RESTITUTION – 2014

Experience Hendrix, Please! Lesser Known Restitutionary Remedies Revisited

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LESSER KNOWN RESTITUTIONARY REMEDIES REVISITED

I. Introduction

In this paper, we aim to provide an introduction to, and brief overview of, lesser known restitutionary remedies. Specifically, we discuss: restitutionary damages; rescission; equitable lien; equitable contribution and indemnity and equitable subrogation. These remedies are less popular and less well-known restitutionary remedies than the constructive trust. We first introduced these remedies in our 2009 CLE paper called, "Constructive Trust's Poor Cousins: Lesser Known Restitutionary Remedies" ("2009 Paper"). This paper is intended to expand on the discussion of restitutionary damages in the 2009 Paper and to provide a brief update on developments in the use or application of the "poor cousins". In the interests of clarity and continuity, particularly where there have been relatively few recent, material developments in an area, we have incorporated portions of the 2009 Paper here.

A thorough discussion of these topics is better left to the leading commentators, and we recommend the following for further reading (P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (Aurora, Ont.: Canada Law Book, looseleaf); Goff & Jones, *The Law of Restitution*, 7th ed. (London: Sweet & Maxwell, 2007); G.H.L. Fridman, *Restitution*, 2d. ed. (Scarborough, Ont.: Carswell, 1992); S.M. Waddams, *The Law of Damages*, 5th ed. (Toronto: Canada Law Book, 2012); Harvey McGregor, *McGregor on Damages*, 17th ed. (London: Sweet & Maxwell, 2003)).

The objectives in calculating a measure of restitutionary relief are (1) the restoration of the value of benefits conferred on the defendant by the plaintiff; and (2) the disgorgement of profits acquired by the defendant through a breach of duty owed to the plaintiff.

As is suggested by the fact that they often have both common law and equitable roots, restitutionary remedies have developed as a pragmatic response to situations not covered specifically or adequately by either legal regime. Thus, the focus of restitutionary remedies has generally been on the practical or "gap filling" function, and has often resulted in a relaxation of the requirements of the common law and equity.

In this paper, we first discuss restitutionary damages, generally and with specific attention to their availability as a remedy for breach of contract in exceptional circumstances. While the term "restitutionary damages" is not much used in Canada, in our view, equivalent remedies are available in this jurisdiction. The paper then considers rescission, through which a party can obtain restitution of benefits conferred under a contract which is void *ab initio*. Next, we turn to the equitable lien. It is very much a poor cousin to remedial constructive trusts, but is a useful alternative in situations where a constructive trust may not achieve actual restitution to the plaintiff. Finally, we touch on equitable contribution and indemnity, a means by which parties to a shared liability can ensure that their co-obligors pay their fair share, and equitable subrogation.

II. Restitutionary Damages

The possibility of seeking restitutionary, or "gain-based" damages, arises where the defendant's gain exceeds the plaintiff's loss and or where the plaintiff suffers no loss at all. Restitutionary damages provide an answer to the wrongdoer who has made a gain at the defendant's expense, though not necessarily by causing him loss, as Lord Shaw pointed out in his classic example in *Watson, Laidlaw & Co. Ltd. v. Pott, Cassels & Williamson* (1914), 31 R.P.C. 104 (H.L.):

> 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 better for the exercise.

A. Restitutionary Damages - new wine in old bottles

Restitutionary damages are concerned with unjust enrichment by wrongdoing. As stated in the Law Commission, *Aggravated, Exemplary and Restitutionary Damages*, Law Comm. No. 247 (1997) (at p. 28), this category:

> depends on the commission of a wrong by the defendant to the plaintiff (whether that wrong is a tort or a breach of contract or an equitable wrong, such as a breach of fiduciary duty or breach of confidence). The enrichment is 'at the expense' of the plaintiff in the sense that the defendant has committed a wrong to the plaintiff. Restitution, concerned to strip away the gains made by the defendant by the wrong, is only one of several possible remedial responses, of which the most common is compensation.

The use of the term "restitutionary damages" is a new way of expressing what courts have, in defined circumstances, already done for some time and called by various names: user damages; equitable damages; *Wrotham Park* damages (*Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd.* [1974] 1 WLR 1361[*Wrotham Park*]); damages for *mesne* profits, trespass and conversion (where no "loss" to the plaintiff); way-leave payments (reasonable payment for use of underground passages: see Waddams, *supra* at 9-3); disgorgement; accounting of profits[1]; damages in lieu of specific performance; damages in

[1] For both disgorgement and accounting of profits, commentators have drawn a distinction between restitutionary damages, designed to reverse a wrongful transfer of value from the plaintiff to the defendant, and

lieu of rescission; and actions for money had and received. Arguably, exemplary damages can also be restitutionary.

B. Availability of Restitutionary Damages

What we call restitutionary damages have been available for many years for a number of causes of action, both in equity and at common law. Equitable damages, for example, are available when a plaintiff has successfully made out an unjust enrichment claim, but a constructive trust is unavailable as the requirements in *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, are not met (see *e.g., Wilson v. Fotsch*, 2010 BCCA 226 at paras. 54 to 55; *Antrobus v. Antrobus*, 2010 BCCA 356 at para. 34 to 36).

A number of proprietary torts allow for restitutionary, gain-based remedies where the plaintiff has not suffered a "loss" as would be typically calculated on a compensatory damages basis: trespass to land or goods, conversion (money had and received) and actions for *mesne* profits. For example, in Canada, gain-based damages for trespass or conversion involving the unauthorised use of natural resources are not uncommonly awarded (see e.g., *Nexxtep Resources Ltd. v. Talisman Energy Inc.*, 2012 ABQB 62; *Freyberg v. Fletcher Challenge Oil & Gas Inc.*, 2007 ABQB 353 at paras. 98 - 130; *Montreal Trust Co. v. Williston Wildcatters Corp.*, 2004 SKCA 116 at paras. 72 - 80 and paras. 108 - 110; leave to appeal to SCC dismissed [2004] S.C.C.A. No. 474 (Q.L.)). And, restitutionary damages for trespass may also be awarded (*Hawkes Estate v. Silver Campsites Ltd.* (1994), 91 B.C.L.R. (2d) 126 (C.A.) [*Hawkes Estate*]; *Tyendinaga Mohawk (Council) v. Brant*, [2008] O.J. No. 1186 (S.C.J.) (Q.L.) at paras. 127 to 129). In *Hawkes Estate*, the court says that the estate's loss was the use of its land, but at the same time, the court found that there was no evidence that the actions of the defendant prevented the estate from utilizing the land for some other profitable purpose. In other words, the estate suffered no loss.

In addition to the above, Waddams notes other types of cases where damages have been measured by the amount of a reasonable fee, rather than by the plaintiff's loss in the strict sense of tort or contract (Waddams, *supra* at 9-3):

1. Refusal to return goods lent to a defendant;

2. Obtaining by deception property that the plaintiff would not otherwise have sold;

3. Refusal to remove goods bought by the defendant from the plaintiff's property; and

4. Wrongful ejection of lessee by lessor.

Whether restitutionary damages are possible in Canada for non-proprietary torts is still not clear. Waiver of tort has become a popular pleading in class actions often based on underlying torts of negligence and conspiracy (see *e.g., Reid v. Ford Motor Co.*, 2006 BCSC 712; *Serhan v. Johnson & Johnson*, 2006 CanLII 20322 (ON SC), (2006), 85 O.R. (3d) 665, 269 D.L.R. (4th) 279 (Div. Ct.), but as of yet no court has determined whether waiver of tort applies to these kinds of torts. In the U.K., there is some authority that indicates restitutionary damages may not be available for non-proprietary torts (*Dennis v. OLG*, 2010

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disgorgement/accounting damages, which requires a surrender of profit resulting from the wrong (*Stewart Estate v. TAQA North Ltd.*, 2013 ABQB 691 at para. 634). However, as is made clear in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, 2 S.C.R. 177, disgorgement has both prophylactic and restitutionary purposes.

ONSC 1332 at paras. 172 to 181, citing *Devenish Nutrition Ltd. v. Sanofi-Aventis SA (France)*, [2009] 3 All E.R. 27, [2008] EWCA Civ 1086 (C.A.) and *Stoke-on-Trent City Council v. W & J Wass Ltd.*, [1988] 3 All E.R. 394 (C.A.)).

A variety of familiar equitable wrongs will give rise to restitutionary damages, including breach of fiduciary duty, breach of confidence, misuse of confidential information, breach of trust and knowing assistance in breach of trust or fiduciary duty (see for example *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 [*Lac Minerals*]; *Canson v. Boughton* [1991] 3 S.C.R. 534; *Hodgkinson v. Simms* [1994] 3 S.C.R. 377 [*Hodgkinson*]; *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, 2 S.C.R. 177 [*Strother*]).

In *Strother*, the court discussed the remedy in terms of disgorgement of the fiduciary's gains. Binnie J. described disgorgement as having two equitable purposes, the prophylactic and the restitutionary. The prophylactic purpose regulates the fiduciary's abuse of trust. The restitutionary purpose restores to the beneficiary profit which has been wrongfully appropriated by the fiduciary in breach of his trust. Regardless of whether the underlying principle engaged is restitutionary or prophylactic, disgorgement effects the same result, and does the same work as restitutionary damages. In other words, where it is warranted, it is a means of transferring the benefit realised by a wrongdoer to the plaintiff.

Gain-based damages are familiar to practitioners of intellectual property law as successful plaintiffs in patent infringement or passing off cases are entitled to elect between an accounting of profits or damages (*Teledyne Industries Inc. et al. v. Lido Industrial Products Ltd*. (1982), 168 C.P.R. (2d) 204 (F.C.T.D.) at 208, [1982] F.C.J. No. 1024 (Q.L.); Waddams, *supra* at 9-3).

As is discussed in more detail below, in certain circumstances, Canadian courts will rescind an agreement and allow a quasi-contractual (restitutionary) claim for the value of benefits conferred under the rescinded contract, rather than damages on the contract (Maddaugh and McCamus, *supra* at 4-8 to 4-9 and 5-51; *S-244 Holdings Ltd. v. Seymour Building Systems Ltd.* (1994), 93 B.C.L.R. (2d) 34 (C.A.), B.C.J. No. 598 (Q.L.)). Also in the contractual realm, damages in lieu of specific performance or specific enforcement may be ordered and the plaintiff is entitled to recover the money or value of the benefits conferred (Waddams, *supra* at 9-11). As Waddams notes, the basis for such an award is restitutionary (*ibid.*).

C. Restitutionary Damages for Breach of Contract

As a general rule an aggrieved party must have suffered a financial loss in order to be entitled to damages for breach of contract. In *Asamera Oil Corp. Ltd. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, Mr. Justice Estey, speaking for the Court, held that:

> It seems to me that the motives or unjust enrichment of the defendant on breach are generally of no concern in the assessment of contractual damages. *Vide* Treitel, *The Law of Contract* (4th ed., 1975), at p. 618 (at 672 to 673):
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> 'In general damages are based on loss to the plaintiff and not on gain to the defendant. They are not, in other words, based on any profit which the defendant may have made out of the breach.'

However, in our 2009 Paper we referred to U.K. authority indicating that restitutionary damages may sometimes be available for breach of contract (*Attorney General v. Blake*, [2001] 1 A.C. 286 [*Blake*] and *Wrotham Park*). Contrary to traditional notions of contract damages, restitutionary damages for breach of contract focus on compensating the wronged party based on the way the contract was actually performed and not on putting the parties back into the position they would have been if the contract had been properly performed.

In *Blake*, the House of Lords was called upon to decide whether an author was entitled to royalties from an autobiography relating in part to his years in the British Secret Service as a spy. Publication of the book was in breach of a declaration the author had executed at the time he commenced employment with the Secret Service and the author was found to be in breach of this contract. Lord Nicholls, in the leading judgment, said that in an exceptional case the court could grant the discretionary accounting of profits remedy for a breach of contract (at 278) and that a useful general guide to determine whether this is warranted is to consider whether the plaintiff has a legitimate interest in preventing the profit-making activity (at 287).

In *Wrotham Park*, the defendant constructed homes in breach of a restrictive covenant agreed to with a local authority. The plaintiff's land value was unaffected by the breach. The court awarded damages measured by a reasonable fee payable to the plaintiff for a relaxation of the covenant. This case is sometimes cited as an example of restitutionary damages in contract, but we note that there was an interest in land at stake and the damages could be characterised as substitutive as opposed to restitutionary.

(See also *Esso Petroleum Co. Ltd. v. Niad Ltd.*, [2001] All E.R. (D) 324 (Nov); *Field Common Limited v. Elmbridge Borough Council* [2008] EWHC 2079 (Ch.); *Experience Hendrix LLC v. PPX Enterprises Inc.* [2003] 1 All E.R. (Comm.) 830, [2003] EWCA Civ 323 [*Experience Hendrix*], where plaintiff suffered no loss and user damages were awarded but not restitution of all profits.)

Waddams explains the restitutionary remedy for breach of contract awarded in *Wrotham Park* and other like cases on the basis of the loss of opportunity to bargain (Waddams, *supra* at 9-4 to 9-13). The plaintiff has therefore actually suffered a "loss" in that the defendant deprived the plaintiff of the opportunity of selling to the defendant the right that was appropriated by him or her. This analysis assumes that the defendant would have paid something for the right taken and that the plaintiff would have made the bargain (Waddams, *supra* at 9-5). Waddams also argues that where the circumstances set out in *Blake* are met, a plaintiff will already have a proprietary right and a concomitant right to an injunction and often there will also have been a loss of an opportunity to bargain (Waddams, *supra*, at 9-10). However, in *Worldwide Fund for Nature v. World Wrestling Federation Entertainment Inc.*, [2007] EWCA Civ 286, the English Court of Appeal held that *Wrotham Park* gain-based damages are available even with no right to an injunction. Similarly, in *Smith v. Landstar Properties Inc*., 2011 BCCA 44 [*Smith*], discussed below, gain-based damages for breach of contract were awarded where there would have been no right to an injunction.

In Canada, the Supreme Court appears to have endorsed the idea that restitutionary damages may be awarded for breach of contract. In *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, 2 S.C.R. 601 [*Bank of America*], the court held (at paras. 25 and 30-33):

> Contract damages are determined in one of two ways. Expectation damages, the usual measure of contract damages, focus on the value

> which the plaintiff would have received if the contract had been performed. Restitution damages, which are infrequently employed, focus on the advantage gained by the defendant as a result of his or her breach of contract.
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> The other side of the coin is to examine the effect of the breach on the defendant. In contract, restitution damages can be invoked when a defendant has, as a result of his or her own breach, profited in excess of his or her expected profit had the contract been performed but the plaintiff's loss is less than the defendant's gain. So the plaintiff can be fully paid his damages with a surplus left in the hands of the defendant. This occurs with what has been described as an efficient breach of contract. In some but not all cases, the defendant may be required to pay such profits to the plaintiff as restitution damages (Waddams, *supra*, at p. 474).
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> Courts generally avoid this measure of damages so as not to discourage efficient breach (*i.e.*, where the plaintiff is fully compensated and the defendant is better off than if he or she had performed the contract) (Waddams, *supra*, at p. 473). Efficient breach is what economists describe as a Pareto optimal outcome where one party may be better off but no one is worse off, or expressed differently, nobody loses. Efficient breach should not be discouraged by the courts. This lack of disapproval emphasizes that a court will usually award money damages for breach of contract equal to the value of the bargain to the plaintiff.
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> However, where a sum of money is required to be paid as of a certain date, the benefit to the defendant of the money during the interval between when the money is owed and when the money is paid is, all other things being equal, exactly the same as the detriment to the plaintiff of not having that money during the same interval. This is not a Pareto optimal outcome, but, rather, a zero-sum outcome. The defendant's gain is the plaintiff's loss, the value of which, but for the defendant's breach, would have belonged to the plaintiff.
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> To prevent defendants from exploiting the time-value of money to their advantage, by delaying payment of damages so as to capitalize on the time-value of money in the interim, courts must be able to award damages which include an interest component that returns the value acquired by a defendant between breach and payment to the plaintiff.

The Court's theory of restitutionary damages agrees with Waddams' theory that such damages are awarded on the contractual basis of a loss of opportunity to bargain. Damages in Canada, have however, been awarded in circumstances where the evidence is that the plaintiff would not, in fact, have made any bargain (see discussion below).

Most recently, in *IBM Canada Limited v. Waterman*, 2013 SCC 70, 3 S.C.R. 985 at para. 36, the Court held that the compensation principle does not always apply strictly and citing *Blake* at 278, it noted that "the rule that contract damages compensate only the plaintiff's actual loss is not the only rule that applies to assessing contract damages" (*ibid.*). In some circumstances an award of damages in contract may be based on the advantage gained by the defendant as a result of the breach rather than the loss suffered by the plaintiff (at para. 36, citing *Bank of America* at para. 25).

Restitutionary, or gain-based, damages for breach of contract appear to have been available in British Columbia even before the *Bank of America* decision. Our Court of Appeal upheld a trial judge's decision that none of the alleged fiduciary obligations in a breach of contract case survived the cessation of the relationship between the parties. However, the Court held that in competing against its principal prior to the end of the relationship, the agent had breached its contract and as a result the plaintiff was entitled to either damages or an account of profits (*Jostens Canada Ltd. v. Gibsons Studio Ltd.*, 1999 BCCA 273). Recent authority confirms the availability of restitutionary damages for breach of contract (*Smith*).

In *Smith*, where a plaintiff loaned money to the defendant on the basis that the loan would be secured yet the defendant did not do so, even though the defendant paid back the loan at the stipulated rate of interest, the Court of Appeal upheld an award for breach of contract for "wrongful retention or use of another's property". Damages were measured as the value of the defendant's use of the plaintiff's capital, regardless of whether the plaintiff had suffered financial loss. The evidence was that the plaintiff had suffered no loss and would not have made an unsecured loan. The court held that the law should give effect, as it did in *Experience Hendrix*, to the notion that the wrongdoer should not profit for free and should make some reasonable recompense. At the same time, Finch C.J.B.C., writing for the Court, agreed with Lord Nicholls in *Blake* that "restitutionary damages" was an "unhappy expression". But he went further, asserting that "[t]his case does not concern an account of profits or damages measured by the defendant's gain … The issue in this case is whether the plaintiff is entitled to damages for breach of contract even though she cannot demonstrate financial loss".

Finch C.J.B.C. referred with approval to *Experience Hendrix*, which he characterised as "very similar". In *Experience Hendrix*, the defendants held a licence to musical recordings as the result of a settlement in previous litigation. They breached that settlement agreement and used the recordings in an impermissible way. The plaintiff could not prove financial loss because there was no evidence that they would have used the licensed recordings for their own benefit. The evidence was also that the plaintiff would not have allowed use of the licensed recordings by the defendants on any terms.

Finch C.J.B.C. quoted the following from *Experience Hendrix* (at paras. 26 and 45) with approval:

> Whether the adoption of a standard measure of damages represents a departure from a compensatory approach depends upon what one understands by compensation and whether the term is only apt in circumstances where an injured party's financial position, viewed subjectively, is being precisely restored. The law frequently introduces objective measures…In a case such as *Wrotham Park* the law gives effect to the instinctive reaction that, whether or not the appellant would have been better off if the wrong had not been committed, the wrongdoer ought not to gain an advantage for free, and should make some reasonable recompense. In such a context it is natural to pay regard to any profit made by the wrongdoer (although a wrongdoer surely cannot always rely on avoiding having to make reasonable recompense by

> showing that despite his wrong he failed, perhaps simply due to his own incompetence, to make any profit). The law can in such cases act either by ordering payment over of a percentage of any profit or, in some cases, by taking the cost which the wrongdoer would have had to incur to obtain (if feasible) equivalent benefit from another source.
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> ...
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> For the past, in the absence of any proven loss, I would confine any financial remedy to an order that PPX pay a reasonable sum for its use of material in breach of the settlement agreement. That sum can properly be described as being "such sum as might reasonably have been demanded" by Jimi Hendrix's estate "as a quid pro quo for agreeing to permit the two licences into which PPX entered in breach of the settlement agreement", which was the approach adopted by Brightman J in *Wrotham Park* (*cf* paragraph 22 above). This involves an element of artificiality, if, as in Wrotham Park, no permission would ever have been given on any terms. And, where no injunction is possible, even the value of a bargaining opportunity depends on the value which the court puts on the right infringed (*cf* paragraph 19 above, citing Lord Nicholls in *Blake*). That said, the approach adopted by Brightman J has the merit of directing the court's attention to the commercial value of the right infringed and of enabling it to assess the sum payable by reference to the fees that might in other contexts be demanded and paid between willing parties. It points in the present case towards orders that PPX pay over, by way of damages, a proportion of each of the advances received to date and (subject to deduction of such proportion) an appropriate royalty rate on retail selling prices.
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> [Emphasis added.]

This analysis was adopted (*Smith* at paras. 43 to 44):

> This case is similar in that the plaintiff cannot show she has suffered financial loss and there is evidence that she would not have agreed to an unsecured loan. However, the law should give effect, as it did in *Hendrix*, to the notion that the wrongdoer should not profit for free and should make some reasonable recompense.
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> Damages on the basis of an interest rate differential merely compensate the plaintiff for the way in which the contract was actually performed, which resulted from the defendant's breach. The interest rate differential between secured and unsecured loans was an appropriate measure of damages in this case. It is based on the commercial value of the right infringed and assesses the sum payable by reference to the interest rate that might have been payable between willing parties.

In *Smith*, the Court was at pains to characterise the award as damages for breach of contract and not restitutionary damages. However, the Court accepted that the plaintiff would not have made the bargain, and in our view, the implication of this is that the plaintiff truly suffered no loss, not just that she "cannot show she has suffered financial loss" (at para. 43). The Court appears to (á la Waddams) construct a hypothetical bargain in order to find that the plaintiff did suffer a "loss", which was the loss of her opportunity to bargain. We fail to see how the award was not, in effect, measured by the defendant's benefit, or gain.

In *De Cotis v. Viam Holdings Ltd.*, 2010 BCCA 368 [*De Cotis*], the appeal concerned the assessment of damages in a long-running dispute over breach of an oral agreement regarding an interest-free loan and ancillary at-cost services ("interest benefit") to the plaintiffs to buy and build a warehouse. To get this benefit, the plaintiffs had given up their partnership interest in two other warehouses, held by the defendants. The plaintiffs argued that in addition to the "interest benefit" awarded in relation to the warehouse (which they were unable to acquire due to the breach), they were also entitled to a "developer's profit" for each of the defendants' warehouses (*De Cotis* at para. 25). The court held that the plaintiffs were not so entitled, as they were restricted to damages for breach of contract and such damages were not to be measured as if they were damages for breach of fiduciary duty, or "restitutionary damages" (at para. 26). Rather, damages for breach of contract to lend funds is generally the difference between the rate of interest at which the lender agreed to lend and the rate of interest the borrower has to pay to borrow the same sum elsewhere (*De Cotis* at para. 26, citing *Don Ingram Ltd. v. General Securities Ltd*, [1939] 4 D.L.R. 775 (B.C.S.C.), aff'd [1940] 1 D.L.R. 220 (B.C.C.A.), aff'd, [1940] S.C.R. 670).

What is the difference in principle at play in *De Cotis* and *Smith*? Is it that in *Smith*, in order to punish wrongdoing and provide damages to the plaintiff, the court had to construct an hypothetical bargain because the plaintiff was unable to show a loss, but in *De Cotis*, the plaintiffs were able to show a loss (the interest benefit) and so damages could, and indeed had to, be awarded on this basis? If that is the case, then perhaps the principle in operation is that for a breach of contract, if a plaintiff cannot show a loss, but the defendant has somehow behaved wrongly, then restitution operates to provide a remedy, whereas if the plaintiff can show a loss, then restitution is unnecessary and the court is restricted to traditional expectation damages (see *e.g., Indutech Canada Ltd. v. Gibbs Pipe Distributors Ltd.*, 2011 ABQB 38 at para. 511; *Nunavut Tunngavik Inc. v. Canada (Attorney General)*, 212 NUCJ 11 at paras. 306 to 334). In other words, in situations where it is necessary to use restitutionary concepts in order to do justice between the parties and where ordinary damages are inadequate or unsatisfactory then restitutionary breach of contract damages may be warranted. If this conclusion is correct, then to award restitutionary damages for breach of contract, courts must determine what is "wrongful" behaviour on the part of a defendant in the contractual realm (in this regard, see *e.g.*, *Huttonville Acres Ltd. (c.o.b. Forest Homes) v. Archer*,]2009] O.J. No. 4139 (S.C.J.) (Q.L.) at paras. 18 to 20; *Worldwide Fund for Nature v. World Wrestling Federation Entertainment Inc.*, *supra*; *Anderson v. Bell Mobility Inc.*, 2013 NWTSC 25 at para. 88; *Hilchie v. Waterton Condominiums Inc.*, 2011 NSSC 489 at para. 59).

Waddams is concerned that if a plaintiff is allowed restitutionary damages for breach of contract in situations where the plaintiff has merely made a losing bargain, then the effect is to put the plaintiff in a substantially better position than if the contract had been performed. This results, in effect, in forfeiture against the defendant of the benefit of the contract, which is inconsistent with basic compensatory principles of damage assessment (Waddams, *supra* at 9-13). In Waddams' view this is only justifiable where the defendant's breach is substantial (*ibid.*). Thus, he would not deny restitutionary damages in contract, but would limit it.

Some other possible ways to limit restitutionary damages in contract have been proposed. Courts could consider whether the plaintiff has a legitimate interest in preventing the profit-making activity, as suggested by the House of Lords in *Blake*. Presumably, having merely made a poor bargain should not be a "legitimate interest". Also, Professor McCamus, notes that in *Blake*, Lord Nicholls describes wrongful conduct justifying an account of profits for breach of contract to be closely akin to a breach of fiduciary obligations (J.D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2012) at 1046; see also *Nunavut Tunngavik Inc. v. Canada (Attorney General)*, 212 NUCJ 11 at paras. 306 to 334 for a discussion of this).

While Canadian courts still need to determine what limits might be placed on restitutionary damages for breach of contract, in our view, courts are better served considering this issue explicitly and acknowledging that gain-based awards do effect a restitutionary result.

III. Rescission

Rescission is a cause of action and restitutionary remedy that has its roots in the common law and equity. It is a discretionary remedy. Under certain circumstances the court will set aside an agreement and grant such incidental relief as will restore the parties to their previous position (Maddaugh and McCamus, *supra* at 5-51). In making a claim for rescission of a contract, a plaintiff asks the court to rescind the agreement and allow a quasi-contractual (that is, restitutionary) claim for the value of benefits conferred under the rescinded contract, rather than ask for damages on the contract (Maddaugh and McCamus, *supra* at 4-8 to 4-9 and 5-51; *S-244 Holdings Ltd. v. Seymour Building Systems Ltd.* (1994), *supra*).

Historically, the "benefits" at issue have often been property. However, According to Maddaugh and McCamus, *supra*, rescission gives courts discretion to do what is "practically just" and may mean ordering a proprietary or personal remedy (at 5-51, citing *Bank of Montreal v. Murphy* (1986), 36 B.L.R. 36 (C.A.)). Although in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 [*Guarantee Co.*], the court expressly declined to comment on the availability of damages in the case of rescission (at para. 47), more recently in *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295, in the context of a separation agreement, the Court awarded damages in lieu of rescission (see also *Dusik v. Newton* (1985), 62 B.C.L.R. 1 (C.A.); *Kupchak v. Dayson Holdings Co. Ltd.* (1965), 53 D.L.R. (2d) 482 (B.C.C.A.) [*Kupchak*]; *Hodgkinson*, *supra*, where three members of the majority described the proper approach to restitutionary damages as the monetary equivalent of a rescissionary remedy; Maddaugh and McCamus, *supra* at 5-53; S.M. Waddams, *The Law of Contracts* (Toronto: Canada Law Book Inc., 1999) at 306).

Rescission is therefore an attractive alternative to contract enforcement where proof of damages would be difficult or costly or where the plaintiff has another reason to want a restitutionary remedy such as where the value of an asset sold under the contract has increased and thus the benefit conferred is the whole of the plaintiff's loss. In order to provide a remedy where a plaintiff has chosen rescission, restitution recognises the rescinding party's right to demand restitution of the benefits conferred under the avoided contract – in effect, to sue for damages measured by the *loss* rather than by the *expectation*. When a party elects rescission, he or she elects to be put in the position that they were in before the contract was made rather than in the position that he or she would have been if the contract had been performed.

Rescission is available when a contract has been induced by fraudulent or innocent misrepresentation (*Guarantee Co.*, *supra*; *Kingu v. Walmar Ventures Ltd.* (1986), 10 B.C.L.R. (2d) 15 (C.A.)); in cases of undue influence or fundamental mistake; where the agreement constitutes an unconscionable bargain; where a fiduciary improperly sells his own property to a beneficiary; or where a fiduciary buys trust property improperly (Maddaugh and McCamus, *supra* at 5-51). The court in *Guarantee Co.* at para. 39,

cited Lord Atkinson in *Abram Steamship Co. v. Westville Shipping Co.*, [1923] A.C. 773 (H.L.) for this definition of rescission (at 781):

> Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties in *status quo ante* and restores things, as between them, to the position in which they stood before the contract was entered into.

Where misrepresentation becomes a term of the contract, even if the misrepresentation is incorporated into the contract, if that misrepresentation is "substantial", "material" or "goes to the root of the contract", then rescission is available (*Guarantee Co.*, *supra* at paras. 44 and 47).

Rescission is also only available to a plaintiff if the following conditions are met: 1) the court can effect a *restitutio in integrum*; 2) the contract has not been affirmed by the plaintiff; 3) there is no laches or undue delay in seeking relief; and 4) third party rights have not intervened (Maddaugh and McCamus, *supra* at 5-52; see also *e.g.*, *Rossner v. Mross (c.o.b. Mross Imports)*, 2011 BCSC 958 at paras. 14 to 19). However, in the latter case, Canadian courts have been willing to substitute money for a property transferred to a third party (see e.g. *Trans-Canada Trading Co. Ltd. v. M. Loeb Ltd.*, [1947] 2 D.L.R. 849 (O.H.C.J.); *Kupchak*; *415703 B.C. Ltd. v. JEL Investments Ltd.*, 2010 BCSC 202).

Rescission cannot be granted where restitution of benefits is impossible (*Redican*; *Dominion Royalty Corporation Ltd. v. Goffatt*, [1935] S.C.R. 565; *Kingu v. Walmar Ventures Ltd.*, *supra*). However, a number of cases have suggested that exact restitution is not required if substantial justice can be done by an appropriate monetary adjustment between the parties (*Kupchak* at paras. 11-13; *Ruchiensky v. A. Spencer Co. Ltd.*, [1948] B.C.J. No. 26 (S.C.) (QL) at paras. 13-16 [*Ruchiensky*] at para. 17; Waddams, *The Law of Contracts*, *supra* at 305; *415703 B.C. Ltd. v. JEL Investments Ltd.*, *supra*).

If a contract has already been executed, then rescission may not be granted unless the ground for rescission is fraud, misrepresentation, an error *in substantialibus* or a complete failure of consideration (*Cole v. Pope* (1898), 29 S.C.R. 291; *Redican v. Nesbitt*, [1924] S.C.R. 135 [*Redican*]; *Ruchiensky*; *Cherris Estate v. Bosa Development Corp*., 2001 BCSC 228, B.C.J. No. 227 (QL)). However, Waddams notes that there are conflicting decisions as to when rescission will be allowed, and execution is only one factor used by courts in determining whether rescission should be denied (Waddams, *The Law of Contracts*, *supra* at 304-305). In *S-244 Holdings Ltd. v. Seymour Building Systems Ltd.*, *supra*, the B.C. Court of Appeal adopted Waddams's statement as the state of the law in this regard (at para. 21).

IV. Equitable Lien

An equitable lien is a proprietary remedy that is available in circumstances that give rise to a constructive trust (Maddaugh and McCamus, *supra* at 5-43). However, while a constructive trust confers entitlement to a specific asset in the defendant's hands, the equitable lien creates a charge on this asset (a non-possessory security interest). It thus secures payment of a judgment that requires a defendant to pay an amount of money (*Galvasky v. Stadnick*, [1937] 1 D.L.R. 473, O.J. No. 260 (C.A.) (QL)). By contrast, a common law lien is founded on possession and, except as modified by statute, merely confers a right to detain property until payment (*Transwest Helicoptors v. Int. Aviation Services et al.*, 2002 BCSC 1244 at para. 11).

Equitable liens are often used in conjunction with constructive trusts (*Steeves v. Steeves*, [1995] N.B.J. No. 473 (Q.B.) (QL) at para. 28, citing G. Klippert, *Unjust Enrichment* (Toronto: Butterworth, 1983) at 201-202):

> ... an equitable lien, like a constructive trust, does not arise from the common intention or agreement of the parties. This remedial device enables the plaintiff to secure a monetary claim against a definable piece of property in the hands of the defendant. The pressing of such a lien arises as a matter of law and is supposed to prevent unjust enrichment. … The constructive trust entitles the claimant to compel the legal title owner to hold the beneficial ownership, in part or in whole as a trustee. An equitable lien is a security mechanism.

An equitable lien can be attached to damages received by an insured from a wrongdoer in the course of a claim where the insurer has a right of subrogation (Maddaugh and McCamus, *supra* at 5-45 to 5-46; *Lord Napier and Ettrick et al. v. Hunter et al*., [1993] A.C. 713 (H.L.) at 738, cited with approval in *Colonial Furniture Co. (Ottawa) v. Saul Tanner Realty* (2001), 196 D.L.R. (4th) 1 (Ont. C.A.) at para. 20).

The equitable lien is often associated with the situation of vendor and purchaser or trustee expenses and trust property (D.W.M. Waters, M.R. Gillen and L.D. Smith, *Waters' Law of Trust in Canada*, 3rd ed. (Thomson Carswell, 2005) at 474-475). In actions for breach of fiduciary duty and breach of confidence, its principal use is to provide a device for granting proprietary relief against an asset, which is the product of a mixture of the claimant's assets with those of another (Maddaugh and McCamus, *supra* at 5-45).

Although constructive trusts are now usually available even where property has been commingled, there are circumstances where an equitable lien may still be advantageous. For example, where an asset has decreased in value, a plaintiff entitled to a constructive trust over an asset held by a defendant can opt for an equitable lien instead of constructive trust because in these circumstances a secured judgment debt may be preferred to the acquisition of the asset (Maddaugh and McCamus, *supra* at 5-43). Furthermore, unlike a constructive trust, it may be possible for a lien to be asserted over the pro-rated share of the defendant's property as well as a pro-rated share of the pro-rated value of the asset exceeding the amount of the plaintiff's monetary claim (Maddaugh and McCamus, *supra* at 5-43 to 5-44, citing English and Canadian authority, including *B.C. Teachers' Credit Union v. Betterly* (1975), 61 D.L.R. (3d) 755, B.C.J. No. 1158 (S.C.) (QL)).

An equitable lien may also be used by a defendant to prevent a plaintiff from acquiring a windfall (see *e.g.*, *Lac Minerals*, *supra*).

Equitable liens have recently being described as a "somewhat elusive concept" (*Biehl v. Strang*, 2011 BCSC 1373 at para. 395). But, as the above summary indicates, this remedy is not so elusive as to be unhelpful and a survey of recent case law indicates that it is still being used, albeit sparingly, in various areas of practice (*Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONSC 3648, appeal allowed 2011 ONCA 817 (creditors and debtors law); *Armstrong v. Lang*, 2011 BCCA 205 (insurance law); *Pan Canadian Mortgage Group Inc. v. 679972 B.C. Ltd.*, 2014 BCCA 113 (real property law); *Dorey v. Havens*, 2011 BCSC 1777 (family law); and *Biehl v. Strang* (commercial law)).

V. Equitable Contribution and Indemnity

Both equitable contribution and indemnity enable a plaintiff, who with one or more defendants share a liability to a third party, to claim from the co-obliger, the other defendant(s), the whole or any part of a payment made by the plaintiff to the third party, which has discharged all or part of that liability (Maddaugh and McCamus, *supra* at 9-1). Sometimes the restitutionary right is to indemnity and sometimes it is to contribution, but the underlying principle is the same.

Maddaugh and McCamus, *supra*, provide a set of hypotheticals that are helpful in distinguishing between these two closely-related remedies (at 9-2):

> **Contribution**: A and B are under a common (equal) obligation to C and if A pays more than A's share, A, may recover the excess from B (emphasis added).
>
> **Indemnity**: A and B are not equally liable to C as B is primarily liable to pay and if A discharges, B's primary obligation, then A can claim complete reimbursement from B (emphasis added).

Equitable contribution

The remedy of equitable contribution provides that, subject to any agreement to the contrary, persons who have a common interest and are subject to a common burden are bound to contribute equally to its satisfaction. "They must bear equally the burthen consequent upon their acts" (*Deering v. The Earl of Winchelsea* (1787) 2 Bos. & Pul. 270; 1 Cox 318, *per* Eyre C.B). There is "obvious justice [in] requiring that a common liability should be shared between those liable" (*Royal Brompton Hospital National Health Service Trust v. Hammond*, [2002] 2 All E.R. 801, [2002] UKHL 14 at para. 2 [*Royal Brompton*], *per* Lord Bingham of Cornhill). The leading case in B.C. on equitable contribution is *FBI Foods Ltd. v. Glassner*, 2001 BCSC 151, 86 B.C.L.R. (3d) 136.[2]

Equitable contribution avoids the unjust enrichment that could result from the "caprice" of a plaintiff who decides to pursue the whole of his damages from a single co-obligor (*Burke v. LFOT Pty Limited*, [2002] HCA 17, 209 CLR 282 [*Burke*] at para. 58, *per* McHugh J. concurring, citing the trial judge). It ensures that each responsible party makes an appropriate contribution to the total compensation, regardless of where the cost has fallen at first instance (*Dubai Aluminum Co. v. Salaam* [2003] 1 All E.R. 97, [2002] UKHL 48 at para. 52, *per* Lord Nicholls). The restitutionary nature of this remedy is illustrated in *Aviva Insurance Co. of Canada v. Lombard General Insurance Co. of Canada*, 2013 ONCA 416, leave to appeal dismissed, [2013] S.C.C.A. No. 375 (Q.L.), where the plaintiff Aviva was entitled to recover from the defendant under the principle of equitable contribution and also under the principle of unjust enrichment.

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[2] For further proceedings between Glassner and Cadbury, see 2001 BCSC 1472, 95 B.C.L.R. (3d) 385 (claim over by Glassner against Cadbury for breach of settlement agreement or unjust enrichment, arising out of liability to contribute to FBI dismissed). For the underlying action for breach of confidence, see *Cadbury Schweppes Inc. v. FBI Foods Ltd.* [1999] 1 S.C.R. 142, (1999), 59 B.C.L.R. (3d) 1.

Equitable contribution requires (a) liability "*in solidum*", that is, a "common liability" (*Royal Brompton* at para. 27, *per* Lord Steyn); (b) an involuntary payment made by one of the parties owing the common liability; and that (c) the payment made has the effect of discharging the co-obligor's liability. As Fridman explains, "[i]t is immaterial whether the liability of the co-obligors grows out of a common transaction or several transactions, as long as there is a liability *in solidum*, that is, there must be liability to a common demand" (Fridman, *supra* at 226-228). Thus, equitable contribution can apply even where the co-obligors are liable on different theories of liability (*Burke* at para. 49, *per* McHugh J. concurring).

The threshold question of what constitutes a common liability is not always clear. Difficulties of application arise, particularly where the remedy is sought to be extended beyond the familiar situations of insurers or parties who together have expressly agreed to assume a common liability. Where no such agreement is present and the potential co-obligors are not parties to the same transaction so their common obligation is involuntary as between them, it is not always easy to discern whether a common liability exists. For examples of these problems, see *Royal Brompton*; *Burke*[3]; and in the Canadian context, *Bilodeau v. Bergeron* [1975] 2 S.C.R. 345 and *Wallace v. Litwiniuk*, 2001 ABCA 118, 200 D.L.R. (4th) 534. But there are more recent decisions of the Supreme Court of Canada, decided under the Quebec *Civil Code*, which hold that persons liable to the same claimant, one in tort and the other in contract, may be responsible "*in solidum*" (*Prevost-Masson v. General Trust of Canada*, 2001 SCC 87, 3 S.C.R. 882 [*Prevost-Masson*]; *Gilles E. Neron Communication Marketing Inc. v. Chambre des notaires du Quebec*, 2004 SCC 53, 3 S.C.R. 295). Notwithstanding the different results, the underlying principles in the Quebec cases appear to be the same as at common law (*Prevost-Masson, supra* at paras. 27-30, *per* Lebel J).

In Canada, equitable contribution is most often applied in the insurance context, where more than one policy provides coverage for the same loss (see *Family Insurance Corporation v. Lombard Canada*, 2002 SCC 48, 2 S.C.R. 695 at para. 14, *per* Bastarache J.; *Pacific Forest Products Ltd. v. AXA Pacific Insurance Co.*, 2003 BCCA 241, 12 B.C.L.R. (4th) 293; *Aviva Insurance Co. of Canada v. Lombard General Insurance Co. of Canada, supra*; *ACE INA Insurance v. Associated Electric & Gas Insurance Services Ltd*., 2013 ONCA 685). Recent examples of the principle can be found in other contexts (*Tempo Building Supplies Ltd. v. Con-Serv Contracting Inc.* [1982] B.C.J. No. 238 (Co. Ct.) (QL) (co-debtors); *Rant v. Ward* (1998), 38 B.L.R. (2d) 82, 1998 CanLII 5993 (B.C.S.C.) ("co-obligants" under a promissory note); *Shoker v. Vollans* (1998), 56 B.C.L.R. (3d) 259, 1998 CanLII 6447 (C.A.) (co-guarantors); *Lafrentz v. M & L Leasing*, 2000 ABQB 714, [2001] 1 W.W.R. 629 (partners); see also s. 34, *Law and Equity Act*, R.S.B.C. 1996, c. 253).

Equitable Indemnity

The same principles ground indemnity as equitable contribution. Indemnity seeks to reverse the benefit conferred on another by reason of a payment that discharges their liability. The principle of indemnity has been described this way (Maddaugh and McCamus, *supra* at 9-21):

> Where two people are liable for the payment of the same debt, but the liability of one can be said to be "primary" and the liability of the other

[3] "The existence of such exceptions [to a right of equitable contribution, where, for example, one of two persons was contributorily negligent, or had offsetting claims] highlights the practical difficulties associated with determining claims for contribution solely on the basis of one party making a payment which another party might have been held equally liable to make, albeit for the breach of a completely different obligation" (*Burke* at para. 60, *per* McHugh J. concurring).

> to be "secondary", the person who is primarily liable may be ordered to indemnify the other.

Note, however, that equitable indemnity limits the plaintiff's recovery to the benefit that that the plaintiff has conferred on the defendant and thus a plaintiff is only reimbursed for the payment made, not for any out-of-pocket expenses (Maddaugh and McCamus, *supra* at 9-22).

Indemnity commonly arises in contracts of guarantee and suretyship. It ensures that a guarantor or surety, who are "secondarily liable", have a right of recovery against the person "primarily liable".

Payment of an indemnity obligation can give rise to equitable subrogation and the ability of the indemnitor to step into the indemnitee's shoes to pursue recovery from third parties (see *e.g.*, *299 Burrard Management Ltd. v. Strata Plan BCS 3699*, 2014 BCSC 390). Equitable subrogation is discussed below.

For a comprehensive discussion of equitable contribution and indemnity, see Maddaugh and McCamus, *supra* at Chapter 9.

VI. Equitable Subrogation

Subrogation is another means of reversing unjust enrichment and effecting restitution. Typically, subrogation enables a person who has conferred a benefit on another, such as the discharge of the other's liability, to exercise that person's rights against a third party who would otherwise be unjustly enriched. Another form of subrogation arises where a person who "has conferred a benefit upon another is unable to sue that other directly for restitution. Here, it may be desirable to subrogate the plaintiff to the position of some third party so the plaintiff might take advantage of that third party's rights against the person benefited" (Maddaugh and McCamus, *supra* at 8-17). In other words, it often acts as an exception to the contractual doctrine of privity.

Although familiar from contracts of indemnity in the insurance context, subrogation is a principle of more general application. It is a right that arises in equity and can exist independent of contract (*Banque Fiancière de la Cité v Parc (Battersea) Ltd.*, [1999] 1 A.C. 221 (H.L.).

In a recent Ontario Court of Appeal case, the Court succinctly summarised the doctrine as follows (*Aldo Group Inc. v. Moneris Solutions Corp.*, 2013 ONCA 725 at para. 36 [*Aldo*]):

> Equitable subrogation allows one party to stand in the shoes of another and advance any claims held by the original party.

The Supreme Court of Canada may soon provide an update to our understanding of equitable subrogation. An application for leave to appeal in *Aldo* was submitted to the Supreme Court of Canada on April 7, 2014 (*Mastercard International Inc. v. Aldo Group Inc.*, [2014] S.C.C.A. No. 31 (QL)). One of the grounds of appeal was whether the Ontario Court of Appeal erred in articulating and applying the doctrine of equitable subrogation.

For a comprehensive discussion of equitable subrogation, see Maddaugh and McCamus, *supra* at Chapter 8.

VII. Conclusion

As in our 2009 Paper, our aim in this paper has been to remind the reader of some lesser-known restitutionary remedies, including rescission, equitable lien, equitable contribution and indemnity and equitable subrogation. We hope that by highlighting these remedies, a number of which can apply beyond the established categories in which they first developed, attention will be drawn to the underlying unjust enrichment principle, with the further result that practitioners will find new and creative ways to apply them.

This paper also aims to highlight the availability of restitutionary damages in Canada, and, in particular, to highlight the fact that such damages can be available for breach of contract. The remedy responds to concerns about unjust enrichment by wrongdoing. We think it will aid in the development of the law to acknowledge and be more explicit about when in the contractual realm we should be awarding damages designed to strip away a wrongdoer's gains, and to rationalise the circumstances in which we now do so.