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The Damage in Negotiating Damages

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I. Introduction

This chapter focuses on the crucial issue of principle left exposed in the 2018 Supreme Court decision of *Morris-Garner v One Step (Support) Ltd*.[1] The question before the Court was beguilingly simple: when can the remedy for breach of contract be assessed not by way of 'expectation damages',[2] but instead by way of 'negotiating damages',[3] being – as the label suggests – the sum which would reasonably be agreed between the parties as the price for releasing the defendant from the obligation which it failed to perform?

The Court's answer, delivered in a 30,000-word judgment, was far from simple. For the ensuing five years lawyers have struggled to unravel the judgment's key paragraphs. To provide yet another round in these debates may thus seem a poor choice for a chapter in a book titled *Shaping the Law of Obligations*. But for good reason the case is acknowledged to be not only difficult but also important.[4]

Unless we understand the principles underpinning different remedies, we will never properly understand the nature of the rights in issue. For all the words in *One Step*, it is still not clear exactly *when* negotiating damages will be awarded and when not, nor, more importantly, quite *why* they are awarded in some cases but not in others. This uncertainty is all the more troubling when common law damages for breach of contract are claimed not a matter of judicial discretion, but as of right, to be awarded or refused on the basis of legal principle.[5] Here ordinary contract damages and negotiating damages are both billed as compensatory

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[1] *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, [2019] AC 649 (SC) (hereafter *One Step*).
[2] *Robinson v Harman* (1848) 1 Ex 850, 855 (Parke B). That typically means putting C in the same economic position as if the contract had been performed. However, if the contract is designed to provide C with non-economic benefits, those aspects can be evaluated in money and added to C's claim for compensation: *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL); *Jarvis v Swan Tours Ltd* [1973] QB 233.
[3] *One Step* (n 1) [3], being the majority's preferred terminology generally, although borrowed from a case concerning damages under Lord Cairns' Act; contrast the SGCA in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44, [2018] 2 SLR 655 (SGCA), preferring '*Wrotham Park* damages'.
[4] A measure of its importance can be gleaned from the number of commentators writing on it. See, eg, Andrew Burrows, 'One Step Forward?' (2018) 134 LQR 515; William Day, 'Restitution for Wrongs: One Step in the Right Direction?' (2017) 133 LQR 384; William Day, 'Restitution for Wrongs: One Step Forwards, Two Steps Back' (2018) 26 RLR 60; Adam Kramer, 'Contract Damages' in William Day and Sarah Worthington (eds), *Challenging Private Law: Lord Sumption on the Supreme Court* (2020), ch 5; Charles Mitchell and Luke Roskill, 'Making Sense of Mesne Profits: Causes of Action' (2021) 80 CLJ 130; Charles Mitchell and Luke Roskill, 'Making Sense of Mesne Profits: Remedies' (2021) 80 CLJ 552; Edwin Peel, 'Negotiating Damages after *One Step*' (2020) 35 JCL 216; Man Yip and Alvin WL See, 'One Step Away from *Morris*-Garner: *Wrotham Park* Damages in Singapore' (2029) 135 LQR 36.
[5] *One Step* (n 1) [95](12) (Lord Reed).

remedies for the claimant, but it seems that neither the claimant nor the court can choose freely to pursue one in preference to the other.[6]

II. *One Step* and the argument advanced in this chapter

In *One Step* itself, the difference between the expectation damages measure and the negotiating damages measure was c.£2m, so the answer to the question before the Court was worth debating. The facts were unexceptional. C had purchased a business from D, with C's position protected by a restraint of trade covenant prohibiting D from competing for three years.[7] Less than a year later D set up in competition. Much later, well after the covenants had expired and indeed after D had sold the offending business for a substantial profit, C claimed damages for breach of contract. The proceedings at every level focused on principle, not quantification, but C's experts had assessed expectation damages (C's provable economic losses as a result of D's breaches) as c.£4m and negotiating damages (the sum for which C would reasonably have agreed to release D from the restraint of trade clause) as c.£6m.[8] The Supreme Court held that C was confined to expectation damages: neither C nor the court could elect for the more advantageous negotiating damages measure.

The majority's explanation was set out in Lord Reed's judgment.[9] Lord Reed began with a detailed assessment of the different principles underpinning damages claims in tort, in contract, under Lord Cairns' Act (LCA),[10] and in the long line of 'negotiating damages' cases that followed *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*,[11] including the exceptional disgorgement remedy for breach of contract awarded in *Attorney General v Blake*.[12] He then set out the principles underpinning negotiating damages in a series of paragraphs (see especially [91]-[95]) which included the key finding that negotiating damages are available:[13]

> 92 … *where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed, as for example in cases concerned with the breach of a restrictive covenant over land, an intellectual property agreement or a confidentiality agreement. Such cases share an important characteristic* … The claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the asset in question. *The defendant has taken something for nothing, for which the claimant was entitled to require payment.*

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[6] Ibid, [96]-[97]. If this is what the Court meant, it is doubted. See, eg, *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 (CA) (hereafter *Strand Electric*); *Ministry of Defence v Ashman* (1993) 66 P&CR 195 (CA) (hereafter *MoD v Ashman*). Also contrast this with the liberty given to C to decide whether to pursue its claim for compensation by proving its expectation losses or by proving its (necessarily lower value) reliance losses, and whether to pursue only its economic losses or also its amenity damages.
[7] And also prohibited D from soliciting C's customers or using C's confidential information.
[8] *One Step* (n 1) [12]-[15].
[9] With Baroness Hale PSC, Lord Wilson and Lord Carnwath JJSC agreeing. Lord Sumption reached the same conclusion on the facts, but for different reasons.
[10] Lord Cairns' Act 1858, s 2, now s 50 of the Senior Courts Act 1981.
[11] *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch) (hereafter *Wrotham Park*).
[12] *Attorney General v Blake* [2001] 1 AC 268 (HL) (hereafter *Blake*).
[13] *One Step* (n 1) [92].

This is a difficult paragraph to unravel, but that is the goal of this chapter. It may facilitate the journey to reveal my intended destination at the outset.[14]

First, the aim is not to invent new legal territory for this area. It is merely to put in place clearer signposts across the territory that already exists. Many of the present difficulties are of our own making. We have used terms such as 'use value', 'licence fee', 'hypothetical bargain', '*Wrotham Park* damages',[15] 'release fee', and now the preferred term 'negotiating damages', in quite undifferentiated ways to describe very different remedies being awarded in response to quite different legal claims. To use the same terms, without discrimination, to describe several conceptually distinct legal territories inevitably leads to analytical chaos: no route map can deal effectively with that problem.[16]

Secondly, the path out of this difficulty is to unpick the different and distinct strands of legal analysis buried in the cases, and expose them for what they are. Once that is done – and if the analysis presented here is accepted – it will be clear that these various words are used in five quite different contexts. They are used when courts quantify the money remedy due to C by way of (i) ordinary contract damages (assessing C's loss as a result of D's breach of contract);[17] (ii) ordinary tort damages (assessing C's loss as a result of D's tort);[18] (iii) LCA damages (assessing C's loss as a result of the court's exercise of its discretion in declining to grant C the injunction requested); (iv) disgorgement damages (stripping D of all the profits made from D's breach, in the rare cases where that is the principled response); and, finally, (v) restitution for unjust enrichment (stripping D of the unjust enrichment obtained from C by virtue of D's unauthorised use of C's property). If we are to make sense of this area, then we need different labels – different signposts – to indicate that a different legal analysis underpins each of these five different remedies.

Finally, the argument in this chapter is that the form of 'negotiating damages' being considered in *One Step*, and the form which all the analysis in that case is endeavouring to define and circumscribe, is an *unjust enrichment claim* advanced by C, not a claim for compensation for breach of contract. It is a claim against D because D has been unjustly enriched by the unauthorised *use* of C's property. If this is recognised, it then follows directly from the very nature of this claim that this option it is not available unless D has indeed made unauthorised use *of C's property*. This is so when D makes such use of C's chair or horse or land or intellectual property;[19] it is not so when D merely breaches a term of some contractual arrangement between C and D, no matter how valuable C's contractually protected rights might be. If this is true, it follows that *One Step*-negotiating damages (if recognised as an unjust enrichment claim) is straightforwardly not available for breach of a restraint of trade

[14] This is also my long-preferred destination: see Sarah Worthington, 'Reconsidering Disgorgement for Wrongs' (1999) 62 MLR 218.
[15] Following *Wrotham Park* (n 11).
[16] A point made emphatically by Lord Walker in *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2011] 1 WLR 2370 (PC), [46] (hereafter *Pell Frischmann*).
[17] Meaning the orthodox expectation damages measure: see n 2. By way of illustration, see Lord Sumption's approach in *One Step* (n 1). Note that claims for reliance losses in contract do not provide another distinctive remedial option to C; their basis lies under the head of expectation damages: they are available only when C cannot prove expectation damages, but can at least show that those damages would exceed C's provable reliance losses. In those circumstances C can elect to claim only the latter provable sum. See the analysis in Ewan McKendrick, *Contract Law* (14th edn, Macmillan International 2021) 399-401.
[18] For the general rule, see *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (Lord Blackburn).
[19] And any associated proof of D's contract breach or D's commission of a tort is merely to show that D's use is *unauthorised*; it is not for the purpose of claiming C's economic losses by way of ordinary contract or tort damages.

clause. Equally, it is suggested, it is not available for breach of an equitable duty of confidence or a contractual confidentiality agreement.[20] D's various wrongs in these circumstances do not include *D's use of C's property*.

The wider context is important, however. Even without an unjust enrichment claim, C is protected in other ways. C can of course claim ordinary contract damages. That is what happened in *One Step*. Tort damages may provide an alternative in some situations. But in almost all the early negotiating damages cases C could show no such loss. That was the problem. In many of those cases, however, C could nevertheless seek an injunction to protect its rights.[21] The court could then either order an injunction or, alternatively, award LCA damages to C. The LCA jurisdiction is wide: it can protect both proprietary and non-proprietary interests;[22] it is therefore not subject to the same 'asset-restrictive' limits sought to be imposed on *One Step*-type negotiating damages.

There are hints of these various alternative claims hiding in the shadows of the principal paragraphs of *One Step* noted earlier. It is this looming presence of different remedial approaches, I suggest, that makes these paragraphs so difficult to unravel and to apply outside the contexts specifically described.

For example, in paragraph [91] Lord Reed notes that:

> 91 The use of an imaginary negotiation can give the impression that negotiating damages are fundamentally incompatible with the compensatory purpose of an award of contractual damages. *Damages for breach of contract depend on considering the outcome if the contract had been performed*, whereas an award based on a hypothetical *release fee depends on considering the outcome if the contract* had not been performed but *had been replaced by a different contract*.[23]

He holds that this impression of fundamental incompatibility is misleading. Nevertheless, this observation identifies a crucial distinction in the relevant counterfactuals in assessing remedies. The latter approach describes precisely the scenario adopted in assessing LCA damages: in those cases, and those cases alone, the court assesses the price at which C would agree to a common *future* where D has been released from the contract or tort obligations it would otherwise owe C. The terminology of '*release fee*' is perfect: it is accurate and informative.

Moving on, the meat of defining negotiating damages then appears in paragraphs [92]-[95]. Taking paragraph [92], cited earlier, as illustrative, there is an evident tension between the assertion that:

> The claimant has in substance been deprived of a valuable asset, and *his loss* can therefore be measured by determining *the economic value* [presumably to him] of the asset in question.

And the next observation that:

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[20] Contrast *One Step* (n 1), especially [92] and [93]. Nevertheless, see Part VII below.
[21] Injunctions to restrain breach of negative covenants or continuing trespasses are relatively common, even where breach of the covenant or commission of the tort does not cause C provable economic loss.
[22] See *Pell Frischmann* (n 16) itself, and also Lord Walker at [46].
[23] *One Step* (n 1) [91] (emphasis added).

> The *defendant has taken something for nothing*, for which the claimant was entitled to require payment.

The former clings to the idea that it is C's economic position that is the focus. Yet so often in these cases C's economic position has been shown to be completely unaffected by D's breach: D has used assets which C was not using at all. It does not clarify or assist to insist that the compensable loss in issue is 'a loss of a different kind',[24] and yet is a loss which C cannot itself elect to pursue.[25]

By contrast, the insight that really clamours for a remedy in C's favour is that D '*has taken something for nothing*' from C. Notice four matters in this context. *First*, this clearly requires more than D simply benefitting incidentally from its breach of contract or the tort. What matters is that D has *taken* something from C. The wrong is merely in the background to explain why the *taking* is unauthorised. *Secondly*, where such *taking* is unauthorised, leaving it unremedied seems patently unjust. This is regardless of whether C has suffered any economic loss itself. Equally, however, and *thirdly*, the injustice that requires a remedy only arises where D *has* taken a benefit. It is not enough, as we will see, that D's breach has simply prevented C from using its own asset. That is remedied by ordinary contract or tort damages. *Finally*, the labelling issue: this focus on D, and D's taking of an unauthorised benefit from C, is – I suggest – the key finding in all the words in *One Step*. It is this remedy that the Court sought to describe and circumscribe. And this remedy – I argue – is a remedy in unjust enrichment, not a remedy for breach of contract.

All this reinforces the need for clearer language. Negotiating damages is too broad a term to enable different contexts to be usefully distinguished. In the context of C's claims for ordinary contract or tort damages, the focus is on C's economic position. C can recover damages for all the economic losses it has suffered as a result of D's breach of contract or D's tort. This includes C being able to recover *'C's provable lost hire charges or licence fees'*, being what C might otherwise have gained in the ordinary course if the assets were, as they should have been, at C's disposal. As the cases show, this means that C will have such claims where C is in the business of hiring out its equipment, leasing its land, licensing its intellectual property, but not otherwise.

By contrast, if the focus is on D's unauthorised taking of C's asset for its own use, and *if* C's claim is a claim in unjust enrichment, then the remedial focus is on D's position, not C's. C can recover the unjust enrichment in D's hands. This might best be labelled as '*D's use value*' to make the point that the focus is on the value *to D* of D's use of C's asset. That is typically the hire charge, or rental or lease charge, that D would have to pay to third party to obtain the same benefit D has obtained without authority from C.

And by further contrast, LCA damages apply in a much wider context. Hire charges, licence fees and use value do not capture the breadth of the context, nor the approach that needs to be taken by the court. Those terms all look either at what has been lost by virtue of breaches that have already taken place, or what has been gained by unauthorised usage that has already taken place. By contrast, LCA damages look *forwards* to a reformed arrangement between

[24] *One Step* (n 1) [30].
[25] Ibid, [36].

the parties, and, for the reasons already noted, a '*release fee*' measure appears perfect as a description of the court's approach to the assessment before it.

But the real task of this chapter is to persuade that the core claim being discussed by the Supreme Court in *One Step* is really an unjust enrichment claim, not a claim for compensation for breach of contract. That requires re-examination of the key cases underpinning this jurisdiction.

III. Older authorities: tort cases

Lord Reed's examination of the earlier authorities began with the tort cases. Where C's property is 'invaded' in the commission of a tort, the cases divide sharply into two groups. In the first, the invasion causes financial loss to C, typically being loss or damage to the property itself and/or lost income because D's breach prevents C's own profitable use of the property.[26] In the second group, C suffers no such financial loss because the property is not taken or damaged, and C would not have made productive use of it.

For example, in *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd*,[27] C's chattels (electric switchboards which C hired out in its own business) were wrongfully detained by D. C sued D in detinue for return of the chattels and its lost hiring charges. Romer LJ focused on C's own economic losses.[28] He noted the surprising absence of direct authority which addressed C's tort losses arising from D's retention and use of C's chattels. Nevertheless, he followed the approach traditionally adopted in land cases and ordered D to return the chattels and pay by way of damages the lease or hiring charges C would otherwise have accrued for the whole period.

He rejected D's complaint that C should not be able to recover the full hiring value, but should give allowance for the usual lay periods when C would not have been able to find a hirer, holding instead that: '[i]t does not lie in the mouth of such a defendant to suggest that the owner might not have found a hirer; *for in using the property* he showed that he wanted it and he cannot complain if it is assumed against him that he himself would have [hired the chattels] rather than not … had the use … at all'.[29] The obvious inference is that, were the facts otherwise, this assumption would not be made: C would then recover only on its usual pattern of hiring.

Romer LJ also rejected D's related claim that it had *not* 'used' the chattels, and so was not subject to this presumption, since it had not actively operated the switchboards but simply kept them on site. Romer LJ noted that D's reason for retaining the switchboards was to make its theatre more saleable than it would otherwise have been, and held that this amounted to use of the equipment by D for its own purposes.[30] In assessing C's losses, Romer LJ also noted that it was irrelevant whether D's use had been profitable for D or not; the only point in issue was an assessment of C's economic losses.[31]

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[26] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (HL), 39 (Lord Blackburn).
[27] *Strand Electric* (n 6).
[28] Somervell and Denning LJJ, by contrast, focused on D's benefits from its unauthorised use: see below.
[29] *Strand Electric* (n 6) 257 (Romer LJ).
[30] Ibid, 256 (Romer LJ).
[31] Ibid, 256 (Romer LJ).

This is all standard fare. The more interesting question is what is to happen if C's property is *not* damaged, and C would *not* have used it productively. In those circumstances, even though a wrong has been committed, C has suffered no economic loss. The orthodox response, both in contract and tort, would be to say that D's wrong has not caused C the type of harm for which the law would make D liable.

Yet there is a powerful intuition that there is something seriously deficient in a legal regime that permits D to make unauthorised use of C's property at will, with no legal consequences so long as the use does not harm C's economic position. The very suggestion goes against all common notions of property and private ownership. And so the judges found a way to provide remedies in just this these circumstances.

Looking back at the legal landscape from our present position, we might say that the judges who took this bold step were clearly not quite sure how to categorise the legal problem being addressed, nor how to describe the remedy they were awarding, but award they did, and with remarkably similar reasoning.

They recognised clearly the distinction between what they were doing in orthodox cases where C's provable economic loss was in issue and what they were doing in these cases where C had suffered no such provable loss.

Both issues arose in *Whitwham v Westminster Brymbo Coal and Coke Co*, where Lindley LJ explained:

> The plaintiffs have been injured in two respects. First, they have had the value of their land diminished; secondly, they have lost the use of their land [although this was not a loss which had caused the plaintiffs economic harm], and the defendants have had it for their own benefit. It is *unjust to leave out of sight the use which the defendants have made of this land for their own purposes*, and that lies at the bottom of what are called the way-leave cases. Those cases are based upon the principle that, if one person has without leave of another been using that other's land for his own purposes, he ought to pay for such user.[32]

The same appreciation of the two different strands of analysis is evident in *Watson Laidlaw & Co Ltd v Pott Cassels & Williamson*,[33] a patents case. Lord Shaw contrasted the traditional claim by C for the economic loss caused to C's business by D's infringement of C's patent, with the different claim which C might make when D made use of the patented invention in jurisdictions where C could not have traded. He described the former as governed by the principle of '*restoration*' of C to the condition in which he would have been had he not so sustained the harm (whether by way of D's tort, breach of contract or infringement of C's statutory rights), no matter how difficult that might be to quantify in money. This is ordinary contract, tort, or statutory damages. By contrast, the second strand was governed by the principle '*of price or of hire*' applicable 'wherever an abstraction or invasion of property has occurred':

[32] *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538 (CA), 541-2 (Lindley LJ). Similarly Rigby LJ at 543.
[33] *Watson Laidlaw & Co Ltd v Pott Cassels & Williamson* 1914 SC (HL) 18 (HL Scotland) (hereafter *Watson Laidlaw*).

> For 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, as I say, *either of price or of hire*. 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.'[34]

Based on that analysis, he held that C was entitled to prove and claim its own loss in the markets in which it operated *and also* (since these were not overlapping) prove and claim a royalty for the unauthorised sale or use of every one of the infringing machines in those other markets in which C own operations were not competing.[35]

The very same approach was adopted by the majority in *Strand Electric*. As noted earlier, Romer LJ based his conclusions on the fact that the tort had deprived C of the profit earning capabilities of its assets. By contrast, both Somervell and Denning LJ reached the same remedial quantum, but based their conclusions on D's 'use value'. As Somervell LJ put it, 'the defendants had for their own benefit the use of the plaintiffs' chattels … The wrong is not the mere deprivation, as in negligence and possibly some detinue cases, but the *user*'.[36] Because this was a case where the goods were normally hired out commercially, he valued that user at the commercial rate.

Denning LJ was equally forthright, while also recognising the alternative option open to C of simply claiming for C's own economic loss:

> If a wrongdoer has made use of goods for his own purposes, then he must pay a reasonable hire for them, even though the owner has in fact suffered no loss. … He cannot be better off by doing wrong than he would be by doing right. …
>
> I am here concerned with the cases where the owner has in fact suffered no loss, *or less loss than is represented by a hiring charge*.[[37]] In such cases *if the wrongdoer has in fact used the goods* he must pay a reasonable hire for them. … The claim for a hiring charge is … not based on the loss to the plaintiff, but on the fact that the defendant has used the goods for his own purposes. It is an action against him because he has had the benefit of the goods. *It resembles, therefore, an action for restitution rather than an action of tort.*[38]

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[34] Ibid, 30.

[35] Ibid, 32. Note that the royalty measure is apt for the latter aspect of the claim: it represents the proper 'price' D would have to pay to obtain the use it had made of C's patents in jurisdictions where C was not itself operating. By contrast, C's *own* losses, in the areas where C *was* competing, are assessed on the basis of proof of C's own losses, but these may sometimes require full disgorgement of D's profits *if* C can prove that these profits *are* the equivalent of C's losses. This frequent equivalence between C's lost business and D's gained business in patent cases explains why the alternative approaches in calculating C's losses are so common, and are indeed reinforced by statutory provisions delivering precisely those ends. Nevertheless, it is important to recognise that the goal is to *assess C's losses* as a result of D's infringement; it is not to strip D of D's gains where there is no equivalence. Lord Shaw makes that plain: ibid, 30-31.

[36] *Strand Electric* (n 6) 252 (emphasis added).

[37] This is a significant (and I think accurate) observation, the implication being that C can elect for the more advantageous option.

[38] *Strand Electric* (n 6) 254-5 (emphasis added).

This final observation is especially prescient, given that English law was more than 35 years away from recognising claims in unjust enrichment and their associated remedies of restitution of the unjust enrichment that D had obtained at C's expense.[39] Perhaps even more remarkable is that Denning LJ recognised this as the appropriate characterisation here, even though many of the early unjust enrichment cases were concerned with D's receipt of *assets* at C's expense, not merely receipt of the '*use value*' of those assets.[40]

Several points are worth reinforcing.

First, all these judges clearly appreciated they were doing two different things: remedying the loss C had suffered as a result of D's wrongdoing was one thing; compelling D to pay a hire fee or royalties for the unauthorised use of C's assets was another. The first requires C and D to be linked by D's *wrongdoing to C* where C has suffered a resulting economic loss; the second requires C and D to be linked by D's *unauthorised use of C's assets* where D has had the benefit of use.

Secondly, this 'use value' approach is only available if there *is* 'use' by D. If C is simply kept out of its expected use of its own assets because D has negligently damaged those assets and cannot return them, or because D is a carrier or a warehouseman who has detained those assets for longer than expected, then the appropriate remedy is simply the ordinary remedy in tort or contract for the recovery of C's provable economic loss; it is not recovery related to D's unauthorised 'user', as there has been no such 'user' by D.[41] Put another way, in these 'use value' cases, the claim being made or the right being protected is not simply *C's* 'loss of dominion' over its assets; it is *D's* abstraction of benefit, its 'taking something for nothing' in making use of C's assets without C's consent.

Thirdly, not one of these claims addressing D's 'use value' (here categorised as unjust enrichment claims) requires D to disgorge the profits of its beach. These are not disgorgement claims. The judges made this plain in all the cases considered so far, and that approach persists in those still to be addressed. Despite this, there is dogged discussion, even after *One Step*, which posits the question of whether negotiating damages are 'restitutionary' or 'compensatory'. 'Restitutionary' in this context refers not to restitution for unjust enrichment – far from it – but to disgorgement of the profits generated from D's wrongdoing.[42] By contrast, the analysis already laid out here, and supported in what comes later, all confirms, firmly, the view that 'use value' claims are *not* designed to strip D of all the profits generated by its unauthorised use of C's assets; they are not even designed to do this on some sliding scale that somehow addresses the significance of C's rights or the culpability involved in D's use of C's assets.[43]

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[39] *Lipkin Gorman v Karpnale Ltd* [1988] UKHL 12, [1991] 2 AC 548 (HL).

[40] Even with *Lipkin Gorman* in play, Nourse LJ predicted that the likely recognition of 'use value' as an unjust enrichment claim still lay some way into the future: *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406 (CA), 1415 (hereafter *Stoke-on-Trent CC*).

[41] *Strand Electric* (n 6) 249-50 (Somervell LJ), 254 (Denning LJ).

[42] See the comments and the cases cited in *One Step* (n 1) [11] (C's formulation of its claim), [58]-[60], [113]; also see the extended analysis in Mitchell and Roskill, 'Mesne Profits: Remedies' (n 4), which includes discussion of these cases.

[43] Much of the subsequent discussion of the remedy awarded in *Wrotham Park* (n 12) is in this vein, and yet finds no support in the judgment itself; see too *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830 (CA) (hereafter *Experience Hendrix*), discussed below.

Disgorgement is an exceptionally rare remedy in the common law. Bar the contract breach claim in *Attorney General v Blake*,[44] which was itself described as exceptional and has barely been followed since, the disgorgement remedy is restricted to fiduciaries and those in receipt of confidential information. In these two contexts the disgorgement remedy is not designed to protect C from economic harm, nor to protect C from having its property used in an unauthorised fashion; it is designed to protect these special *relationships* by discouraging self-interested behaviour by D where the nature of the relationship renders that a real moral hazard *and* the relationship cannot provide the protective attributes intended and inherent in it merely by focusing on remedying harm to C.[45] In these circumstances the approach is not to seek compensation from D, but to deny D the benefit of all of D's profit-making ventures that fall within the scope of the fiduciary or confidential relationship.[46]

IV. Older authorities: contract cases

The preceding cases are all tort cases, but the approach to 'use value' claims in the context of contracts offers further insights. The simple facts in *Ministry of Defence v Ashman*[47] expose the remedial alternatives in play. C owned property which it leased at a concessionary rent to D2, a member of the Royal Air Force. At the outset, D2 had agreed that he was entitled to occupy the property only so long as he remained a serving member of the Royal Air Force living with his spouse (D1). Two years later, D2 moved out, leaving D1 and their two children in occupation. A month later, C gave the defendants notice to vacate within two months. However, D1 could not afford the local market rents, and did not leave until 11 months after the notice to vacate had expired, when she finally obtained local authority housing.

The issue before the court was the basis upon which C's 'damages' or 'mesne profits'[48] should be calculated. Three very different figures were suggested: the open market rental of the property (£472 pcm); the rental cost of appropriate local authority housing (£145 pcm); or the concessionary rental charge offered by C to its service personnel (£95 pcm). C claimed the proper basis was the property's open market rental; D1 and D2 claimed it was the concessionary rental. The Court of Appeal awarded the equivalent local authority housing rental. What is crucial for present purposes is how the court arrived at this conclusion.

The court's finding that the basis of C's claim in this case lay in unjust enrichment could not be more explicit. The orthodox compensatory measure in tort was an alternative route to a remedy, but the two remedies were described in terms, and on principles, that render them mutually exclusive: the former is not some special measure of compensation operating as a subset of the latter category in special cases.

Hoffmann LJ offered a pithy description of the route taken by the majority:

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[44] *Blake* (n 12).
[45] Sarah Worthington, 'Fiduciaries: When Is Self-Denial Obligatory?' (1999) 58 CLJ 500.
[46] See Sarah Worthington, *Equity* (2nd edn, OUP, 2006), ch 5 (hereafter Worthington, *Equity*) (but noting the comments below at n XX). Note too that this same approach does not apply to contractual duties of confidence, where the remedies are contract damages, not disgorgement, unless the relationship can be characterised as also a relationship of confidence and the information in issue as 'confidential'.
[47] *MoD v Ashman* (n 6).
[48] Ie sums of money paid for the occupation of land to a person with a right of immediate occupation, where no permission has been given for that occupation.

> A person entitled to possession of land can make a claim against a person who has been in occupation without his consent on two alternative bases. *The first is for the loss which he has suffered in consequence of the defendant's trespass*. This is the normal measure of damages in the law of tort. *The second is the value of the benefit which the occupier has received. This is a claim for restitution.* The two bases of claim are mutually exclusive and the plaintiff must elect before judgment which of them he wishes to pursue. These principles are not only fair but, as Kennedy L.J. demonstrated, well established by authority.
>
> 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.*[49]

Kennedy LJ reached the same conclusion via the older authorities.[50] He cited from *Swordheath Properties Ltd v Tabet*[51] – another case where tenants had over-stayed – and from *Penarth Dock Engineering Co Ltd v Pounds*.[52] In the latter case D had failed to remove a pontoon he had purchased from C in circumstances where C could not itself show any loss from the breach of contract and Lord Denning MR had said that:

> The test of the measure of damages is *not what the plaintiffs have lost, but what benefit the defendant obtained by having the use of the berth* … If he had moved it elsewhere, he would have had to pay on the evidence £37–10s a week for a berth for a dock of this kind. [53]

In *MoD v Ashman,* C had elected for this unjust enrichment 'use value' remedy. It adduced no evidence of its own losses, these being irrelevant to a restitution claim. All that mattered was the value of benefit which D1 and D2 had received. Both Hoffmann and Kennedy LJJ agreed that the open market value will ordinarily be appropriate because the defendant has chosen to stay in the premises rather than pay for equivalent open market premises somewhere else. But they noted that sometimes benefits may not be worth as much to the particular defendant as to someone else, especially in circumstances where a defendant has not been free to reject the benefit. In short, special circumstances may warrant subjective devaluation.

Here there were two special circumstances: D1 had previously occupied the premises at a concessionary rent; and she now had, in practice, no choice but to stay in those premises until the local authority was willing to rehouse her. The latter context indicated an objective 'use value' to D1, valuing what she would have to pay for equivalent accommodation elsewhere as the equivalent local authority housing rental which she was unable to access immediately. But D1 could not remain in C's property, insisting on that below-market 'use value', if her earlier behaviour had indicated she valued C's property more highly than that. Here, however, she had occupied C's property at a concessionary rate below her own objective 'use value' assessment, not at a market rate.[54] She was thus entitled to subjectively devalue her

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[49] *MoD v Ashman* (n 6) 200-201 (emphasis added); similarly, see *Ministry of Defence v Thompson* (1993) 25 HLR 552 (CA), with the judgment given by Hoffmann LJ. Note that the assertion is that mesne profits 'can' be a claim for restitution, with the implication that the term can also be used for other measures of 'damages'. See the comprehensive analysis in Mitchell and Roskill, 'Mesne Profits: Causes of Action' (n 4).
[50] *MoD v Ashman* (n 6) 199.
[51] *Swordheath Properties Ltd v Tabet* [1979] 1 WLR 285 (CA) (hereafter *Swordheath Properties*).
[52] *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359 (QB) (hereafter *Penarth Dock*).
[53] Ibid, 362 (emphasis added).
[54] *MoD v Ashman* (n 6) especially 201-202 (Hoffmann LJ).

'use value' to the local authority equivalent, a value well below the market rate. All this confirms unequivocally that the court was implementing an unjust enrichment remedy, not a compensatory remedy, in favour of C: its focus was on D's use value, not C's economic loss.

Lloyd LJ was content to go along with the majority's unjust enrichment assessment, with 'damages' assessed on the basis of the benefit accruing to D1 from her unauthorised occupation.[55] Nevertheless, his preferred approach was to confine C to claiming its own losses only, on the orthodox compensation measure. C would thus have recovered only the concessionary rental for the entire period of D1's unauthorised occupation, although with the small concession that C would not be required to prove that it would in any event have been able to find a suitable tenant for the entire period.[56]

Lloyd LJ's reason for this restrictive view was that C had only claimed 'damages', and in any event he did not believe that a claim in unjust enrichment was legally open against a tenant holding over, instead reading all the older cases cited by the majority not as cases of restitution for unjust enrichment 'but rather as special cases where the plaintiff can apparently recover more than his loss'.[57] The oddity in categorising these older cases as cases where C is confined to recovering its *own* compensatory losses (notwithstanding that these had been shown to be nil), but then awarding C a sum which is more than those losses, is surely not lost on anyone.

But Lloyd LJ's judgment provides one insight which merits close attention. He distinguished between tenants who hold over after the lawful termination of the tenancy, and tenants who hold over *with the consent of the landlord*.[58] With a modern eye, we might not characterise these cases as Lloyd LJ did. But the crucial point to note is that where D holds over *with C's consent*, C cannot claim damages in trespass because D has C's consent, and cannot claim restitution for unjust enrichment because the enrichment is with C's consent. What is missing is that C's consent to D's holding over has often come without an express stipulation as to the rent to be paid during that period. However, C's permission is reasonably seen as not by way of gift, and the courts will likely be quick to find a common understanding or an implied term that D was to continue to pay the earlier rent. It is only when – and if – D refuses to do so that C will terminate the arrangement, give D notice to quit if that is necessary, and then sue D for compensation *or* for restitution for unjust enrichment (precisely as in *MoD v Ashman*, including all these steps to eventual resolution).

Put more forcefully, while the contract between C and D is on foot, the risk allocation prescribed by its terms cannot be displaced by C electing to pursue what might seem to be an alternative claim for restitution for unjust enrichment rather than its claim in damages for breach of contract. The claim in unjust enrichment relating to D's use value is only available for the period when the contract has ceased to govern the parties' relationship.[59] What the contract does in all these cases where negotiating damages come into the frame is define

[55] Ibid, 204-5.
[56] See this similar approach to assessing C's losses in *Strand Electric* (n 6) 256-7 (Romer LJ), discussed earlier at pp XX.
[57] *MoD v Ashman* (n 6) 203 (Lloyd LJ).
[58] Ibid, 202 (Lloyd LJ).
[59] See the analysis in *Barton v Morris* [2023] UKSC 3 (SC), although in a very different context.

when D is no longer authorised to use D's property. This was true in *Swordheath Properties*, *Penarth Dock*, *Strand Electric*, *MoD v Ashman* and *MoD v Thompson*.[60]

Before closing, there is one important further point. Proper classification and characterisation of the various claims advanced by C is essential if like cases are to be treated alike. The majority in *MoD v Ashman* described the 'use value' claim as a claim for restitution of D's unjust enrichment. By contrast, *One Step* describes these as claims for C's compensation. If the *One Step* characterisation is correct, and the 'use value' identifies *a loss of a different type* which C has suffered, and for which C should be compensated, then it is difficult to see why C is not able to *add* this loss to the other heads of loss that are recoverable in the orthodox tort claim. Yet this additive approach is not possible. It is possible when C wishes to add other heads of compensatory loss together, such as adding loss of the asset, or damage to the asset, to C's provable loss of earnings. But it is not possible to add the 'use value' measure. In *MoD v Ashman*, for example, C could claim *either* D's use value, *or* C's lost hiring charge, but not both: the claims are mutually exclusive.[61] That seems right; but it also suggests the compensatory characterisation of the use value claim is inapt.

V. Older authorities: cases where there is no use of C's property

The conclusion from these tort and contract cases – that the unjust enrichment claim, or 'use value' claim, is only available to C where D is unjustly enriched by *use of C's assets* – can be seen hiding in the weeds in the much criticised (but arguably correct) analysis in *Stoke-on-Trent City Council v W & J Wass Ltd*.[62] In this case C had the right to operate a statutory market, and D set up an unauthorised rival market within close proximity. C suffered no financial loss, but nevertheless endeavoured – unsuccessfully – to claim substantial damages based on the licence fee D would have been required to pay if it had operated lawfully.

In advancing its claim, C relied on analogies with the earlier cases already considered in this chapter. In particular, C relied on the fact that its market right was a property right, being an intangible right attached to the relevant market site. C further suggested that this right gave C a monopoly in respect of holding markets within a certain area (in this case, within a radius of 6 2/3 miles of C's market site). The former invited analogies with land use cases,[63] the latter with patent cases.[64]

The court found neither analogy persuasive. The judges distinguished the land use cases because here D had not made *use of C's property right* attached to land, but had instead used land in close proximity in an unauthorised way that might have (but did not) cause economic harm to C's property.[65] The preferable analogy was with cases of nuisance, as when D blocked C's light or obstructed C's access to C's own property.[66] Equally, the judges distinguished the patent cases, where the claim is that D has made wrongful use *of the*

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[60] *Swordheath Properties* (n 62) (remedies only after the tenants held over); *Penarth Dock* (n 63) (only after the end of the generous time limit the contract gave for removing the pontoon); *Strand Electric* (n 6) (see the earlier discussion at pp xx); *MoD v Ashman* (n 6) (only after the end of the notice to quit); *MoD v Thompson* (n 60) (similar to *Ashman*, with Hoffmann LJ summarising and applying the law in *Ashman*).
[61] *MoD v Ashman* (n 6) 201 (Hoffmann LJ). Also see *Watson Laidlaw* (n 37) 30 (Lord Shaw).
[62] *Stoke-on-Trent CC* (n 40).
[63] Eg *Whitwham* (n 32).
[64] Eg *Watson Laidlaw* (n 33).
[65] *Stoke-on-Trent CC* (n 45) 1414-5 (Nourse LJ), 1416 (Nicholls LJ).
[66] Ibid, 1415 (Nourse LJ).

property comprised in the patent, in breach of the patent-holder's monopoly right. Here D had not made wrongful use of C's monopoly right to operate markets anywhere within a radius of 6 2/3 miles of a given site, because C did not have such a right; C merely had the right to operate its market *at the given site*, and not to be disturbed in the enjoyment of that right by other people operating markets within a radius of 6 2/3 miles.[67] In short, on either analogy the court was not persuaded that this was an appropriate case for the application of the 'user principle' and the consequential award of user or licence fee damages.

This was precisely the conclusion reached by David Edwards QC in a careful judgment in *Priyanka Shipping Ltd v Glory Bulk Carriers Pte Ltd*.[68] This was also a contract case: C sold a ship to D, with the parties agreeing that the vessel was only to be used for scrap and was not to be used by D for further voyages. In breach of that agreement, D used the ship for further voyages. The court granted C an injunction to prevent further breaches, but held that, in respect of past losses, negotiating damages were not available, and LCA damages, at least in respect of past breaches, afforded no additional remedy beyond the common law quantification.[69] C had not claimed common law damages for breach of contract, these being difficult to assess and likely to be minimal/nominal. The reason for refusing negotiating damages was that, on these facts, D had not used C's property (since, after the sale, the vessel was D's), and – in trading the vessel itself – it had not taken C's right to trade the vessel, since C had lost that right on sale of the vessel.[70]

If the argument is followed so far, then the decision in *Experience Hendrix LLC v PPX Enterprises Inc*[71] may warrant revisiting. It was heavily influenced by the exceptional decision in *AG v Blake*[72] (see especially the judgment of Mance LJ[73]), and is out of line with modern analysis.[74] In *Experience Hendrix*, D was the owner of various master tapes of Jimmy Hendrix recordings and also owned the copyright in those recordings. A settlement agreement between C and D obliged D not to use its property in specified ways without paying royalties to C. D breached the agreement. C sued, obtaining an undertaking from D to the court that D would comply with the contract in the future. C also sought negotiating damages or an account of profits to compensate for the harm suffered up until the undertaking was given, since it could not prove its orthodox contract damages. The court ordered negotiating damages, by way of a royalty payment for past breaches, not a full account of profits as had been ordered in *AG v Blake*, even though the court found the analogies with that case compelling.

The reason this case is out of line with modern analysis is that C's contract right only prevented D dealing *with D's own assets* in particular ways, as in *Surrey CC* and in *Priyanka*

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[67] Ibid, 1418 (Nicholls LJ). By contrast, Nourse LJ thought the patent cases were examples of orthodox tort claims (with the court assessing C's financial loss as a result of lost market, and finding a licence fee to be the appropriate measure of a provable loss where, unlike here, real loss could be shown), and not illustrations of the 'user principle': ibid, 1413-4. Also see n xx above.

[68] *Priyanka Shipping Ltd v Glory Bulk Carriers Pte Ltd* [2019] EWHC 2804 (Comm) (QBD) (hereafter *Priyanka Shipping*).

[69] Ibid, [141] and [169].

[70] Ibid, especially [195]-[197], and also [198]-[199].

[71] *Experience Hendrix* (n 43).

[72] *Blake* (n 12).

[73] Adopting the view, it seems, that a court could in appropriate circumstances – and in order to protect valuable contract rights – order remedies ranging from orthodox contract damages to negotiating damages to accounts of profits (as had been ordered in *Blake*) on a continuum that could reflect the value of the rights infringed.

[74] See the qualified comments of Lord Reed in *One Step* (n 1) [82] on *Blake* and [85] and [90] on *Experience Hendrix*; see too *Priyanka Shipping* (n 74) [198].

Shipping. There was no appropriation or use of *C's property* by D. Accordingly, following the analysis earlier in this chapter, there is no basis for C to claim an unjust enrichment remedy for D's unauthorised use *of C's assets*. Equally, following the analysis in *One Step*, the pre-conditions for an award of negotiating damages are not present.

To the contrary, however, in *One Step* Lord Reed indicated the decision could nevertheless be supported:

> Notwithstanding some of the reasoning, the decision in the case can be supported on an orthodox basis. *The agreement gave the claimant a valuable right to control the use made of PPX's copyright.* When the copyright was wrongfully used, the claimant was prevented from exercising that right, *and consequently suffered a loss equivalent to the amount which could have been obtained by exercising it*.[75]

Bu the latter is the very loss C could not prove. Moreover, if negotiating damages are to be available every time C has a contract which requires D to deal with its property in specific ways, then almost every contract will be open to this alternative remedy, which was precisely the outcome Lord Reed and the majority in *One Step* did not want to see.

VI. Injunctions and Lord Cairns' Act (LCA) damages

Whatever the limitations on the availability of 'use value' claims, C's rights can often be protected by injunction or, if that is denied, by LCA damages in lieu. The terminology of 'negotiating damages' and its various equivalents is common in court assessments of the damages to be awarded in lieu of an injunction or specific performance under LCA.[76] Despite the overlapping terminology, this jurisdiction has almost nothing in common with the jurisdiction to award asset-restrictive *One Step*-type negotiating damages. For a start, the LCA jurisdiction involves injunctions and damages awards for the threatened infringement of both proprietary and non-proprietary rights.[77] There is no pre-condition requiring that C has lost a valuable asset, or that D has taken something for nothing. In addition, the LCA jurisdiction operates on quite distinct principles. Most significantly, it enables the award of damages for wrongs that that have not yet been committed, as when the court awards damages in lieu of an order for specific performance or an injunction to prevent a threatened continuing wrongdoing.[78]

A wide variety of rights merit protection by injunction or specific performance. The statutory market right in *Stoke-on-Trent CC*[79] was such a right. The court recognised that C would be

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[75] *One Step* (n 1) [89].
[76] Lord Cairns' Act 1858, s 2, now s 50 of the Senior Courts Act 1981. This statutory provision allows for the award of damages 'in addition to, or in substitution for' an injunction or specific performance. The concern here is with the latter. With the former – ie damages in addition to – the rule is that, if C wishes, at trial, to recover a money remedy for harms suffered before the injunction/specific performance order is granted, those damages are assessed under the ordinary common law (or equitable) rules for the assessment of remedies for harm (whether past or prospective) caused by a tort or breach of contract or other infringement that has already been committed: *Johnson v Agnew* [1980] AC 367 (HL) 400-01 (Lord Wilberforce, the other Law Lords agreeing). To the same effect, see *Priyanka Shipping* (n 74) [141] and [169] (David Edwards QC), after careful analysis and despite Lord Reed's comments in *One Step* at [47].
[77] *One Step* (n 1) [2]; *Pell Frischmann* (n 18) [46].
[78] *Jaggard v Sawyer* [1995] 1 WLR 269 (CA), 284 (Millett LJ), cited in *One Step* [43].
[79] *Stoke-on-Trent CC* (n 40).

entitled to a permanent injunction to prevent D's wrongful interference with C's market right (ie an injunction restricted in time and in area to C's statutory entitlements to be free of interference), and, moreover, would be entitled to such an injunction without proof of loss.[80]

But what is C's position if the court has jurisdiction to grant an injunction, but declines to do so? *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*[81] was just such a case.[82] D had erected houses and constructed roads in breach of a restrictive covenant which bound D and any purchasers who bought these houses from D. C sought a mandatory injunction for demolition of the roads and houses. Brightman J held that there was jurisdiction to grant such an injunction,[83] but declined to do so given the economic and social waste involved.[84] He then needed to consider what damages, if any, should be awarded in the court's discretion in substitution for the injunction, as allowed under LCA.

D argued that since C had suffered no economic loss as a result of the breach – and, although this was not made explicit, would presumably suffer no further harm as a result of the continuing breach – the damages should be nil.[85] By contrast, C argued – by reference to the trespass, detinue and patent infringement cases discussed earlier in this chapter – that substantial damages ought to be ordered, that a 'licence fee'/'negotiating damages' measure was appropriate, and that in development contexts where a landowner's property stood in the way of a development, such a fee was typically a half or a third of the development value of the land.[86]

Brightman J rejected D's argument: since the court had declined to order an injunction, for social and economic reasons, which it would not have hesitated to grant in circumstances where the social and economic costs were lower, then it would be of 'questionable fairness' to leave C with no remedy at all and D with all the fruits of its wrongdoing.[87] The judge also declined to accept C's approach, holding that the cases C relied upon were 'a long way from the facts of the case before me',[88] and that a damages award in these circumstances needed to be *an adequate substitute for the injunction the court might otherwise have granted*.[89] This was a sum that the court calculated C might reasonably have demanded of D as the price for relaxing this particular covenant in these particular circumstances: in short, a '*release fee*'. The qualifications, although not made explicit by Brightman J, are evident in his reasoning: he awarded C only 5% (£2,500) of the development value of the land on the basis that the covenant had not been inserted in order to give C a right or an asset of commercial or nuisance value; the effect of D's breach on C was insignificant and related to only a very small part of C's land; and C had known of the proposed sale of the land as development land, but had not protested and D had purchased it on that basis.[90] Clearly the 'release fee' in

[80] Ibid, 1419 (Nicholls LJ).
[81] *Wrotham Park* (n 11).
[82] This case seems worth attention notwithstanding Lord Reed's assessment that it 'is a source of potential confusion because of the opacity of its reasoning, and it can now be regarded as being of little more than historical interest': *One Step* (n 1) [3].
[83] It is obvious from these brief headlines that C cannot claim LCA damages if the court has no jurisdiction to grant an injunction: the statutory power would not then exist, and the common law affords no equivalent: ibid, [4] and [45]-[46], doubting *Pell Frischmann* (n 18) [48](5); also see *Jaggard v Sawyer* (n 84), 287.
[84] *Wrotham Park* (n 11), 811.
[85] Ibid, 812.
[86] Ibid, 812-15.
[87] Ibid, 812.
[88] Ibid, 814.
[89] Ibid, 815; *One Step* (n 1) [44]; *Pell Frischmann* (n 18) [48]; *Blake* (n 13) 281.
[90] *Wrotham Park* (n 12) 815-16.

these cases escalates in direct proportion to the harm C suffers by the continuing infringement and the benefit D gains from the latitude in allowing it: *both* are material in any hypothetical 'release' negotiation between the parties.

It is plain that these cases are in a class of their own. They are not like cases claiming ordinary contract or tort damages, where C has to prove a loss to C *already sustained*, and is not entitled to demand a remedy for a wrong anticipated to be continuing into the future. They are also not like cases advancing unjust enrichment 'use value' or 'negotiating damages' claims, where D has made unauthorised use of C's property: these too are claims looking to the past, not the future. The critical feature of LCA damages awards is that they look *forward*, and aim to provide C with an adequate monetary substitute for the court's effective sanctioning of D's continuing breach by declining to order an injunction to prevent it. In this context, a hypothetical '*release fee*' is intended to reflect the reasonable price of putting in place a different arrangement to govern the parties' future relationship, not some backwards-looking process to address past harms.[91]

Even with this limited background to LCA damages, it is difficult to agree with Lord Reed that these cases are aligned coherently with the other negotiating damages cases analysed in *One Step*, or that this might be so because the LCA damages measure 'reflect[s] the fact that the refusal of an injunction had the effect of *depriving the claimant of an asset which had an economic value*'.[92] The laudable intention in this description is to maintain alignment with other negotiating damages scenarios, where it is crucial that C does have an *asset* – some property – in the game. And yet the 'asset' in issue in LCA cases is simply a *right* of some kind, in contract or tort, which a court might protect by injunction. The language of property and 'assets' loses all discriminatory power if used as loosely as this.

The purpose of this section is not to dig deeply into the details of LCA damages, but simply to note that they are *very* different from the asset-restrictive *One Step*-type negotiating damages which the Supreme Court endeavoured to describe and define: they arise in much broader contexts, they require no asset-loss by C or asset-taking by D, their quantification is not designed to compensate C for past losses, or remedy past unjust enrichments that worked in D's favour. Instead, they aim to settle the future relationship between the parties, being a future where D will no longer owe C the duties that D threatens to breach. This is such a different starting point, a different end point, and different means of travel between them that there seems little reason to look for enlightenment delivered by way of commonalities between this form of damages and the forms of damages which were the primary target of investigation in *One Step*.

VII. More controversial cases: equitable and contractual obligations of confidence

This final section, on obligations of confidence, deals with one of the specific categories where the majority in *One Step* indicated that negotiating damages *will* be available. The justification for this conclusion in the context of C's right to control confidential information was set out by Lord Reed as follows:

[91] See Lord Reed's description in *One Step* (n 1) [91], although this was not provided by way of defining his preferred approach to LCA damages.
[92] *One Step* (n 1) [63] (emphasis added).

> [in this context] the contractual right is of such a kind that its breach can result in *an identifiable loss equivalent to the economic value of the right, considered as an asset* … That is something which is true of some contractual rights, such as a right to control the use of land, intellectual property or confidential information, but by no means of all.[93]

This is doubted. If D discloses the confidential information, without authority, then C no longer has information which it can control. C will of course have various claims against D, but – even in the absence of proof of expectation damages – has D's breach resulted in some other form of 'an *identifiable loss equivalent to the economic value of the right*'? And is it apt to regard C as being 'deprived of a valuable *asset*'?[94] Presumably the answer to each question is 'Yes', given the Court's specific finding that negotiating damages are available for breaches of obligations of confidence. But it is difficult – perhaps impossible – to see why C's rights under a contractual non-disclosure agreement fall into this category, but C's rights under a commercial restraint of trade clause do not. Both rights are likely to have significant economic value; both rights would be protected by injunction, giving some indication of the law's inclination to protect each; in both cases D's breach could 'result in an identifiable loss [presumably] equivalent to the economic value of the right'; and in neither case would we say that C's right is one giving it control over 'property', or an 'asset', thus making it equally hard to say that in either case D's breach has deprived C of a 'valuable asset'.[95] Both rights would seem to belong in the *same* category, not in different ones, as *One Step* holds they do.

Alternatively, perhaps the central principle underlying these breach of confidence cases is revealed the descriptive strand, that D '*has taken something for nothing*, for which the claimant was entitled to require payment'.[96] But here too the difficulties with confidential information are no less. The '*something'* being taken must be given real meaning: taking an asset is one thing, but simply causing C 'to suffer pecuniary loss resulting from … wrongful competition, such as a loss of profits and goodwill, which is measurable by conventional means'[97] was held to be not enough. Breach of restraint of trade clauses was therefore put in the 'not enough' category, yet it is difficult to see why breach of an obligation of confidence escapes the same fate.

In my view, breach of confidence cases (whether the breach is of equitable or common law obligations) do not belong in the *One Step* negotiating damages canon. Confidential information is not property.[98] It is not like land or chattels or IP (think of transferring or licencing confidential information, or creating security over it, or a trust of it). It confounds all hope of drawing defensible analogies which assist in deciding whether *One Step* negotiating damages are available to list confidential information alongside these other assets, and, further. to insist it sits in contrast with other legal rights to control D's activities which would seem equally valuable, such as C's right to control D's interference with C's statutory market,[99] or C's competing business.[100]

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[93] Ibid, [93] (emphasis added).
[94] Ibid, [92] (emphasis added).
[95] Indeed, see ibid at [125], where Lord Sumption describes a restraint of trade clause as closely analogous to a right of property. By contrast, information is not regarded as property. The compelling dissent of Lord Upjohn in *Boardman v Phipps* [1967] 2 AC 46 (HL), 127-9, is accepted as orthodoxy.
[96] Ibid, [92] (emphasis added).
[97] *One Step* (n 1) [93].
[98] See n xx.
[99] *Stoke-on-Trent CC* (n 40).
[100] *One Step* (n 1).

Equally, even in relation to confidential information, it is inappropriate to bundle together C's equitable and contractual rights to control D's use of information. The equitable duty arises regardless of any contract, when the context is right and the information is confidential.[101] The remedy for unauthorised disclosure by D is *disgorgement* of the profits D has generated by the breach.[102] By contrast, the contractual duty allows C to nominate which information is not to be disclosed (which may include information which equity would not regard as 'confidential'), and then insist D complies with the tailored terms of the parties' contractual confidentiality clause. The remedy for breach does not look to D's profitable use of the designated information (unless the equitable duty also applies and can be used to deliver those ends), but instead provides orthodox contract damages to remedy the economic harm C suffers from the breach.[103] There are contexts in which the two breaches and their remedies overlap fully,[104] but often they do not.

Care is needed in the assessment of remedies in these cases.[105] Simple labels (whether equitable or contractual) cannot be applied unthinkingly. As noted in quite different circumstances, any analysis of remedial consequences must start with a precise understanding of the obligation which has been breached and the detailed performance requirements demanded by it.[106] In duty of confidence cases, the equitable or contractual obligation may specify that D is not to use the information *at all*, or, alternatively, not to use it *without paying for it*. Context matters of course, but that different formulation often leads to the inference that the former constraint suggests that C retains to itself the right to *all* the benefits that might derived from productive use, ie all the profits of any lucrative venture, whereas in the latter context the inference may be that C retains the right to receive a royalty or licence fee from any use. These two different forms of constraint suggest different remedial consequences. In the equitable context, if D then breaches the obligation of confidence, it follows that the *profits* D must disgorge from the *unauthorised* use[107] are, in the former context, *all* the profits D derives, whereas in the latter context they are only a licence fee.[108] This approach ensures that, in either context, D is *only* stripped of the profits D has derived from the breach of the particular equitable obligation owed to C, but, equally, is stripped *fully* of those profits. Similarly, in the contractual context, breach of the contractual constraint will require D to compensate C for the losses C suffers as a result of the breach. In the former context, these are all the commercial profits C might have generated from its own use of the

[101] *AG v Guardian Newspapers (No 2)* [1990] 1 AC 109 (HL); *Coco v AN Clark (Engineers) Ltd* [1968] FSR 525 (Ch).
[102] *AG v Guardian Newspapers (No 2)* (n 101).
[103] See by analogy the earlier discussion of *Watson Laidlaw* (n 33) at the text to n xx.
[104] As when certain information is regarded as confidential in equity *and* under the parties' contract, and D's profits from its unauthorised use mirror exactly the commercial benefits C has foregone because of the contractual breach. See above at n xx.
[105] And in this context my current thinking is more refined than in Worthington, *Equity* (n 51) 152-4.
[106] *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58 (SC) at many stages in the judgments, including [52], [59], [61], [64], [66], [70], [76] (Lord Toulson SCJ) and [92], [93], [138] (Lord Reed SCJ); by contrast, see the controversial decision in *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch) holding that the court could choose the appropriate remedy for breach of confidence from a sliding scale ranging from ordinary contract damages to full disgorgement depending on the value of the right being infringed. That approach is not favoured here.
[107] eg *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1964] 1 WLR 96 (Ch).
[108] This may well be the best explanation of the much-criticised judgment in *Seager v Copydex Ltd* [1967] 1 WLR 923 (CA).

information;[109] in the latter context it is the lost royalties C would expect to obtain from anyone using the information D has used without consent.[110] In the contract context, C may also have suffered other collateral damage as a result of the breach of confidence.

Finally, and more simply, in both cases C may of course seek an injunction to prevent D making unauthorised disclosures in the future in breach of either the equitable or contractual obligation. C will generally succeed in obtaining such an order. However, if the court declines to order an injunction, it can instead order LCA damages in lieu. These are assessed on the *release fee* basis discussed earlier. This is true whether the breach in issue is breach of the equitable or contractual duty, notwithstanding the purists who would insist that LCA only applies to common law wrongs.

In short, none of the remedies for breach of a duty of confidence in equity or in contract deliver the *One Step* form of negotiating damages, although both may deliver LCA damages if the court has jurisdiction to award an injunction but declines to do so.

VIII. Conclusion

It is a measure of the serious thought that went into the judgments in *One Step* that we are still debating the issues 5 years later. This contribution endeavours to unravel some of the critical strands of analysis in the judgments. A key conclusion is that we have made this area more difficult for ourselves, not by failing to treat like cases alike, but by failing to treat different cases differently, and – crucially – doing that because we have neglected to label them differently and more informatively.

One Step endeavoured to unify the analysis and provide a coherent approach to remedies in cases where C's property or valuable rights had been *invaded and used by D* without C's permission. One result was to use a single preferred term – 'negotiating damages' – to describe what, when properly unwrapped, appear to be several conceptually distinct legal territories.

The argument advanced in this chapter is that we would do well to keep these different areas separate and label them accordingly. In the *One Step* context, with its focus on situations where D's wrong was to invade and use C's property or valuable rights, there are three distinctive types of claims in play. The first, and simplest, is C's ordinary compensation claim in contract or tort, where C is entitled to recover its own *provable lost hire or licence or royalty charges* because D has kept C out of the ordinary use of its own assets. Second is C's claim for LCA damages, where C seeks an injunction to prevent D's further future infringement of C's rights, and the court instead awards damages in lieu. These LCA damages are appropriately assessed by way of a *release fee*, designed to compensate C for the court's decision to vary the future arrangement between the parties by releasing C's rights and permitting D's infringements in their ongoing relationship.

Finally, and most controversially, the key argument in this chapter is that the form of 'negotiating damages' of primary concern in *One Step*, the form which is the subject of all the most cited paragraphs, is an *unjust enrichment claim* advanced by C, not a claim for

[109] This would seem to be the appropriate measure in *Pell Frischmann* (n 16), and may explain why the PC's assessment of damages was so much higher than that ordered by the lower courts.
[110] Again, and only by analogy, see *Watson Laidlaw* (n 33).

compensation for breach of contract. It is a claim against D because D has been unjustly enriched by its unauthorised *use* of C's property. This conclusion is consistent with earlier authorities. If this reclassification is recognised, it then follows directly from the very nature of this claim that this option it is not available unless D has indeed made unauthorised use *of C's property*. This is so when D makes such use of C's chair or horse or land or intellectual property; it is not so when D merely breaches a term of some contractual arrangement between C and D. It follows that *One Step*-negotiating damages (if recognised as an unjust enrichment claim) is straightforwardly not available for breach of a restraint of trade clause. Equally, it is not available for breach of an equitable duty of confidence or a contractual confidentiality agreement. D's various wrongs in these circumstances do not include *D's use of C's property*.

All this reinforces the need for clearer language. Words, if used appropriately, can significantly simplify the task of treating like cases alike and different cases differently. We might then more confidently address the proper ambit of *One Step* negotiating damages.