of the benefit of the same by the recipient

The principle of unjust enrichment was further elaborated upon by the apex court in *Mafatlal Industries* v. *Union of India*[22] to uphold the right to recovery of excess taxes paid under a mistake of law. It was further applied to compel polluting chemical industries to pay remedial costs for enrichment at the cost of the public in *Indian Council For Enviro-Legal Action v. Union Of India & Ors*[23]. However, the provision of disgorgement based remedies under this section remains contested due to the debate over the ambit of the unjust enrichment principle extending to cover disgorgement-based damages as well.

Though the common law principle of restitution in the form of disgorgement is not prevalent under contract law, it has been imported by SEBI under Section 11B of the SEBI Act 1992[24] thus enabling the authority to issue directions in the interest of investors. By virtue of the explanation to the section inserted by the Securities Laws (Amendment) Act, 2014, the authority is vested with "the power to direct any person, who made a profit or averted loss by indulging in any transaction or activity in contravention of the provisions of this Act or regulations made thereunder, to disgorge an amount equivalent to the wrongful gain made or loss averted by such contravention." Disgorgement remedies for violation of securities law are based on the common law principles of equity and restitution and seek to enforce yielding of trading profits earned in violation of the law.

Disgorgement orders thus issued by SEBI to compel relinquishment of unlawful gains from breach of contract have frequently been upheld by the Securities Appellate Tribunal and the Supreme Court. A few relevant cases highlighting the utilisation of disgorgement awards as a

[22] Mafatlal Industries v. Union of India, (1997) 5 SCC 536 (1996)(India).
[23] Indian Council For Enviro-Legal Action v. Union Of India & Ors , (2011) 8 SCC 161 (India).
[24] Securities and Exchange Board of India Act, 1992.

 [ISSN 2581-5369]

form of damages include those of *Dushyant Dalal v. SEBI*[25] and the Roopalben Panchal Scam[26]. Two other significant instances of disgorgement measures directed by SEBI are against *Beejay Investment & Financial Consultants Private Limited*[27] and *Ramalinga Raju & Ors*[28] wherein the parties in the former suit were directed to disgorge unlawful trading profits earned in violation of disbarment orders. In the latter case, arising out of the Satyam scam, the parties were directed to disgorge the unlawful gains of 1848.93 crores accrued from insider trading and sale of shares in breach of SEBI provisions.

In the Dushyant Dalal case, the appellants deprived investors of their legitimate IPO shareholdings by distorting the demand for shares and thus unlawfully gained over four crores. They were directed by SEBI to disgorge the profits made along with interest cumulatively amounting to six crores, non-compliance with which would result in disbarment from trading on the securities market. The Roobalben Panchan Scam case dealt with the illegal acquisition of shares in multiple IPOs set aside for retail individual investors(RII) through fictitious trading accounts following which a SEBI order was issued compelling disgorgement of the unlawful gains along with interest aggregating to thirty-six crores, the failure of which would result in debarment under the authority's right to enforce disgorgement. In a more recent order[29] passed in 2017, Reliance Industries was directed by SEBI to pay over 1300 crores on the grounds of fraudulent trading in stock of subsidiary Reliance Petroleum resulting in unlawful gains. The appeal against the same is currently underway by the Securities Appellate Tribunal.

Disgorgement remedies as stipulated by foreign arbitral awards enforced by Indian courts form a part of disgorgement-based damages under Indian law as well. In the case of *Venture Global Engineering* v *Satyam Computer Services Ltd*[30] , the Andhra Pradesh High Court upheld the validity of the disgorgement of royalties in form of the arbitral award by the London Court of International Arbitration while stating that the court did not have jurisdiction over the suit as the parties had undertaken arbitration for dispute resolution and thus, the New York Convention Awards incorporated in the 1996 Act[31] would be in force.

[25] MANU/SC/1239/2017.
[26] Securities Appellate Tribunal, Order in the matter of irregularities in IPOs, WTM/PS/17/EFD/JUNE/2015 (Issued on April 7, 2015).
[27] Securities and Exchange Board of India, Order under Section 11B, WTM/PS/57/IVD/JUN/2016 (Issued on June 16, 2016).
[28] Securities and Exchange Board of India, Order under Section 11B, WTM/RKA/SRO/64 - 68 /2014 (Issued on July 15, 2014).
[29] Securities and Exchange Board of India, Order under Section 11B, WTM/GM/EFD/ 18 /MAR /2017 (Issued on March 24, 2017).
[30] 2007 SCC Online AP 148.
[31] Arbitration and Conciliation Act, 1996, § 44.

 [ISSN 2581-5369]

IV. COMPARATIVE ANALYSIS OF DISGORGEMENT REMEDIES

Disgorgement based remedies in other common-law and civil law systems have primarily involved varied interpretations of the harm-based approach. The courts of Ireland have awarded disgorgement remedies in exceptional cases involving deliberate, cynical exploitation of breach of contract in order to make a gain as emphasised in the form of obiter dicta in *Hickey v Roches Stores.*[32]

Disgorgement awards under German law on damages are considered on grounds of normative damages or unjust enrichment in contractual claims for infringement of intellectual property rights. "*Commodum ex negotiation"* is another important form of disgorgement under German, Swiss and Austrian law that arise in breach of contract by sale to third party whereby the claimant is entitled to the profits made on the second sale.

Restitution in American law exists both as a ground for recovery and a measure of damages. Restitution may often be the sole remedy available in cases where remedy for breach is unavailable due to unenforceability of contract. Courts regard restitution as an equitable remedy primarily in cases where the legal remedy for breach is prevented. As a measure of damages, it is the amount necessary to restore the benefit conferred by one party on the other. The determination of the restitution award is specified under Section 371 of the Second Restatement.[33]

Disgorgement as a principle entails surrender of gains obtained by the party who reneges and is not generally an accepted ground for damages in American contract law.[34] However, courts are generally willing to grant disgorgement based remedies when the injured party requests for the same in cases where the bargain seems to be in preference of the party in breach. However, as per Section 373, total breach must be suffered and suit for performance of contract cannot coexist with the claim for restitution. However, in the Restatement of Restitution Draft, the principle of recovery in form of restitution on grounds of unjust enrichment is utilised wherein the contract remedies are insufficient. Specific restitution in unenforceable contracts compelling the party in breach to return property to the other party is a less common remedy for breach under this head of gain based remedies.[35]

In a case similar to Blake, the disgorgement principle was invoked by the US Supreme Court

[32] Hickey v. Roche Stores (Dublin) Ltd (No 1) (1976) [1993] RLR 196 (HCI).
[33] Restatement (Second) of Contracts § 178 (Am. Law Inst. 1981).
[34] BRIAN H. BIX, CONTRACT LAW – RULES, THEORY AND CONTEXT 101 (2012).
[35] GREGORY KLASS, CONTRACT LAW IN THE USA 229, 282 (2010).

 [ISSN 2581-5369]

in *Snepp v United States*.[36] The appellant had published classified information related to the CIA in breach of agreement restricting the same. He was held by the court to have breached a fiduciary obligation and directed to disgorge profits rather than pay punitive damages as it was determined to be a more effective deterrent and form of remedy.

Another landmark case highlighting the importance of disgorgement in situations of insufficient loss-based remedies is that of *Warren* v. *Century Bankcorporation*, Oklahoma SC.[37] In the aforementioned case, the parent company was sued by the minority shareholders of Bankcorporation for the establishment of a subsidiary in the loan sector on grounds of unfair competition. Despite the defence of ultimate benefit accruing to Bankcorporation from the subsidiary, the court invoked the principles of disgorgement and held that wrongdoing of unfair competition is ideally remedied through deprivation of the unlawful gain rather than compensation of adversely affected parties.

Gain-based remedies have also been increasingly granted in suits pertaining to the Federal Food, Drug and Cosmetic Act in American restitution law. Some of the largest impositions of financial penalties on healthcare companies for violation of the Act have primarily involved disgorgement of gains. The focal cases include Abbott Laboratories, Wyeth Ayerst and Schering Plough. The recourse to this form of remedy however has been highly contested in recent times given the lack of case authority to substantiate the same. [38] Recoverability of disgorgement damages is recognised under Article 74 of the United Nations Convention on Contracts for the International Sale of Goods as well thus highlighting the same as a relevant, applicable form of remedy.

V. CONCLUSION

Gain-based monetary rewards have been awarded by courts under a variety of measures including damages in substitution of injunctions, exemplary damages, accounts of profits and wayleave cases in form of reasonable fees for unconsented use of plaintiff's rights. While these remedies seem to incorporate the principle against unjust enrichment as their underlying objective, disgorgement of profits cannot be solely classified under the same. The court accounts for factors including public policy, considerations of wrongdoing and justice in going beyond compensatory damages to deprive defendants of unlawful gains.[39] More often than not,

36 (1980) 444 US 507 (US SC).
37 Warren v. Century Bankcorporation, Inc., 1987 Okla. (14).
38 JEFFREY GIBBS, IT'S THE LAW DISGORGEMENT AND RESTITUTION (2006), https://hpm.com/wp-content/uploads/2006/02/Law_Feb.pdf (last visited Mar 21, 2021).
39 STEPHENS WADDAMS, GAINS DERIVED FROM BREACH OF CONTRACT IN CONTRACT DAMAGES 191 (2008).

disgorgement based remedies are considered in addition to compensatory damages rather than in substitution in cases wherein the loss suffered by the claimant is difficult to quantify. In the words of Lord Lloyd[40], "*the principle need not be characterised as exclusively compensatory or restitutionary; it combines elements of both*."

However, a definitive rule hasn't been formulated with respect to ascertaining gains derived from breach of contract. The test laid down in Blake on grounds of 'whether the plaintiff had a legitimate interest in preventing the defendant's profit making activity and hence, in depriving him of the same' has been subject to criticism for its non-contractual nature. The notion of compensation for loss to opportunity to bargain is more acceptable as a complementary form of damages in addition to money awards. While gain-based awards have been linked to punitive and deterrent considerations, the fact remains that breach of contract and unjust enrichment may occur without fault on part of the defendant thus rendering such considerations undesirable.

Gain based damages in the form of disgorgement are awarded in linkage with the intertwined considerations of justice, undue enrichment, restitution, practical convenience and compensation rather than with respect to a particular aspect of contractual claims. While the scope for arbitrary and subjective awards cannot be overlooked in the absence of clear precedents and definitive rules , the criticism may be countered on grounds of the general rule upholding compensatory damages for breach of contracts in the majority of cases with recourse to disgorgement awards being taken by courts primarily in exceptional cases. Interdependent factors including availability or foreclosure of ordinary damages, deprivation of opportunity to bargain, unjust enrichment by retention of gains, considerations of deterrence and public policy are accounted for in determining the necessity of disgorgement of profits under contractual claims. Thus, endeavours directed towards formulation of a precise rule or categorisation will ultimately lead to oversimplification of the issue which in itself may defeat the court's objective of ensuring justice.

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[40] Inverugie Investments Ltd v. Hackett [1995] 1 WLR 713 (PC) 718.

 [ISSN 2581-5369]