Concentrate Questions and Answers Contract Law: Law Q&A Revision and Study Guide (3rd edn)

James Devenney

12. Additional Remedies

James Devenney, Head of School and Professor of Transnational Commercial Law, School of Law, University of Reading, UK and Visiting Full Professor, UCD Sutherland School of Law, University College Dublin, Ireland

https://doi.org/10.1093/he/9780192865625.003.0012

Published in print: 13 October 2022

Published online: October 2022

Abstract

The *Concentrate Questions and Answers* series offers the best preparation for tackling exam questions. Each book includes typical questions, answer plans and suggested answers, author commentary, and other features. The standard common law remedy of damages will not always prove adequate for the victim of a breach of contract. Equity therefore developed a number of additional remedies, discretionary in nature, aimed at ensuring that a claimant was not unreasonably confined to an award of damages; in particular, specific performance and injunctions. The possibility of awarding restitutionary damages, in part to offset any unjust enrichment secured by a contract-breaker, is also considered.

Keywords: contract law, remedies, performance, specific performance, injunctions, damages, unjust enrichment, restitution

Are you ready?

In order to attempt the questions in this chapter you must have covered the following areas in your revision:

- When the standard common law remedy of compensatory damages might not prove adequate for the victim of a breach of contract, and when additional discretionary equity remedies may be relevant;
- The nature of the remedy of specific performance;

- The nature of mandatory and prohibitive injunctions;
- When injunctions will be ordered;
- When a claim to specific performance (or injunction) can be combined with claims for damages (see **ss. 49–50 of the Senior Courts Act 1981**);
- When courts have been prepared to consider the award of 'restitutionary damages', based on the recovery of gains secured by the defendant (as opposed to an award based on the loss suffered by the claimant).

Key debates

Debate: the nature of the remedy in *Attorney General v Blake* [2001] 1 AC 268.

Is the aim of this remedy to punish the party in breach of contract? When will it be available?

Debate: the nature of the award in the line of authority emanating from *Wrotham Park Estate Co. Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (although compare *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20).

There has been a lot of debate about whether the defendant is being asked to: *restore* unjustly acquired profits to the victim; account for profits; or pay a sum of money equivalent to that which the non-breaching party would have charged the defendant for release from an existing legal/contractual duty.

p. 198

Question 1

The circumstances in which a court may be prepared to order specific performance or grant an injunction in respect of a breach of contract are so limited as to make such remedies almost superfluous nowadays.

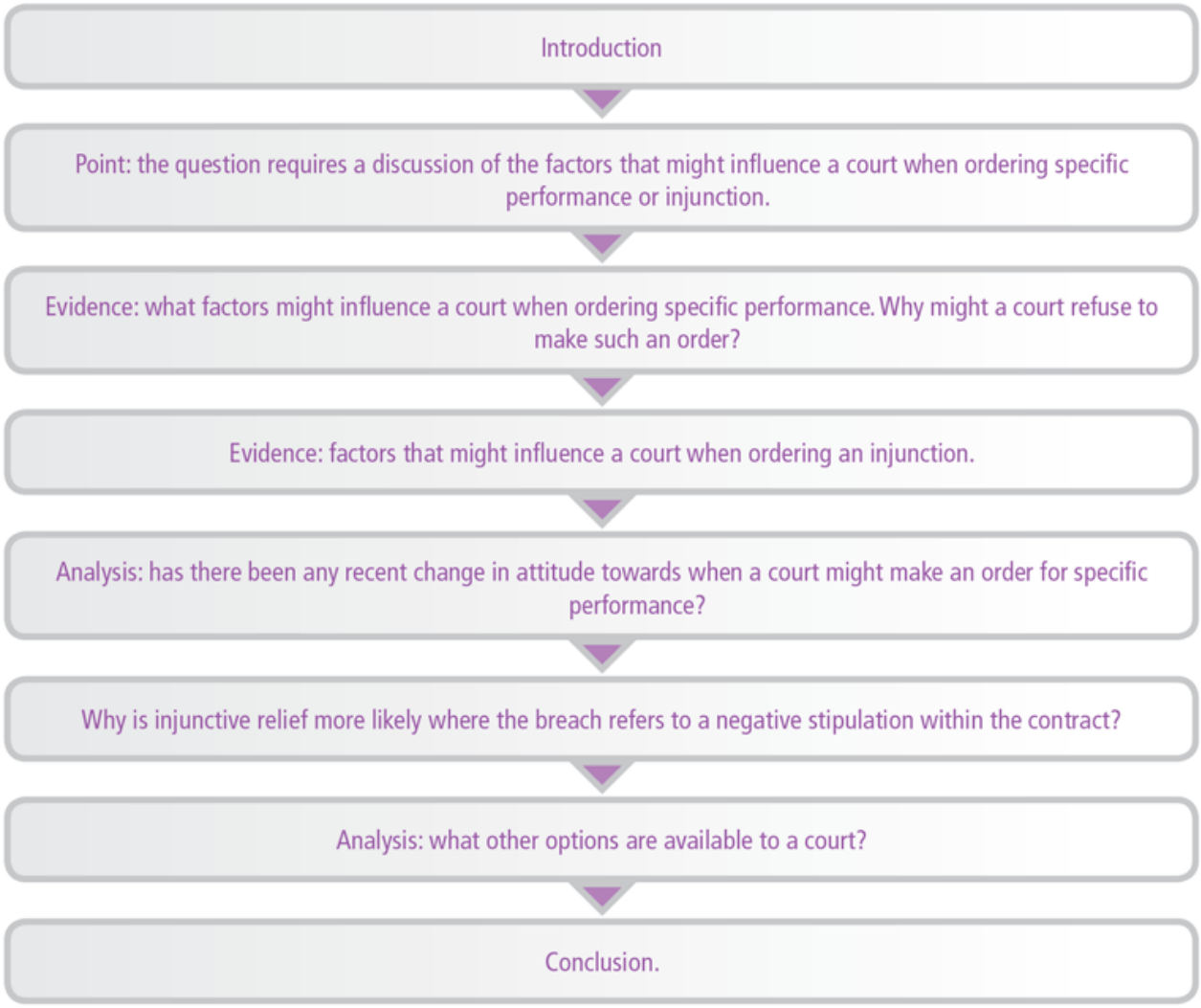
Discuss.

Caution!

■ It is very unlikely, although not impossible, that an examination question would be set exclusively on equitable remedies. It is more likely that some aspect of equitable remedies will arise in a damages question or form part of a mixed question (see **Chapter 14** on mixed questions).

■ Questions in this area are most likely to comprise essays, so you can use the PEA structure.

Diagram answer plan



p. 199

Suggested answer

This essay requires a discussion of the equitable remedies of specific performance and injunction in relation to breach of contract.

Specific Performance

The remedy of specific performance (where a court orders performance) is a discretionary remedy sometimes granted by the courts in connection with a breach of contract: 'The court gives specific performance instead of damages, only when it can by that means do more perfect and complete justice' (***Wilson v Northampton and Banbury Junction Ry Co.* (1874) 9 Ch App 279** at 284 per Lord Selborne). In particular, a court will consider certain questions.[1]

[1] There are some key questions—address each in turn.

The first question to be addressed is whether damages are an adequate remedy; if so, a court would be very unlikely to grant an order of specific performance. Consequently, specific performance of contracts of sale of goods are rarely ordered where the contract involves goods which are readily available in the market. Thus, in cases of non-delivery of such goods, purchasers would be expected to purchase the required goods elsewhere; if that came at a higher price, or the purchaser is put to costly inconvenience, the court can award damages to cover this. In such circumstances, damages would be considered an adequate remedy. However, if the purchaser finds that he/she cannot obtain a satisfactory substitute elsewhere, damages may be viewed as inadequate (see ***Phillips v Lamdin* [1949] 2 KB 33**, at 41, involving the wrongful removal of an Adam door, and ***Gregor Fisken Ltd v Carl* [2020] EWHC 1385 (Comm)** where the court awarded specific performance in respect of a unique and original gearbox to a Ferrari purchased for $US44 (approved on appeal: **[2021] EWCA Civ 792**)). Other examples of inadequacy potentially include the speculative nature of the claimed damages, the difficulty of proving loss (see also ***AB v University of XYZ* [2020] EWHC 2980 (QB)** where specific performance of a contract between a student and a university was ordered on the ground that there was, in that case, no realistic way to assess damages for the student not being able to have legal representation at a disciplinary hearing.) or the irrecoverability of the claimed loss in law (see, generally, ***Decro-Wall International SA v Practitioners in Marketing Ltd SA* [1971] 1 WLR 361**).

However, more recent case authority suggests some relaxation in this overall approach, possibly making orders for specific performance a little more likely.[2] In ***Laemthong Lines Co. Ltd v Artis (The Laemthong Glory) (No. 2)* [2005] EWCA Civ 519, [2005] 1 Lloyd's Rep 632**, specific performance was ordered as the assessment of damages in similar circumstances had not been 'an entirely

p. 200 straightforward matter'. More importantly, in ***Thames Valley Power Tool Ltd v Total Gas and Power Ltd* [2005] EWHC 2208 (Comm), [2006] 1 Lloyd's Rep 441** the defendant sought to be released

from an obligation to supply gas to the claimant for 15 years, at a rate that was subject to a complicated formula, on grounds of *force majeure*. This argument was rejected and, seemingly, the obligation to supply the gas was specifically enforceable as the original contract had been based on the claimant's need to receive gas from a first-rate supplier for a minimum period of time; in effect, as the claimant would not have been able to secure supply from an equivalent, substitute source, damages were an inadequate remedy. A separate justification revolved around the difficulty of calculating future losses and the delay that might be encountered in obtaining payment of any damages.

[2] Examine the case law that helps to build an argument.

In deciding whether to award an order for specific performance, a court '... will only grant specific performance if, under all the circumstances, it is just and equitable to do so' (see ***Stickney v Keeble* [1915] AC 386** at 419 and see also ***NaviG8 Chemicals Pool Inc v Aeturnum Energy International Pte Ltd* [2021] EWHC 3132 (Comm)** on the relevance of the defendant's conduct). An order will usually only be made if:[3] (a) the contract could also be enforced by the defendant, at the time of the hearing (see ***Sutton v Sutton* [1984] 1 All ER 168**); (b) the defendant can comply with the order (see ***Watts v Spence* [1976] Ch 165**; ***The Sea Hawk* [1986] 1 WLR 657**); (c) the claimant has not taken unfair advantage of the defendant (eg negotiating with a drunkard) or has acted dishonestly or in some other unconscionable way (compare ***Watkin v Watson-Smith* [1986] CLY 424** with ***Shell UK Ltd v Lostock Garages Ltd* [1976] 1 WLR 1187**); and (d) it will not cause the defendant severe hardship (see ***Patel v Ali* [1984] Ch 283 and compare UTB LLC v Sheffield United Ltd [2019] EWHC 2322 (Ch)**), or the costs of performance are not wholly disproportionate to the benefit conferred on the claimant (see ***Tito v Waddell (No. 2)* [1977] Ch 106** at 326). These cases demonstrate the overarching 'fairness' considerations of the existing judicial approach to specific performance of a contract. The possibilities of enforcement are wide-ranging, but their use is significantly influenced by the individual circumstances of both parties. Recent cases have not undermined that approach.

[3] Note: some examiners might dislike use of (a), (b), etc. within essays.

Finally, when deciding whether or not to award an order for specific performance, there are certain types of contract that courts generally do not enforce. This would include, for example, a contract of personal service; so, employees cannot be forced to work for their employer and an employer who is found to have unfairly dismissed an employee ultimately cannot be compelled to reinstate or re-engage him/her (this is an area supplemented by statute). The courts are also wary of

p. 201 ↵ enforcing contractual performance where constant supervision would be required. For example, in ***Ryan v Mutual Tontine Association* [1893] 1 Ch 116** the lease of a flat gave the tenant a right to have a

porter 'constantly in attendance' but the court's reluctance to supervise such activities on a daily basis led to a refusal to grant an enforcement order. Yet the courts have shown some flexibility: in ***Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*** **[1998] AC 1** the House of Lords stated its disquiet with any refusal of an enforcement order based *solely* on the need for constant supervision, helpfully highlighting the difference between supervision of an ongoing 'activity' and a 'result', the latter being far easier to execute. Since then, courts have been prepared to enforce building/repair obligations where the required work could be described with greater certainty (eg ***Rainbow Estates Ltd v Tokenhold Ltd*** **[1999] Ch 64**), whilst in ***Thames Valley Power (see earlier)*** the potential problems of supervising the maintenance of a gas supply contract that still had five years to run were seemingly ignored by the court.

These comments potentially suggest, at the very least, that orders of specific performance remain an important remedy for dealing with contract breaches.[4] Can the same be said for the use of injunctions?[5]

[4] Reach some form of conclusion here before moving to the next part of the question.

[5] Make sure to address both remedies indicated in the question.

Injunctions

Traditionally, an injunction would be refused if it would compel the defendant to perform acts which could not form the basis of a decree of specific performance (eg a contract of personal service—see ***Chappell v Times Newspapers Ltd*** **[1975] 1 WLR 482**). There are some important exceptions to the general rule.[6]

[6] Answers often require consideration of a legal rule and its exceptions. Here, address the three exceptions.

First, if the contract contains a negative stipulation it may be possible for the injunction to be framed in such a way as to enforce this negative aspect without compelling positive performance of the whole contract. For example,[7] when an employee resigns in order to take up employment with another firm, the (now) ex-employer may wish to enforce a restraint clause in the relevant employment contract which prevents ex-employees from working for competing firms within a specified area: a properly framed injunction could enforce this negative obligation (if not an invalid restraint of trade) without forcing the employee to work for his old employer; for example, he could find work outside the

specified area or join a non-competing firm (see ***Fitch v Dewes* [1921] 2 AC 158**; ***Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472**). However, the employee must possess a reasonable, alternative way of earning his/her living, otherwise an injunction serves as a disguised form of specific performance (see, generally, ***Page One Records v Britton* [1968] 1 WLR 157**).

7 This is quite a complicated point, so using an example can help the explanation.

p. 202 ↵ Secondly, except in contracts of personal service, the courts have sometimes been prepared to *imply* negative stipulations into the contract even though the contract, as a whole, may not be specifically enforceable. In ***Associated Portland Cement Manufacturers Ltd v Teigland Shipping A/S* [1975] 1 Lloyd's Rep 581**, an injunction was granted to prevent a shipowner from employing a ship under charter in ways that were inconsistent with the charterparty.

Thirdly, a negative stipulation which is too wide can be severed and enforced in part. For example, in ***Warner Bros Pictures Inc. v Nelson* [1937] 1 KB 209**, the defendant undertook neither to act for third parties without the plaintiff's consent nor to 'engage in any other occupation' without requisite permission. An injunction was awarded to enforce the former obligation, but the latter was considered unenforceable as it would force the defendant, an actress, to work for her existing employer.

The courts are not compelled to adopt an 'either/or' approach to the award of damages or specific performance/injunction.[8] Although **s. 50 of the Senior Courts Act 1981 (SCA 1981)** allows courts to award damages in lieu of, or in substitution for, specific performance and injunction, **s. 49 of the SCA 1981** permits courts to entertain a *combined* claim to damages and specific performance or injunction. Consequently, a court can prevent future breaches via the grant of an injunction whilst compensating a claimant for past breaches via the award of damages (see ***Experience Hendrix LLC v PPX Enterprises Inc. and Edward Chaplin* [2003] EWCA Civ 323, [2003] EMLR 25**).

8 This shows awareness of how the remedies can interact.

In conclusion,[9] it would appear that specific performance and injunctions continue to perform important roles, even if at common law damages remains the primary remedy for dealing with breaches of contract.

9 A brief conclusion should suffice as the argument has been clearly developed throughout.

Looking for extra marks?

■ Be wary of questions that seemingly encourage you to adopt a particular stance. Essay questions give you an opportunity to reveal the extent of your knowledge, but their primary purpose is to see how you can use that knowledge to produce a well-thought-out argument that is directed towards defending or attacking a particular proposition. To ensure higher marks, your answer must achieve this.

Question 2

The concept of 'restitutionary damages', as exemplified in ***Attorney General v Blake*** **[2001] 1 AC 268**, can displace the standard rules for assessing recoverable loss in a breach of contract action in favour of measuring the claimant's loss by the value of the defendant's unjust enrichment.

Discuss.

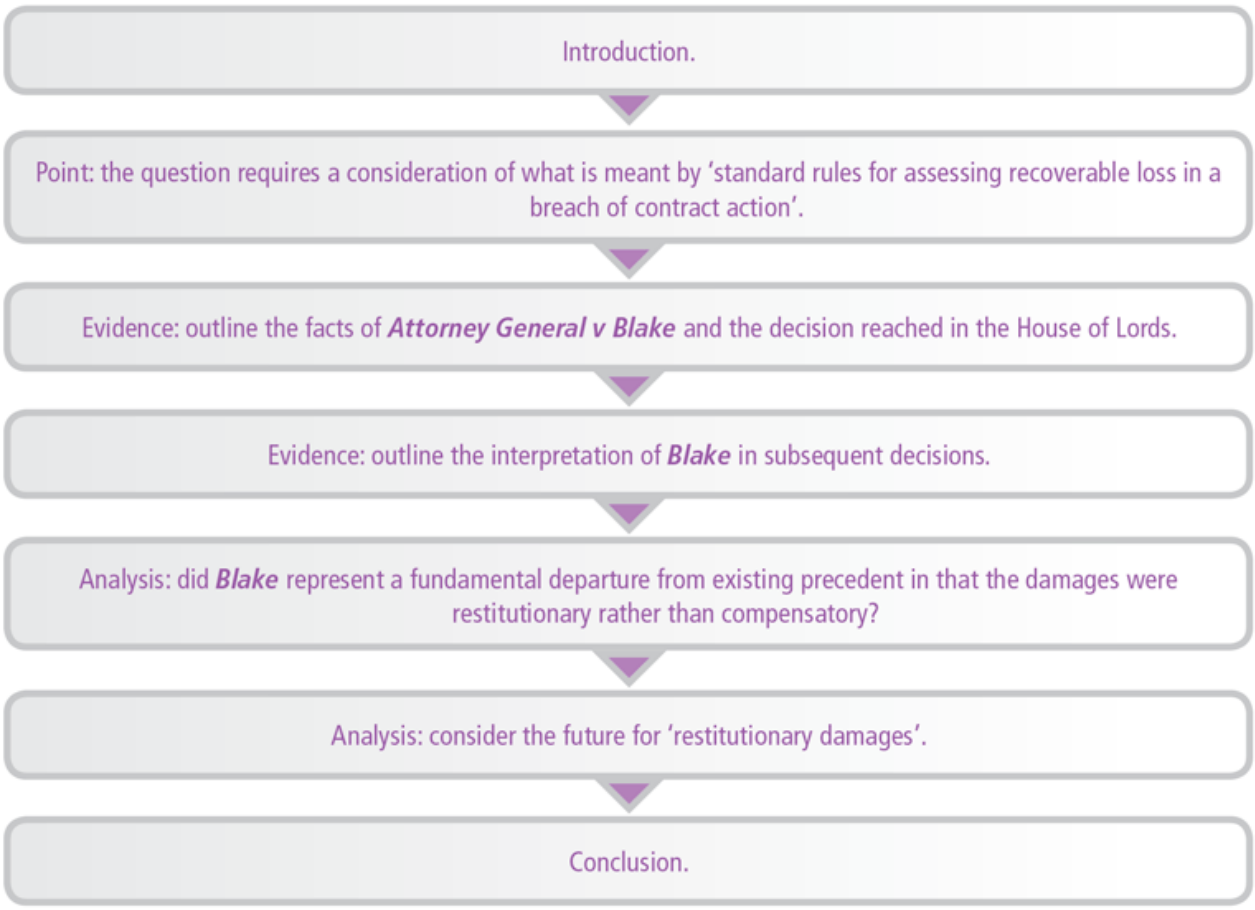
p. 203

Caution!

■ This is a difficult question, requiring analysis of a number of complex cases relating to an area of law with many uncertainties.

■ Don't be afraid to acknowledge that this may be an area where 'there is never one answer'.

Diagram answer plan



Suggested answer

In the landmark case of ***Attorney General v Blake*** **[2001] 1 AC 268** the House of Lords considered the traditional focus of the courts on *compensating* a claimant for actual losses suffered as result of a breach of contract and also whether a different measure might be adopted where, for example, a defendant purposely breaches a contract in order to secure an additional benefit or profit but the claimant suffers no financial loss.

p. 204 ↵ The traditional purpose of an award of damages for breach of contract[1] is to ensure that the victim is compensated for his/her losses, provided those losses would have been reasonably contemplated as liable to result from that breach (at the time of contract formation). This focus is evident in a number of cases, including recently in ***Morris-Garner v One Step (Support) Ltd*** **[2018] UKSC 20**.[2] The court will seek to place the victim, so far as money can do this, in the position he/she should have occupied if the contract had been properly performed (***Robinson v Harman*** **(1848) 1 Ex**

850). Such damages usually compensate the victim for lost expectations although where, for example, such expectations are difficult to value, the courts have been prepared to award reliance damages as a substitute (eg ***McRae v Commonwealth Disposals Commission*** **(1951) 84 CLR 377**). As damages are traditionally intended to offset the victim's loss, rather than punish the defendant for his/her breach, damages would usually be nominal if the claimant suffered no loss. Awarding damages predicated on the claimant's lost consumer 'surplus' simply represents the value that a court would have attributed to the claimant's known, subjective expectation (eg in ***Jarvis v Swan Tours Ltd*** **[1973] 1 QB 233**, the level of enjoyment anticipated from going on holiday). This is also illustrated by ***Ruxley Electronics and Construction Ltd v Forsyth*** **[1996] AC 344 (HL)** where the plaintiff was awarded damages for loss of an 'enjoyable amenity' arising from the installation of a swimming pool that failed to conform to the original contract specification in terms of its required depth, consequently potentially limiting the plaintiff's level of enjoyment from its use (see also ***Morris-Garner v One Step (Support) Ltd*** **[2018] UKSC 20** at **[40]**).

[1] First address what is meant by the phrase 'standard rules for assessing recoverable loss in a breach of contract action'.

[2] Review the case law on this point.

However, in ***Blake***[3] the House of Lords addressed a case where the defendant purposely breached a contract to secure an additional benefit or profit but the claimant apparently suffered no financial loss. In that case the defendant, a former member of MI5, defected to the Soviet Union and wrote his autobiography. Publication of this book breached the defendant's former employment contract. It was held that, in *exceptional* circumstances, where the normal basis for damages provided inadequate compensation, and particularly where the discretionary remedies of specific performance and injunctions were unavailable (the autobiography had already been published), the defendant could be compelled to account to the victim for any benefits secured from the breach. Such damages would protect the claimant's 'interest in performance'. In ***Morris-Garner v One Step (Support) Ltd*** **[2018] UKSC 20** Lord Reed stressed at **[82]** that the correctness of the ***Blake*** decision was not in question in that appeal.

[3] Outline the facts of ***Blake*** and what decision the House of Lords reached.

p. 205

Whilst some argued that the approach adopted in ***Blake*** seemed to follow the earlier decision in ***Wrotham Park Estate Co. Ltd v Parkside Homes Ltd*** **[1974] 1 WLR 798** where a form of 'gains-based' damages had arguably been awarded for the breach of contract (although such a view of ***Wrotham Park*** was subsequently rejected in ***Morris-Garner v One Step (Support) Ltd*** **[2018] UKSC 20**, where the Supreme Court regarded ***Wrotham Park*** as compensatory in nature), ***Blake*** appeared to go much further: the Crown successfully recovered *all* of the defendant's profits. How could this be justified?[4] Lord Nicholls, representing the majority view, appeared to emphasize the quasi-fiduciary nature of the parties' employment relationship: arguably the defendant's breach of confidentiality fundamentally undermined the morale and trust of existing MI5 personnel and their informers and, more importantly, the general operational effectiveness of the intelligence services. Beyond that, Lord Nicholls's speech offers some general indications. First, this type of award could only be justified in *exceptional* circumstances. Secondly, a claimant would need to establish the existence of a *legitimate interest* in preventing the defendant's profit-making activity. Finally, evidence of 'skimped performance', or proof that the defendant had profited by doing the very thing he had contracted not to do, were insufficient per se to be considered 'exceptional'.

[4] Don't be afraid to pose questions, and then provide an answer.

Although ***Blake*** was initially viewed as a 'one-off' decision, it was soon followed by ***Esso Petroleum Co. Ltd v Niad Ltd*** **[2001] EWHC 6 (Ch), [2001] All ER (D) 324**.[5] In that case the parties had entered into a petrol solus agreement, with the claimant also providing a monetary inducement to each of its tied customers, including the defendants, to charge specified (and lower) petrol prices to its forecourt customers. On proof that the defendants had failed to discount the forecourt price, the court held that 'restitutionary damages', following ***Blake***, were potentially available. No attempt was made to justify this award on grounds that it represented the price for which the defendants would have paid for being released from an existing contractual commitment (as on a compensatory view of ***Wrotham Park***). ***Niad*** raised a number of questions, including whether the circumstances were sufficiently 'exceptional' (as per ***Blake***) for an award of restitutionary damages.[6] However, it is clear that the court was prepared to award damages on the basis of the defendant's gain rather than the claimant's financial loss.

[5] The point here is whether subsequent decisions interpreted ***Blake*** expansively or sought to limit its application.

[6] Acknowledge where the law is uncertain.

The crucial problem lies in identifying the basis upon which damages were awarded in ***Blake***.[7] The damages were not clearly punitive; although the defendant had to give up all profits received or expected, no *additional* financial penalty was imposed. Two possible interpretations subsequently emerged. First, that the decision was a logical extension of a compensatory view of ***Wrotham Park*** and, therefore, represented a new method of compensating the claimant ↵ for a breach of contract whilst complying with the overriding 'compensatory' approach in ***Robinson v Harman***. Alternatively, the decision represented a form of restitutionary relief whereby the level of damages was determined by the size of the defendant's gains rather than the hypothetical amount the claimant might have charged for releasing the defendant from an existing contractual commitment.

p. 206

[7] Analyse whether ***Blake*** represented a fundamental departure from existing precedent in that the damages were restitutionary (not compensatory) in nature.

The current weight of authority clearly favours the view that compensatory damages were awarded in ***Wrotham Park*** (see ***Morris-Garner v One Step (Support) Ltd*** **[2018] UKSC 20**);[8] that is, reflecting the plaintiff's loss rather than the defendant's gain—an important conclusion because much of the analysis in ***Blake*** relies upon this case. Indeed, in ***Jaggard v Sawyer*** **[1994] EWCA Civ 1, [1995] 1 WLR 269**, Sir Thomas Bingham pointed out that the court in ***Wrotham Park*** had been influenced by the level of the defendants' profits *not* for the purposes of stripping them of those profits, but because it provided a suitable context within which to identify the amount they would have been willing to pay to secure a release from the relevant contractual commitment (see also ***Gafford v Graham*** **[1998] EWCA Civ 666, (1998) 77 P & CR 73**). However, the more important question is whether one can extrapolate from ***Jaggard*** that the damages awarded in ***Blake*** were also compensatory. Clearly the result achieved in ***Niad*** suggested otherwise, whilst the court in ***Harris v Wynne*** **[2005] EWHC 151 (Ch), [2006] 2 P & CR 595** again adopted the label of 'restitutionary damages' in referring to ***Blake*** (at [34]) and treated the defendant's 'underhand dealings' as essential when making such an award.

[8] Refer to subsequent case law.

This ongoing debate was revisited in ***WWF-World Wide Fund for Nature (formerly World Wildlife Fund) v World Wrestling Federation Entertainment Inc.*** **[2007] EWCA Civ 286, [2007] 1 All ER 74**. Chadwick LJ (delivering the main judgment) found 'puzzling' any suggestion that restitutionary damages had been awarded in ***Wrotham Park***. He considered the remedy adopted in ***Wrotham Park***, and the account

of profits in ***Blake***, as being 'juridically highly similar', especially as their common underlying feature was the need to compensate in circumstances where the claimant could not establish an identifiable loss. This suggested that the dividing line between hypothetical release damages and an account of profits was becoming blurred.[9] However in ***Morris-Garner v One Step (Support) Ltd*** **[2018] UKSC 20** Lord Reed (with whom Lady Hale, Lord Wilson, and Lord Carnwath agreed) was of the opinion that the award in ***Blake*** *was not* compensatory in nature. By contrast Lord Reed felt that the award in ***Wrotham Park*** *was* compensatory in nature. That award was made in lieu of an injunction (as permitted under Lord Cairns' Act) and, as such, one 'possible method of quantifying damages under

p. 207 ↵ this head is on the basis of the economic value of the right which the court has declined to enforce, and which it has consequently rendered worthless'; in valuing such a right 'the amount which the claimant might reasonably have demanded as a quid pro quo for the relaxation of the obligation in question' (so-called 'negotiating damages'). Moreover, Lord Reed recognized that negotiating damages might also be awarded at common law in appropriate circumstances. In particular, such damages might be awarded where the breach of contract results in the 'loss of a valuable asset created or protected by the right which was infringed'. Examples might include the breach of a restrictive covenant over land, the breach of an intellectual property agreement, or the breach of a confidentiality agreement (**[92]**). In such cases, the imaginary negotiation is merely a tool for determining the value of the relevant asset (**[91]**). Crucially Lord Reed was of the opinion that not all contract rights were to be considered as an asset in this sense (**[93]**) although it is, perhaps, not clear how the distinction will be made. More recently in ***Priyanka Shipping Limited v Glory Bulk Carriers Pte Limited*** **[2019] EWHC 2804 (Comm)** David Edwards QC (sitting as a Judge of the High Court) held that 'negotiating damages' were not available where the purchaser of a ship used the ship in breach of a provision as to the permitted use of the ship.

[9] Acknowledges that the law is unclear.

Moreover, in ***Morris-Garner v One Step (Support) Ltd,*** Lord Reed disagreed with some of the statements in ***Experience Hendrix LLC v PPX Enterprises Inc*** **[2003] EWCA Civ 232** that negotiating damages could be used more widely to achieve 'practical justice'. Nevertheless, Lord Reed agreed with the decision in the case on the basis, as discussed earlier, that it involved the breach of an intellectual property agreement.

It would, therefore, seem that ***Blake*** represents a judicial preparedness to award gains-based damages in *exceptional* circumstances. Whilst ***Niad*** appears to go further, it is arguably unlikely to be followed,[10] with the ***Blake*** principle primarily operating where the parties have an existing fiduciary or quasi-fiduciary relationship, which will magnify the responsibilities of the defendant not to abuse a dominant position.

[10] This appears quite a confident statement, but it is offered as an opinion.

Therefore, the original question is only partly correct.[11] A court can compensate the victim of a breach of contract in the most effective way possible, including either the award of damages predicated on the claimant's lost expectation (***Robinson v Harman***), or the costs of his reliance (***McRae v Commonwealth Disposals Commission***), or the deprivation of a valuable asset, which may be best informed by the gains secured by the defendant (***Wrotham Park*** and ***Morris-Garner v One Step (Support) Ltd*** **[2018] UKSC 20**). It is true that ↵ the damages awarded in ***Blake*** were measured by the defendant's gain but this approach can also, to some extent, be adopted in calculating compensatory damages (***Wrotham Park*** and ***Morris-Garner v One Step (Support) Ltd*** **[2018] UKSC 20**). Case law demonstrates that the use of the term 'restitutionary damages' can be misleading as compensatory damages measured by the defendant's gain (***Wrotham Park***) are not the same as damages specifically intended to strip the defendant of his/her profits (***Blake***). This analysis is reinforced by posing one simple question: how can damages in ***Blake*** be viewed as compensatory when the parties never concluded a bargain and in no circumstances would have done so (ie compensation for loss of bargain was never possible)?

p. 208

[11] Here is the conclusion, based on the preceding analysis.

Looking for extra marks?

■ Additional marks may be awarded for noting that in ***Jaggard v Sawyer*** Sir Thomas Bingham's approach to ***Wrotham Park*** conflicted with the view of ***Wrotham Park*** as an example of an award of 'restitutionary damages reversing the defendants' unjust enrichment' in the Law Commission Report (*Aggravated, Exemplary and Restitutionary Damages*, Law Com Report No. 247, 1997, at para. 1.36). See now ***Morris-Garner v One Step (Support) Ltd*** **[2018] UKSC 20**.

Taking things further

■ Bartlett, E. and Humphreys, E., 'One Step Could Not Side-Step Usual Contract Breach Principles' (2018) 191 Emp. LJ 22.

Considers ***Morris-Garner v One Step (Support) Ltd*** **[2018] UKSC 20.**

■ Cunnington, R., 'The Assessment of Gains-Based Damages for Breach of Contract' (2008) 71 MLR 559.

Considers the ***Wrotham Park*** *measure and the* ***Blake*** *measure as two different measures of gain-based damages for breach of contract*.

■ Fox, D., 'Restitutionary Damages to Deter Breach of Contract' (2001) 60 CLJ 33.

Suggests that, following ***Attorney General v Blake*** **[2001] 1 AC 268,** *the deterrent nature of restitutionary damages removes the financial incentive for defendants to walk away from the contract*.

■ Schwartz, A., 'The Case for Specific Performance' (1979) 89 Yale LJ 271.

Argues for routine availability of specific performance.