Remedies for Breach of Contract:

The Jimi Hendrix Experience

a presentation by

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1. In *Ruxley Electronics and Construction Limited v Forsyth* [1996] AC 344 Lord Bridge started his speech with these words, “My Lords, damages for breach of contract must reflect, as accurately as the circumstances allow, the loss which the Claimant has sustained because he did not get what he bargained for. There is no question of punishing the contract breaker”. In *Attorney General v Blake* (2001) 1 AC 268, the House of Lords introduced a substantial departure from that principle.

2. The majority (Lord Hobhouse dissenting) held that in “exceptional circumstances” a contract breaker could be ordered to account to a Claimant for the benefits he received from the breach of contract. The breach of contract in the Blake case was that of a member of the Secret Intelligence Service who had spied for the Soviet Union. Later he wrote a book about his exploits and the Attorney General took action, amongst other things, to “expropriate” the royalties that he was to receive from the publication of the book.

3. Ultimately that action was successful. The House of Lords based its decision on a breach of the contractual undertaking that Blake had given not to divulge any official information that he had gained during the course of his employment. The House of Lords held that in the exceptional circumstances of the case the courts could afford to the Crown the remedy, described by Lord Hobhouse as being “essentially punitive”, of ordering an account of profits.

4. One of the problems faced by the Crown in that case was that it could show no loss arising from the breach of contract. That problem was again faced by the
Claimant in *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323. In that case the effective beneficiaries of the estate of Jimi Hendrix brought an action for damages for breach of a settlement agreement arising out of earlier litigation. That settlement agreement had conceded to PPX copyright in relation to 33 listed master recordings of Jimi Hendrix’s work and a limited permission to honour existing contracts or licenses in relation to other titles.

5. In breach of the settlement agreement PPX had granted further licenses in relation to some of the latter titles. At first instance Buckley J granted an injunction restraining the further licensing of those titles but dismissed the claim made for an account. The claim for an account had been introduced, it seems, at a late stage of the proceedings when counsel for the Claimant conceded that evidence of loss arising from PPX’s breaches was not available and was unlikely to be available.

6. The Court of Appeal declined to order a full account of all profits earned but instead (see paragraph 45) it ordered PPX to pay over, “by way of damages, a proportion of each of the advances (of royalties) received to date and (subject to deduction of such proportion) an appropriate royalty rate on retail selling prices”.

7. In so doing it seems that the Court of Appeal considered themselves to be following (although not quite all the way) the Blake decision. In other words, it seems that the Court of Appeal felt that the case was sufficiently exceptional to make an award of damages where, on a traditional analysis, none had been
suffered, but not quite exceptional enough to make an award which was, essentially, punitive in nature.

8. The trouble, in my view, with that approach is that it leaves first instance courts with little guidance as to the circumstances when it would be appropriate to make the kind of award made in the Hendrix case, let alone that made in the Blake case.

9. Lord Nicholls at page 286 of the Blake case approved the suggestion that Lord Woolf MR had made in the Court of Appeal in Blake where he suggested three facts which should not be a sufficient ground for departing from the normal basis on which damages are awarded, namely the fact that the breach was cynical and deliberate; the fact that the breach enabled the Defendant to enter into a more profitable contract elsewhere; and the fact that by entering into a new and more profitable contract the Defendant put it out of his power to perform his contract with the Plaintiff. Lord Nicholls said that he agreed that none of those facts would be, by itself, a good reason for ordering an account of profits.

10. That which appears to have persuaded the House of Lords in Blake to award an account of profits was the assertion that Blake was in a position that was near to that of a fiduciary and that the Crown had a special interest in enforcing the obligations of Blake. The Court of Appeal in the Jimi Hendrix case was unable to find those factors present (see paragraph 37).
11. In the Jimi Hendrix case, the Court of Appeal analysed a number of cases 
where, after Blake, an account of profits had been sought. These are analysed at 
paragraphs 31 to 33.

12. In one, *Esso Petroleum v Niad* [2001] AER (D) 324, the Court had ordered an 
account of profits where an Esso dealer had pocketed price support from the 
supplier, Esso, but had failed to maintain reduced prices in accordance with his 
obligations under the Esso Price Watch Scheme. It could easily be seen how 
such activities might damage the Price Watch Scheme but Esso could show little 
in the way of actual losses. The key factor there was the fact that the dealer had 
“pocketed” the price support without passing on the benefit to the customer and 
that Esso had a legitimate interest in enforcing the scheme. Interestingly, the 
court awarded an alternative remedy as well, namely “restitution” of the amount 
by which the dealer had “overcharged” for the petrol. This was on the basis of 
unjust enrichment.

account of profits had been refused for the wrongful use of the initials WWFin 
breach of a negative covenant in an agreement. Also in *AB Corporation v CD Company* (2002) 1 Lloyds Reports 805 an account of profits was refused for the 
wrongful withdrawal of a ship from a charter after the market had risen.

14. In the Court of Appeal in the Jimi Hendrix case at paragraph 35 Mance LJ gave 
an example of a case that he thought could give rise to the remedy that was 
given to the Claimant in the Hendrix case. That was the case of a claim based 
on a restrictive covenant not to use land for a pop concert where the breach
occurred when the beneficiary was out of the country and suffered no discomfort at all. In those circumstances Mance LJ said that he could see no reason why since Blake there was any bar in appropriate circumstances to an order for payment of a reasonable sum having regard to any benefit made by the infringement even though no loss had occurred.

15. The problem with that approach is that there is nothing particularly exceptional about those circumstances. Also, as distinct from the Blake case, the remedy given in the Hendrix case does not have a truly punitive element. It is much more akin to the remedy given by Brightman J in Wrotham Park Estate Company Limited v Parkside Homes Limited (1974) 1 WLR 798. There, in breach of a restrictive covenant, the Defendant had built new houses on land burdened by the restrictive covenant. The beneficiary of the covenant had sought an injunction, by way of specific enforcement of the covenant, that the houses be demolished. That injunction was refused and Brightman J made an award of damages instead, being five percent of the developer’s anticipated profit, being the amount of money which could reasonably have been demanded for a relaxation of the covenant. Lord Hobhouse, in his dissenting speech in Blake, analysed that decision as compensating the Claimant for the sum that he could have exacted from the Defendant as the price of his consent to the development.

16. In essence, that is exactly what the Court of Appeal did in the Hendrix case.

17. Lord Nicholls in the Blake case considered another type of case where it has been said that the remedy of an account of profits for a breach of contract might
be appropriate. That is the “skimped performance” type of case. The Court of Appeal in the Blake case said that the new remedy should be available in such cases where the “gain” would take the form of the expense saved in the skimped performance. Lord Nicholls at page 286 said that it was not necessary to apply the “new remedy” to such cases because the law already provided a satisfactory remedy, namely the difference in the value received.

18. The Ruxley case, however, showed up the problem with that approach, namely, how do you assess that diminution in value?

19. In that case contractors had built a swimming pool a few inches less deep than the specification but that made no difference to the amenity value of the pool nor to the value of the property on which it was constructed. Most of the case concerned whether or not in those circumstances the building owner could claim the cost of rebuilding the pool to specification.

20. The House of Lords, however, did give consideration, albeit briefly, to the award of £2,500 that the first instance judge had made for “loss of amenity”. In so doing Lord Jauncey in his speech at page 355 cited a passage from the speech of Lord Cohen in East Ham Corporation v Bernard Sunley and Sons Limited [1966] AC 406 at 434 to 435. There Lord Cohen had cited with approval a passage in Hudson’s Building and Engineering Contracts Eighth Edition which had postulated three possible bases of assessing damages for defective work, namely either the cost of reinstatement, the difference in cost to the builder of the actual work done and the work specified or the diminution in value of the work due to the breach of contract.
21. It is the second measure which is significant in some skimped performance cases. In cases where there is no objective diminution in value in terms that can be measured in money and where reinstatement is not a practical possibility then, it seems to me, the correct analysis of what is due to the building owner is a sum that he might have negotiated had the building contractor approached him and sought his consent for the substituted performance.

22. Likewise in the case of a breach of a negative obligation where it is difficult if not impossible to prove a loss, the Claimant has lost the opportunity that he would otherwise have had of exacting from the contractor a price for the permission to do that which was prohibited.

23. In other words the situation that arose in Hendrix can be equated with the situation that arose in Ruxley and, indeed, that which arose in Wrotham. These are not exceptional cases and should, in my view, be treated as merely instances of where the court awards damages, properly so called, measured by the price that the Claimant would have exacted for, in the one case, substituted performance and in the other case, for a permission to do that which the covenantor had promised not to do.

24. As can be seen, this analysis involves no real departure from existing authority. It also leaves the Blake case (namely an order for an account of profits) as being applicable only to circumstances that can truly be described as exceptional. In that way the remedy of an account of profits for breach of contractual duty can be kept in bounds and the words of Lord Bridge that I quoted at the beginning of these notes can be given their proper force.
25. A practical application of this analysis would be to the situation of a breach of a restrictive covenant in a contract of employment. This situation was considered in paragraph 32 of the Hendrix judgment where Mance LJ stated that the terse dismissal of the possibility of an account of profits in a restraint of trade case by Jacob J in the WWF case might require reconsideration in a future case.

26. In my view Jacob J was probably right to dismiss the remedy of an account of profits in a breach of covenant in a restraint of trade case as being unlikely to be sufficiently exceptional. The foregoing alternative analysis, however, would provide a reasonable remedy to the Claimant where, as is often the case, it is very difficult to prove loss. The Court could award damages, as set out above, on the basis of an assessment of what price would have been exacted for a relaxation of the covenant.

27. **Summary**

At first sight the Hendrix case is an important development following on from the Blake case. In my view, however, it can be viewed more satisfactorily as a further illustration of the assessment of damages on the basis that an award is made to reflect what price would have been exacted had a permission or license for the breach of negative covenant been sought in the first place. In my view that type of analysis is also a satisfactory analysis of what the court should seek to do in the “skimped performance” cases. Neither of these two types of case can truly be described as “exceptional” and, therefore, should not be equated with the Blake type of case. The key, there, perhaps is the equation of Blake to the position of “almost a fiduciary”. The key to the Niad case was the abuse of price support by the defaulting dealer, who, although it was not put like this,
could be seen in relation to the price support as almost a fiduciary. Equity is
happy to strip fiduciaries of profits that are earned out of their fiduciary
position, it is my view that the common law, in relation to breach of contract,
should be careful to limit the remedy of an account of profits to similar
situations.

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