

Damages for Breach of Negative Covenants

The Place of ‘*Wrotham Park* Damages’ in Australia

RANDEEP SINGH KOONAR

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ANU College of Law, The Australian National University

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Table of Contents

I	Introduction.....	4
II	Chapter I.....	7
A	The Relevance of Specific Relief.....	7
B	The Object of Contractual Damages.....	9
C	Understanding the Ambiguity in the Compensation Principle.....	10
D	In Defence of the Performance View of Contractual Rights.....	13
E	Conclusion.....	16
III	Chapter II.....	22
A	The Compensation Principle in Australia.....	22
B	How Should Australian Courts Assess Damages in Cases Like <i>Wrotham Park</i>	23
C	Conclusion.....	29
IV	Chapter III.....	29
A	<i>Wrotham Park</i> Damages as Restitutionary Damages.....	29
B	The Argument for a Restitutionary Remedy in <i>Wrotham Park</i>	32
C	The Problem with <i>Blake</i>	35
D	Conclusion.....	37
V	Chapter IV.....	37
A	<i>Wrotham Park</i> Damages as Equitable Damages.....	37
B	Background to <i>Lord Cairns' Act</i>	38
C	The Significance of <i>Lord Cairns' Act</i> in <i>Wrotham Park</i>	39
D	Are Equitable Damages the Same as Common Law Damages.....	43
E	Applying the Maxim 'Equity Follows the Law'	44
F	When Should Equity Depart from the Law.....	46
G	Conclusion.....	50
VI	Conclusion.....	50

VII	Bibliography.....	52
VIII	Acknowledgements.....	58

This paper is concerned with cases where a defendant has breached a negative term under a contract but has not caused the plaintiff to suffer direct financial loss. Consider a simplified version of the facts in the English case of *Wrotham Park Estate Co v Parkside Homes Ltd* (*Wrotham Park*).¹

A and B enter into a contract where A promises to convey part of his land to B. Under the contract, B promises not to develop the land without A's consent. In breach of contract, B builds houses on the land and sells them for a substantial profit. A on the other hand does not suffer financial loss as the remainder of his land has not diminished in value.

In *Wrotham Park*, Brightman J assessed damages on the basis of the sum which the plaintiffs could reasonably have demanded to release the defendants from their contractual obligations.² This was held to be 5% of the defendant's profit.

There is disagreement as to how the award in *Wrotham Park* is best explained.³ In particular, the disagreement has concerned whether:

- (i) A should recover substantial damages despite not having suffered financial loss
- (ii) Such damages are compensatory or restitutionary
- (iii) A's ability to recover substantial damages depends on whether damages are sought at common law or in equity

¹ [1974] 1 All ER 321.

² *Ibid* 341-2.

³ Graham Vago, *Principles of the Law of Restitution* (Oxford University Press, 2nd ed, 2006) 431.

I INTRODUCTION

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¹ [1974] 2 All ER 321.

² Ibid 341-2.

³ Graham Virgo, *Principles of the Law of Restitution* (Oxford University Press, 2nd ed, 2006) 481.

Wrotham Park raises important legal issues in Australia. First, the case has not been considered by the High Court in the context of the measure of damages awarded by Brightman J.⁴ On the other hand, the High Court's reasoning in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* ('*Tabcorp*')⁵ contains powerful suggestions as to how cases like *Wrotham Park* might be decided in Australia. Of significance are the High Court's comments as to how damages for breach of contract are assessed. Secondly, *Wrotham Park* raises the issue of whether restitutionary remedies should be available for a breach of contract. Although English law has answered this question in the affirmative, it awaits determination by the Australian High Court.⁶ Therefore there is an unresolved issue of whether Australia ought to follow the English position in cases like *Wrotham Park*. Finally, a case like *Wrotham Park* may require the High Court to settle the uncertainty surrounding the scope of a court's power to award damages in equity.

Chapter I of the paper deals with whether an award of substantial compensatory damages should be available to a plaintiff in cases like *Wrotham Park*. Chapter II deals with how cases like *Wrotham Park* are likely to be decided in Australia. Chapter III deals with whether *Wrotham Park* damages are better regarded as being restitutionary. Chapter IV deals with whether the measure of damages would differ according to whether they are sought at common law or in equity.

⁴ *Wrotham Park* was considered in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1. The issue there concerned the enforceability of a restrictive covenant.

⁵ (2009) 236 CLR 272.

⁶ Keith Mason, John Carter and Greg Tolhurst, *Mason and Carter's Restitution Law in Australia* (LexisNexis Butterworths, 2nd ed, 2008) 737.

II CHAPTER I

A The Relevance of Specific Relief

Under Anglo-Australian law, pecuniary damages are the primary remedy for breach of contract.⁷ Specific remedies, which compel the defendant to perform his contractual obligations, are exceptional and only available where damages are an 'inadequate remedy' and even then, in the court's discretion.⁸ Where a negative term is breached however, the position is said to be different and the prohibitory injunction is the primary remedy.⁹ Therefore, the policy of the law has been to enforce the performance of negative terms. This Chapter begins by considering why this is so in the context of *Wrotham Park*.

1 Inadequacy of Damages

Where a negative term is breached, damages are generally considered to be an inadequate remedy.¹⁰ As Robertson, Paterson and Duke caution however, that proposition is only an empirical generalisation and should not be treated as a legal principle.¹¹ When then would damages be an inadequate remedy? According to Spry, a plaintiff must show that 'the right that is sought to be protected is of such a nature that an award of damages would not leave him *in all material respects in as good a position as if he had obtained performance in specie*' (emphasis added).¹²

⁷ David Wright, *Remedies* (The Federation Press, 2010) 4.

⁸ Michael Evans, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012) 710.

⁹ Craig Smith, 'Recognising a Valuable Lost Opportunity to Bargain when a Contract is Breached' (2005) 21 *Journal of Contract Law* 250, 253-4.

¹⁰ Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (Thomson Reuters, 4th ed, 2012) 572.

¹¹ *Ibid.*

¹² Ian Spry, *The Principles of Equitable Remedies* (Lawbook Co, 8th ed, 2010) 383.

Therefore, damages would have been an inadequate remedy in *Wrotham Park* for two reasons. The first concerned the ability of the plaintiffs to obtain substitute performance. Having undertaken not to develop the land, the defendants were the only party capable of performing the contract. Therefore, the plaintiffs would not have been able to utilise a damages award to obtain the equivalent of the defendants' performance from elsewhere.

Secondly, the negative term was primarily protective of the plaintiffs' non-pecuniary interests. At trial, Brightman J found that:

- i) The restrictions were important for visual and amenity reasons as certain developments might have been offensive on the eye.¹³
- ii) The restrictions were important for environmental reasons as the plaintiff wished to create a 'green-belt' within the estate to prevent the undue exploitation of the land.¹⁴

As the plaintiffs' interests were non-pecuniary, an award of pecuniary damages could scarcely have been a perfect substitute for their rights.

3. Injunctive Relief in *Wrotham Park*

Had the plaintiffs acted promptly after becoming aware of the defendants' breach they could have applied for a prohibitory injunction to restrain the development of the

¹³ [1975] 1 W.L.R. 1402, 1403; 70 L.R. 779.

¹⁴ Brightman J. *Wrotham Park* [1974] 2 All ER 321, 335. The grant of an injunction remains a matter of discretion.

John Carter, Elizabeth Paton and David Tolhurst, *Contract Law in Australia* (Lansdowne Butterworths, 5th ed.).

¹³ *Wrotham Park* [1974] 2 All ER 321, 335.

¹⁴ *Ibid* 334.

2 **Discretion to Award an Injunction**

In *Doherty v Allman*, Lord Cairns explained a court's jurisdiction to restrain breaches of negative terms in the following terms:

If parties for valuable consideration and with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is say, by way of injunction that the thing shall not be done...It is then not a question of balance of convenience or inconvenience, it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves.¹⁵

Although the accuracy of Lord Cairns' speech has been questioned,¹⁶ it continues to reflect important policy considerations which guide a court's discretion in awarding an injunction.¹⁷ In particular, it remains that where a prohibitory injunction is sought, the position of the plaintiff is stronger than that of the defendant and the injunction will usually be granted.¹⁸ Courts will have regard to the fact that the negative term reflects a freely negotiated bargain supported by good consideration.¹⁹ Therefore, there is no reason why the defendant should not be held to that bargain.

3 **Injunctive Relief in Wrotham Park**

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¹⁵ (1878) LR 3 App Cas 709, 720.

¹⁶ *Dalgety Wine Estate Pty Ltd v Rizzon* (1979) 141 CLR 552, 573 (Mason J). The grant of an injunction remains a matter of discretion.

¹⁷ John Carter, Elizabeth Peden and Greg Tolhurst, *Contract Law in Australia* (LexisNexis Butterworths, 5th ed, 2007) 948-9.

¹⁸ *Tabcorp* (2009) 236 CLR 272, 285.

¹⁹ Smith, above n 9, 253.

land. Based on the principles enunciated in *Doherty v Allman*, the injunction would probably have been granted and the status quo preserved.

The plaintiffs however did not seek a prohibitory injunction and by the time the matter came to trial, the defendants had built 14 houses on the land. At trial, the plaintiffs' claim was instead for a mandatory injunction, which would have required the houses to be torn down. Unlike prohibitory injunctions, courts are reluctant to grant mandatory injunctions due to the potential severity of such orders.²⁰ In *Wrotham Park*, a mandatory injunction was refused for public policy reasons. Ordering the houses to be torn down would, in Brightman J's opinion, have involved an 'unpardonable waste of much needed housing'.²¹

B *The Object of Contractual Damages*

Where a plaintiff fails to obtain specific relief, he is left to claim damages. In *Robinson v Harman*, Parke B explained the object of an award of damages in the following terms:

Where a party sustains loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed.²²

1 *The Ambiguity in the Compensation Principle*

Parke B's speech has become entrenched in Anglo-Australian jurisprudence.²³ Orthodoxy dictates that damages compensate a plaintiff for loss. There is however an ambiguity in the compensation principle which has profound implications for a

²⁰ David Bean, *Injunctions* (FT Law and Tax, 7th ed, 1996) 24.

²¹ *Wrotham Park* [1974] 2 All ER 321, 337.

²² (1848) 1 Exch 850, 855.

²³ See, eg, *Tabcorp* (2009) 236 CLR 272, 286; *Attorney General v Blake* [2001] 1 AC 268, 282.

plaintiff's ability to recover substantial damages in cases like *Wrotham Park*. As Coote argues, it is unclear whether the purpose of contractual damages is to secure for the plaintiff performance of the contract itself ('lost benefits in law'), or whether the purpose is to secure the financial consequences of performance only ('lost benefits in fact').²⁴

This distinction can be explained using the simplified facts of *Wrotham Park*. If damages compensate a plaintiff for lost benefits in fact, then A, not having suffered financial loss, should only recover nominal damages only. Conversely, if damages compensate a plaintiff for lost benefits in law, then A is taken to have lost his right to performance of the contract. A should then receive compensation representing the value of that right.

C *Understanding the Ambiguity in the Compensation Principle*

Why then does such ambiguity arise? Coote has attributed this to the ambivalence surrounding the nature of the rights conferred by a contract.²⁵ As this part of the Chapter will show, there are three main views of contractual right.

In this respect, Wright has also argued that there is a close relationship between the primary contractual right and the remedy awarded for its breach.²⁶ Therefore, how we understand contractual rights will in turn inform how damages are to be assessed for its breach.

²⁴ Brian Coote, 'Contract Damages, Ruxley, and the Performance Interest' (1997) 56 *Cambridge Law Journal* 537, 540, 550.

²⁵ *Ibid* 541.

²⁶ David Wright, above n 7, 8.

1 **Three Views of Contractual Rights**

(a) **A Plaintiff Always has a Legitimate Interest in Performance ('Performance View')**

This view dictates that contracts are made to be performed and therefore binding on the parties.²⁷ A defendant is under a legal obligation to render the promised performance. The corollary to that proposition is that the plaintiff has a legal right to expect performance.

(b) **A Plaintiff Never has a Legitimate Interest in Performance ('Efficient Breach View')**

Conversely, others argue that a plaintiff never has a legal right to performance of a contract. According to Holmes, the law gives a defendant the option of performing or paying damages in the alternative.²⁸ In the absence of a legal obligation on the defendant to perform, the plaintiff cannot be said to have a legal right to performance. Instead, the plaintiff's contractual right is reduced to the mere expectation that he will receive damages should the defendant breach.

The Holmes view of contract has been rationalised by economists as the doctrine of 'efficient breach'.²⁹ This theory posits that the law should permit and encourage

²⁷ See, eg, Daniel Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 *Law Quarterly Review* 628, 629; Brian Coote, 'The Essence of Contract' (1988) 1 *Journal of Contract Law* 183, 190; Charles Fried, *Contract as Promise* (Harvard, 1981) 17.

²⁸ Oliver Wendell Holmes, 'The Path of the Law' (1987) 10 *Harvard Law Review* 457, 462.

²⁹ See, eg, David Campbell and Donald Harris 'In Defence of Breach: A Critique of Restitution and the Performance Interest' (2002) 22 *Legal Studies* 208, 227; Richard Posner, *Economic Analysis of Law* (Wolters Kluwer, 6th ed, 2003) 119-20.

breaches of contract where it would be economically efficient to do so.³⁰ This would in turn point against the plaintiff have an absolute right to performance.

(c) A Plaintiff May, but Need not, have a Legitimate Interest in Performance ('Legitimate Interest View')

Finally, some take a middle approach. Edelman for example rejects the notion that a plaintiff never has a legal right to performance of a contract.³¹ Conversely, Edelman is equally critical of the suggestion that a plaintiff always has such a right.³² In this respect, Edelman has argued that:

The law has not always provided the promisee with the remedies to adequately protect such a legal right to performance of the contract. Without adequate remedies to enforce or protect a right to performance, such a right sometimes appears empty or illegitimate.³³

Therefore, a plaintiff's right to performance of a contract is defined by the type of remedies which a court will grant upon its breach.³⁴

2 The Significance of Theoretical Differences in Assessing Damages

Under the performance view of contractual rights, the plaintiff always has a right to performance. Upon the defendant's breach, the plaintiff's 'loss' is his right to performance of the contract.³⁵ Therefore, the plaintiff is to be compensated with a

³⁰ NC Seddon and MP Ellinghaus, *Cheshire and Fifoot's Law of Contract* (LexisNexis, 9th ed, 2008) 1229. It is beyond this paper to comprehensively examine the variants of the theory. It is sufficient for present purposes to note that a plaintiff does not have an absolute right to performance under this theory.

³¹ James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart, 2002) 153.

³² *Ibid* 154.

³³ *Ibid*.

³⁴ Or whether the contract is specifically enforceable.

³⁵ *Marks v GIO Holdings Limited* (1998) 196 CLR 494, 502 (Gaudron J).

sum of money equivalent to the value of that right.³⁶ In this sense, damages are a substitute for performance and compensate a plaintiff for lost benefits in law.

Under the efficient breach and legitimate interest views, the plaintiff never has an absolute right to performance. Never having had such a right, there is no question of the plaintiff being compensated for the loss of that right upon the defendant's breach. Instead, the plaintiff's loss is the diminution in his financial position caused by the breach. Therefore, it is the case that under the efficient breach³⁷ and legitimate interest views,³⁸ damages compensate a plaintiff for financial loss or lost benefits in fact.

D *In Defence of the Performance View*

In this part of the Chapter, it will be shown that the performance view offers the best explanation of contractual rights. In particular it will be argued that:

- i) A plaintiff always has a right to performance of a contract
- ii) Damages are a substitute for performance
- iii) The non-financial interests of the plaintiff should not be disregarded when assessing damages

³⁶ Ibid.

³⁷ Campbell and Harris, above n 29, 210. The diminution in value measure is the 'normal measure' of damages.

³⁸ James Edelman and Elise Bant, *Unjust Enrichment in Australia* (Oxford University Press, 2006) 38. The starting point when assessing damages is compensation for financial loss, rather than as a substitute for the loss of a right.

1 ***Does a Plaintiff Always Have a Right to Performance?***

It is proposed to exclude the efficient breach view from discussion in this part of the Chapter. As the High Court said in *Tabcorp*,³⁹ the weakness of that view is that it takes no account of the existence of specific remedies, whereby the policy of the law has clearly favoured the performance of contracts. As an absolute proposition therefore, the efficient breach theory has never been accepted by English⁴⁰ or Australian courts. In *Coulls v Bagot's Executor and Trustee Co Ltd*, Windeyer J described the theory as 'a faulty analysis of legal obligations', instead preferring the view that a plaintiff always has a right to performance of a contract.⁴¹

On other occasions, criticisms of the theory have been more equivocal. In *Zhu v Treasurer (NSW)*, the High Court said:

Subject to the established limits on the grant of [specific remedies], each contracting party may be said to have a right to the performance of the contract.⁴²

Here, the legitimate interest view is superficially attractive. Unlike the efficient breach view, it accounts for the existence of specific remedies. Moreover, it accounts for the fact that specific remedies are discretionary and exceptional under Anglo-Australian law. The question for the performance view therefore is: Where the law will not order specific performance of a contract, can a plaintiff still be said to have a right to performance? This paper argues in the affirmative. Consider this example:

³⁹ *Tabcorp* (2009) 236 CLR 272, 286.

⁴⁰ *Beswick v Beswick* [1968] AC 58, 91.

⁴¹ (1967) 119 CLR 460, 504.

⁴² (2004) 218 CLR 530, 574.

A contracts to sell a car to B. A breaches the contract by delivering a car that does not meet the contractual specifications. The value of the car which B receives is \$5000. The market value of a car meeting the contractual specifications is \$7000.

Assuming the car is a non-unique good, damages would be an adequate remedy and specific performance of the contract will not be ordered. Instead, the plaintiff will recover \$2000 in damages. What does the damages award then represent? For the legitimate interest view, it represents the plaintiff's financial loss. This example is therefore the paradigm case where a plaintiff does not have a legitimate interest in performance and is only entitled to compensation for financial loss. For the performance view, damages are awarded to reflect the notional transaction whereby the plaintiff sells the car in the market and purchases a replacement meeting the contractual specifications.⁴³ Therefore, damages are a substitute for performance as they give the plaintiff the resources to obtain the very performance which he bargained for.

2 *Why are Damages Better Regarded as a Substitute for Performance?*

In the example above, the measure of damages would be the same whether we understand damages as being a substitute for performance or as compensation for financial loss. In other cases, that distinction would matter. In a dissenting speech in *Attorney General v Blake* ('*Blake*'), Lord Hobhouse cautioned that:

[Damages are] a substitute for performance...The error is to describe compensation as relating to a loss as if there has to be some identifiable physical or monetary loss to the plaintiff. In the vast majority of cases, this error does not matter because the plaintiff's claim can be described without distortion. But in a minority of cases, the

⁴³ *Tabcorp* (2009) 236 CLR 272, 286.

error does matter and cases of the breach of negative promises typically illustrate this category.⁴⁴

This part of the Chapter will show that Lord Hobhouse's dissent is an illuminating one. Using *Wrotham Park* as an example, it will show that the performance view of contractual rights provides a more coherent account of the law in cases where a negative term is breached. It will further show that when applied to these cases, the legitimate interest view is riddled by an inconsistency which undermines its efficacy.

(a) Cases Involving Breach of Negative Terms

As explained earlier, the legitimate interest view perceives the extent of a plaintiff's right to performance of a contract as dependent upon the type of remedies which a court would grant upon its breach. According to Edelman, a plaintiff would have a legitimate interest in the performance of a contract in cases where a court would have granted an injunction to restrain its breach.⁴⁵ *Wrotham Park* therefore would have been such a case. Had the plaintiffs applied for a prohibitory injunction, it would almost certainly have been granted. Under the legitimate interest view, it would not matter that a mandatory injunction was subsequently refused. Instead, it is sufficient that the contract was of a type which a court would have specifically enforced.⁴⁶

Where a mandatory injunction is refused however, the assessment of damages under the legitimate interest view is problematic. According to that view, damages are compensation for financial loss. Therefore, compensatory damages would have been nominal in cases like *Wrotham Park*. Yet for proponents of the legitimate interest view, such a result is troubling because the plaintiff's legitimate interest in

⁴⁴ [2001] 1 AC 268, 298.

⁴⁵ Edelman, above n 31, 155.

⁴⁶ Ibid 156.

performance of the contract would not be adequately protected. There is thus thought to be a gap in the law of contract which should be filled by a new remedy. In particular it is argued that a restitutionary remedy should be available.⁴⁷ This issue will be addressed further in Chapter III of this paper. There, it will be shown that there is no need for a restitutionary remedy in cases like *Wrotham Park*.

Moreover, there is a weakness in the legitimate interest view which shows that it really is a contradiction in its own terms. This relates to why injunctions are granted to restrain the breaches of negative terms. Earlier in this Chapter, it was said that a plaintiff seeking an injunction must show that damages would be an inadequate remedy. Why then would damages have been an inadequate remedy in *Wrotham Park*? The problem with the legitimate interest view is that it appears to suggest that damages were an inadequate remedy because they would have been nominal. This, it is submitted, is hopelessly circular. If, as the legitimate interest view appears to suggest, a plaintiff has suffered no loss in cases such as *Wrotham Park*, why then would damages be an inadequate remedy? If the plaintiff has suffered no loss, surely it could then be said that nominal damages would have been adequate to remedy the breach.

The problem with the legitimate interest view is that it fails to explain why damages are an inadequate remedy in cases like *Wrotham Park*. The reason for this, it is suggested, is that by using the existence of remedies to explain a plaintiff's primary contractual right, the theory fails to properly appreciate the nature of the primary right.

The performance view on the other hand rejects the notion that damages only compensate a plaintiff for financial loss. Instead, it requires damages to be a

⁴⁷ Ibid 178-9.

substitute for performance. Therefore, the focus is on the performance which the plaintiff is legally entitled to expect under the contract and the sum of damages required to give the plaintiff the equivalent of that performance. Earlier in this Chapter, it was said that the nature of the plaintiffs' interest in performance of the contract, being primarily non-pecuniary, was such that an award of damages could never have been a perfect substitute for performance in *Wrotham Park*. Under the performance view, damages would have been an inadequate remedy for this reason.

The performance view avoids two problems associated with the legitimate interest view. First, it identifies why damages were an inadequate remedy in *Wrotham Park*. Secondly, it does not assume that damages in *Wrotham Park* were necessarily nominal. As Chapter II of this paper will show, courts will do their best to place a value on a plaintiff's contractual rights.

(b) Cases Where the Contract is Protective of Non-Financial Interests

The deficiencies of the efficient breach and legitimate interest views of contractual rights are further exposed in cases where the plaintiff has contracted for a non-financial benefit. In *Wrotham Park*, the covenant prohibiting the defendants from building was important to the plaintiffs for visual and environmental reasons rather than for financial ones. Moreover, the covenant was itself of no market value. By its very nature, it was not something which could be bought and sold on the market. Instead, the value of the covenant was subjective and personal to the plaintiff. In the literature, this value has been described as the 'consumer surplus.'⁴⁸ In cases like

⁴⁸ Donald Harris, Anthony Ogus and Jennifer Phillips, 'Contract Remedies and the Consumer Surplus' (1979) 95 *Law Quarterly Review* 581, 593-4: The consumer surplus is the subjective and non-financial value which a plaintiff attributes to performance that is over its market value.

Wrotham Park, the question for the law is whether the consumer surplus, and thus a plaintiff's non-financial interests, should be given legal recognition and protection.

Under the efficient breach and legitimate interest views, contractual damages compensate a plaintiff for financial loss. In this way, the subjective value which a plaintiff places on performance would be irrelevant to the assessment of damages, except to the extent that it is reflected in the financial consequences of breach.⁴⁹

Under the performance view, contractual damages compensate a plaintiff for lost benefits in law or the loss of his contractual right to performance. The performance view looks at the performance to which the plaintiff is contractually entitled to. Therefore, the plaintiff's non-financial interest in performance would be relevant in identifying what the plaintiff has lost as a result of the defendant's breach and thus the damages which he ought to receive.

This part of the Chapter will show that the performance view should be preferred in cases where a plaintiff has expressed non-financial interests in a contract. In particular, it will be argued that the performance view upholds the freedom which parties have to contract in a way which the other views do not.

(i) *Respecting Freedom to Contract*

⁴⁹ Chapter III of this paper will show that the legitimate interest view does in fact account for a plaintiff's consumer surplus. However, it does so by awarding restitutionary damages.

Under Anglo-Australian law, parties have freedom to contract.⁵⁰ In *Wrotham Park*, the plaintiffs had freedom to bargain for restrictions on the defendants' ability to develop the land. They could have bargained for restrictions of whatever nature and for whatever reason which they desired. Equally, the defendants were free to accept those restrictions. Had such restrictions been objectionable to them they could have bargained with the plaintiffs for their modification.

If the policy of the law is to afford parties freedom to contract, then the law should also be committed to upholding freely entered into bargains. If a plaintiff has bargained for a non-financial result under the contract, why should the law make nonsense of the plaintiff's ability to specify such interests in a contract by only compensating a plaintiff for the financial consequences of the defendant's breach?

In *Wrotham Park*, the plaintiffs had never bargained for a financial result. To have compensated them purely on the basis of financial loss would not have given them any part of the benefit they had bargained for. This point is best illustrated using a modified version of the facts in *Wrotham Park*. Had the value of the plaintiffs' land appreciated in value, could the plaintiffs still be said to have suffered a loss? This paper submits that the answer is 'yes' for the plaintiffs would still have lost the benefit of their bargain.

A similar issue arose in *Radford v De Froberville* ('*Radford*').⁵¹ There, the plaintiff sought the cost of building a boundary wall which the defendant had failed to build in breach of contract. The evidence suggested that the value of plaintiff's property was higher without the wall being built. Oliver J awarded the cost of building the wall and in a very powerful judgement said:

⁵⁰ Carter, Peden and Tolhurst, above n 17, 8.

⁵¹ [1978] 1 All ER 33.

Now, it may be that viewed objectively, it is not to the plaintiff's advantage to be supplied with the article or service which he has stipulated...But surely, that must be for the plaintiff to judge. Pacta sunt servanda.⁵²

Radford emphasises the law's commitment to upholding the bargains entered into by the parties. More importantly, *Radford* shows that it is for the plaintiff to judge whether he has received the performance which he had bargained for.

The problem with the legitimate interest and efficient breach views is that by only compensating a plaintiff for financial loss, the law would not be upholding bargains in cases where a plaintiff has bargained for a non-financial result. In turn, freedom to contract would be undercut. In contrast, the performance view gives content to freedom to contract by looking at the performance which the plaintiff had bargained for and giving the plaintiff as close a substitute as possible for that performance.

E Conclusion

Chapter I of this paper has shown that the performance view provides the most coherent explanation of contractual rights in cases like *Wrotham Park*. Under this view, damages compensate a plaintiff for lost benefits in law. Damages therefore are a substitute for performance.

Chapter II will show that the performance view of contractual rights represents the law in Australia. It will then consider how cases like *Wrotham Park* might be decided in Australia.

III CHAPTER II

A The Compensation Principle in Australia

⁵² Ibid 42.

In *Tabcorp*, the lessees of office premises breached a covenant prohibiting alterations to the premises by demolishing the foyer and building a new one in its place. Although the value of the premises had diminished by \$34,820, the landlord sought and was ultimately awarded the higher cost (\$1,380,000) of reinstating the premises to their original condition.

It is clear from the High Court's unanimous judgement that the object of the award was not to compensate the plaintiff for financial loss. First, the Court held that to place the plaintiff in the same position as if the contract had been performed does not always mean the same financial position.⁵³ Secondly, the Court held that the plaintiff's expectations under the contract were not only relevant to the extent that they were measurable by some depreciation in the plaintiff's financial position.⁵⁴ Instead, the Court emphasised that its award reflected the contractual right of the landlord to the preservation of its premises.⁵⁵

Tabcorp thus establishes that the performance view of contractual rights represents the law in Australia. In Australia, contractual damages compensate a plaintiff for lost benefits in law.

B *How Should Australian Courts Assess Damages in Cases Like Wrotham Park?*

⁵³ *Tabcorp* (2009) 236 CLR 272, 286.

⁵⁴ *Ibid* 287.

⁵⁵ *Ibid*.

Should a case like *Wrotham Park* arise in Australia, the starting point should be the compensation principle as it was interpreted by the High Court in *Tabcorp*. The question for a court is what sum of damages will place the plaintiff in the position he would have been in had the contract been performed, noting that this need not be same financial position. In applying the compensation principle, it is important to remember that:

- i) It is erroneous to assume that damages only compensate a plaintiff for financial loss
- ii) Damages compensate the plaintiff for the loss of his right to performance of the contract
- iii) Damages are a substitute for performance
- iv) A plaintiff's non-financial interests are relevant to identifying the plaintiff's loss and therefore to the assessment of damages

1 *Wrotham Park Damages as a Model for Recovery in Australia*

In *Wrotham Park*, damages assessed on the basis of financial loss would not have adequately compensated the plaintiffs for their non-financial interest in performance would have been ignored. The problem however was finding a substitute for the defendants' performance. There, the defendants were the only party who was capable of performing the contract. Accordingly, there was no possibility of the plaintiffs being awarded the cost of obtaining substitute performance elsewhere.

In this respect, there may be merit in Australian courts adopting a similar approach to Brightman J in *Wrotham Park*. When faced with the question of what damages ought

to be awarded, Brightman J asked himself how the defendants might have avoided breaching the contract.⁵⁶ The first way would have been by not developing the land. The second according to Brightman J would have been by seeking a release from their contractual obligations. Therefore, Brightman J assessed damages at the sum which the plaintiffs could reasonably have demanded from the defendants for a relaxation of the covenant. His honour assessed this sum at £2,500, being 5% of the defendants' profit.

There is much to be said about Brightman J's award in *Wrotham Park*. In principle, it was a substitute for performance as it purported to place the plaintiffs in the position they would have been in had the contract not been breached. In this sense, it would be consistent with how the compensation principle was interpreted in *Tabcorp*. However, as the next part of this Chapter will show, there are unresolved issues about Brightman J's award which must be addressed.

2 What Losses do Wrotham Park Damages Compensate For?

(a) Damages for Lost Opportunity to Bargain

Some commentators have explained *Wrotham Park* damages as compensating the plaintiff for a lost opportunity to bargain with the defendant for the relaxation of the covenant.⁵⁷ This explanation has been criticised for being 'fictional'. The fiction, it will be shown, lies in two senses. One wide and the other narrow.

⁵⁶ *Wrotham Park* [1974] 2 All ER 321, 341.

⁵⁷ Robert Sharpe and Stephen Waddams, 'Damages for Lost Opportunity to Bargain' (1982) 2 *Oxford Journal of Legal Studies* 290, 292; Smith, above n 9, 250.

(i) The Method of Assessment is Fictional

The narrower criticism relates to the hypothetical manner in which *Wrotham Park* damages are assessed.⁵⁸ In this respect, the assessment of damages in *Wrotham Park* was admittedly fictional. However, if the fiction only lies in how damages are assessed, then the argument against recovery on the *Wrotham Park* basis is a weak one. As Phang and Lee argue, difficulty in assessing damages is not a bar to recovery.⁵⁹ Instead, courts have maintained that they will do their best to quantify the plaintiff's loss.⁶⁰ It is also the case that quantification in these cases is hypothetical due to the defendant's own conduct.⁶¹ In such circumstances, courts have seen it just to resolve the question of quantum of damages against the defendant.⁶²

(i) The Loss in *Wrotham Park* was Fictional

The wider criticism is that *Wrotham Park* damages compensate the plaintiff for a fictional loss.⁶³ It is argued that in cases where the plaintiff would never have relaxed the covenant, the plaintiff cannot be treated as having suffered a loss. A closer examination of this argument reveals that it is premised on the assumption that the only loss which the plaintiff could have suffered as a result of the breach of contract is financial loss. So much is clear from the following passage of Steyn LJ's judgement in *Surrey County Council v Bredero Homes Ltd* ('*Bredero*')

[T]hat [*Wrotham Park* damages] can be justified on the basis of a loss of bargaining opportunity is a fiction. The object of the award in the *Wrotham Park* case was not to

⁵⁸ Andrew Burrows, *Remedies for Tort and Breach of Contract* (Oxford University Press, 3rd ed, 2008) 223.

⁵⁹ Andrew Phang and Pey-Woan Lee, 'Rationalising Restitutionary Damages in Contract Law: An Elusive or Illusory Quest?' (2001) 17 *Journal of Contract Law* 240, 254.

⁶⁰ *Fink v Fink* (1946) 74 CLR 127, 143.

⁶¹ *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1990) 24 NSWLR 499, 508.

⁶² *Ibid.*

⁶³ Virgo, above n 3, 481; Edelman and Bant, above n 38, 37; Andrew Burrows, *The Law of Restitution* (Butterworths LexisNexis, 2nd ed, 2002) 483.

compensate the plaintiff for *financial injury*, but to deprive the defendant of an unjustly acquired gain. (emphasis added)⁶⁴

This paper has shown that assumption to be erroneous. In Australia, contractual damages compensate a plaintiff for the loss of his right to performance of the contract. Therefore, the wider criticism of *Wrotham Park* damages can be dismissed.

(b) *Wrotham Park* Damages as Compensation for Loss of Performance Interest

This paper suggests that it is desirable to eschew the notion that *Wrotham Park* damages compensate a plaintiff for the loss of an opportunity to bargain with the defendant. What is being compensated for in cases like *Wrotham Park* is not the loss of a factual bargaining position. Instead, it would be better to treat the award as compensating the plaintiff for the loss of his right to performance of the contract in circumstances where that right is not readily measurable in monetary terms. Alternatively, although courts have seen this label as unhelpful,⁶⁵ it might be said that such awards compensate the plaintiff for the loss of his 'consumer surplus'.

The case law reveals support for awards made on this basis. In *Ruxley Electronics and Constructions Ltd v Forsyth* ('*Ruxley*'),⁶⁶ the defendant breached a contract by building a swimming pool that was 9 inches shallower than what was contracted for. The difference in value between the pool built and the one contracted for was nominal and the House of Lords refused to award the plaintiff the cost of replacing the pool on the ground that it would have been wholly unreasonable. Instead, their lordships upheld the trial judge's award of £2,500 being damages for loss of amenity.

⁶⁴ [1993] 3 All ER 705, 714.

⁶⁵ *Farley v Skinner* [2002] 2 AC 732, 748.

⁶⁶ [1996] AC 344.

Lord Mustill expressly recognised the award as compensating the plaintiff for the loss of consumer surplus.⁶⁷ In *Farley v Skinner*,⁶⁸ Lord Scott was at pains to stress that the purpose of the award in *Ruxley* was not to compensate the plaintiff for a loss of amenity which was merely consequential upon the defendant's breach. Instead, his honour regarded the award as compensating the plaintiff for the loss of a contractual benefit in circumstances where that benefit was difficult to assess in monetary terms.

This is not to say that Brightman J's approach in *Wrotham Park* should no longer be relevant. The consumer surplus, being a subjective and personal value, is notoriously difficult to quantify.⁶⁹ In this respect, Brightman J's approach has been commended for seeking to place a commercial value on the plaintiff's contractual rights by looking at the price which would have been payable between willing parties.⁷⁰ Ultimately however, it is important to recognise that such awards are largely arbitrary and reflect a court's attempt to step into the shoes of a plaintiff and place a monetary value on a right, which by its very nature has no monetary value.

3 When are *Wrotham Park* Damages Available?

In *Bredero*, Dillon LJ expressed the concern that *Wrotham Park* damages would pose the problem of indeterminate liability.⁷¹ According to Dillon LJ, it would be impossible to define with clarity the situations in which a plaintiff could be said to have been deprived of an opportunity to bargain. His honour opined that every time a

⁶⁷ Ibid 361.

⁶⁸ *Farley v Skinner* [2002] 2 AC 732, 772.

⁶⁹ Bibi Sangha and Bob Moles 'Can Contract Law Protect Individual Rights and Preferences' (1998) 10 *Bond Law Review* 39, 46-7; Alexander Loke 'Cost of Cure or Difference in Market Value? Towards a Sound Choice in the Basis for Quantifying Expectation Damages' (1996) 10 *Journal of Contract Law* 189, 203.

⁷⁰ *Experience Hendrix LLC v PPX Enterprises Inc* [2003] 1 All ER (Comm) 830, 846.

⁷¹ [1993] 3 All ER 705, 713.

contract was breached, a plaintiff could be regarded as having been deprived of an opportunity to bargain for the defendant's release.⁷²

To alleviate such concerns, some have sought to limit the availability of *Wrotham Park* damages to situations where the plaintiff could have been restrained by an injunction at the time of breach.⁷³ In *Bredero*,⁷⁴ this argument was rejected by both Dillon and Steyn LJ. It is submitted that their honours were correct in this respect for it is unclear why the availability of damages at common law should depend on the availability of a wholly different and discretionary set of remedies available in equity. This argument will be revisited in Chapter III of this paper which deals with damages awarded in equity.

Dillon LJ's concerns however are overplayed. What is being compensated for in cases like *Wrotham Park* is the loss of the plaintiff's right to performance of the contract and not any factual bargaining position. Therefore, the question in each case remains what sum of damages would give the plaintiff the benefit of the performance which he contracted for. In cases of delivery of defective goods, damages will be awarded on the diminution on value basis to reflect the notional transaction where the plaintiff goes into the market to mitigate his loss by selling the defective goods and purchasing new ones. In other cases, a plaintiff may see no practical advantage in seeking damages on the *Wrotham Park* basis. In cases like *Tabcorp*, the plaintiff is more likely to seek the higher cost of reinstatement.

This paper however concedes that *Wrotham Park* damages should be limited to cases where the plaintiff's performance interest is difficult to quantify in monetary

⁷² Ibid.

⁷³ Stephen Waddams, 'Profits Derived from Breach of Contract: Damages or Restitution' (1997) 11 *Journal of Contract Law* 114, 122; Smith, above n 9, 257.

⁷⁴ [1993] 3 All ER 705, 713, 714.

terms. Therefore, it is important that the courts carefully consider what the parties had bargained for. Where the bargain was purely financial, a plaintiff is more likely to be adequately compensated on the basis of financial loss.

C Conclusion

In this Chapter, it was shown that a plaintiff is likely to recover substantial compensatory damages should a case like *Wrotham Park* arise in Australia. Such damages, it was suggested, may be assessed on the basis of Brightman J's approach in *Wrotham Park*. It is however important to recognise that what is being compensated for in these cases is the loss of the plaintiff's performance interest and not a factual bargaining position.

IV CHAPTER III

A Wrotham Park Damages as Restitutionary Damages

In the case law and academic commentary, there is support for the proposition that Brightman J was awarding restitutionary damages in *Wrotham Park*. By 'restitutionary damages' it is meant damages assessed by reference to the benefit obtained by the defendant from of the breach of contract.⁷⁵ In *Wrotham Park*, where damages were assessed at 5% of the defendant's profit, the damages award can be explained as restitutionary in two ways.⁷⁶ First, it could represent the expense saved by the defendant in not negotiating a release from the contract. Alternatively, it could represent a partial disgorgement of the actual profits made by the defendant in breach of contract.

⁷⁵ Mason, Carter and Tolhurst, above n 6, 709; Richard O'Dair, 'Restitutionary Damages for Breach of Contract and the Theory of Efficient Breach: Some Reflections' (1993) 46 *Current Legal Problems* 113, 114.

⁷⁶ Mason, Carter and Tolhurst, above n 6, 709.

1 *The Rule Against Restitution*

The problem with treating *Wrotham Park* damages as restitutionary is that orthodoxy denies the availability of restitutionary damages for breach of contract.⁷⁷ In Chapter I, it was explained that the object of an award of damages is to place the plaintiff in the position which he would have been in had the contract been performed. The corollary to that proposition is that the plaintiff is not to be placed in a better position.⁷⁸ Therefore, restitutionary damages would be objectionable if they have the effect of conferring the plaintiff with a windfall that exceeds the value of his contractual rights.

Here, it is important to restrict the expression 'restitutionary damages' to cases where the benefit obtained by the defendant does not represent a loss suffered by the plaintiff.⁷⁹ In Chapter II of this paper, it was shown that *Wrotham Park* damages can be explained on the basis of the compensation principle in Australia. Therefore, there would be no need for an award of restitutionary damages in cases like *Wrotham Park*.

2 *Developments in England*

English courts have now recognised that restitutionary remedies may be awarded for breach of contract in some circumstances. More importantly for the purposes of this paper, the House of Lords has interpreted *Wrotham Park* damages as a

⁷⁷ See, eg, *Tito v Waddell* (No 2) Ch 106, 332; *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157, 196.

⁷⁸ *Haines v Bendall* (1991) 172 CLR 60, 63 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Commonwealth v Amman Aviation* (1991) 174 CLR 64, 82 (Mason CJ and Dawson J).

⁷⁹ Mason, Carter and Tolhurst, above n 6, 709.

restitutionary award.⁸⁰ In Australia, the issue of whether restitutionary remedies are available for breach of contract has not been considered by the High Court.⁸¹ The question for this Chapter therefore is whether Australian Courts are likely to follow the English position in cases like *Wrotham Park*. First, it is necessary to consider the exceptional case of *Attorney General v Blake*.⁸²

(a) *Attorney General v Blake*

Blake was a former secret service agent who was imprisoned for spying for the Soviet Union. He later escaped and fled to Moscow where in breach of his employment contract, he wrote an autobiography about his time in the service. The Crown did not seek an injunction to restrain its publication. It was only after it learnt of the size of the royalty payable to Blake that the Crown commenced proceedings, seeking that Blake account for the profit made from the publication of the book. In the House of Lords, the majority upheld the Crown's claim.⁸³

(b) *The Significance of Wrotham Park in Blake*

Prior to *Blake*, the traditional rule denied the availability of restitutionary remedies for breach of contract and there was virtually no precedent where such a remedy had been awarded.⁸⁴ It was in *Wrotham Park* that the majority found a precedent for awarding a restitutionary remedy. Lord Nicholls, in giving the leading judgement, described *Wrotham Park* as:

⁸⁰ [2001] 1 AC 268, 283-4. See also, *Experience Hendrix LLC v PPX Enterprises Inc* [2003] 1 All ER (Comm) 830, 846. In *Hendrix*, the English Court of Appeal awarded *Wrotham Park* damages on a restitutionary basis.

⁸¹ Kit Barker and Ross Grantham, *Unjust Enrichment* (LexisNexis Butterworths, 2008) 362.

⁸² [2001] 1 AC 268.

⁸³ Strictly speaking, the award in *Blake* was the equitable remedy of an account of profit and not damages. The concern of this Chapter however is the treatment of *Wrotham Park* in that case.

⁸⁴ Burrows, above n 63, 481.

[A] solitary beacon, showing that in contract as well as tort, damages are not always narrowly confined to the recoupment of financial loss. In a suitable case, damages for breach of contract may be measured by the benefit gained by the wrongdoer from the breach.⁸⁵

(c) *Issues Arising from Blake*

This Chapter will consider whether Lord Nicholls' treatment of *Wrotham Park* damages as a restitutionary award is justified. The Chapter does not purport to deal with the question of whether restitutionary remedies should be available for breach of contract. Instead, its purpose is to show that there is no need for a restitutionary remedy in cases like *Wrotham Park*.

B *The Argument for a Restitutionary Remedy in Wrotham Park*

1 *Wrotham Park as a Case of Wrongdoing*

Restitutionary awards are sometimes justified by invoking the maxim 'no man should profit from his wrongdoing'.⁸⁶ On its face, *Wrotham Park* could be regarded as a case where a restitutionary remedy might have been desirable. There, the defendants had acted wantonly and in defiance of the plaintiffs' protests. In doing so, they had also made a significant profit. As Brightman J said, awarding the plaintiffs nominal damages would have been a questionable result for it would have left the defendants in 'undisturbed possession of the fruits of their wrongdoing'.⁸⁷

⁸⁵ *Blake* [2001] 1 AC 268, 283-4.

⁸⁶ Burrows, above n 63, 479; Mason, Carter and Tolhurst, above n 6, 716-7.

⁸⁷ *Wrotham Park* [1974] 2 All ER 321, 339.

Such an interpretation of *Wrotham Park* has been favoured by Virgo.⁸⁸ Virgo has argued that where a contract is specifically enforceable, the policy of the law favours performance. Thus, a restitutionary award serves two functions.⁸⁹ First, it ensures that the defendant does not profit from his wrongdoing. Secondly, it deters breaches of similar contracts in other cases.

Virgo's argument is difficult to sustain. In *Wrotham Park*, Brightman J did not see himself as awarding restitutionary damages. Although his honour had regard to the defendants' profit, it was only for the purposes of valuing the contractual right which the plaintiffs had been deprived of in consequence of the defendants' breach.⁹⁰ More importantly, if *Wrotham Park* damages were awarded to punish the defendants for their wrongdoing, one must ask why the defendants were not required to give up all, or at least a more significant proportion, of their profits.⁹¹ Moreover, it is difficult to see how depriving the defendants of 5% of their profit would have had the effect of deterring breaches in other cases. In this respect, one commentator has gone as far as to suggest that *Wrotham Park* damages were no different from nominal damages.⁹²

2 *Wrotham Park as a Case of Uncompensated Loss*

Arguments favouring restitutionary awards in cases like *Wrotham Park* would instead seem to stem from a perception that greater protection ought to be afforded to the plaintiff's performance interest in circumstances where it is not readily measurable in financial terms.

⁸⁸ Virgo, above n 3, 495.

⁸⁹ Ibid.

⁹⁰ *WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2008] 1 All ER 74, 89.

⁹¹ David Campbell and Philip Wylie, 'Ain't No Telling (Which Circumstances are Exceptional)' (2003) 62 *Cambridge Law Journal* 605, 612.

⁹² Ibid 626.

In this respect, it is argued that there is a risk of uncompensated loss in cases where a plaintiff places a subjective, non-financial value⁹³ on performance.⁹⁴ Moreover, these tend to be cases where the policy of the law has been to compel the performance of contract through the grant of specific relief. Where specific relief is impossible or refused on discretionary grounds, it is argued that the plaintiff's performance interest would not be adequately protected by an award of compensatory damages for the plaintiff has not suffered 'loss' in these cases.⁹⁵

In Chapter I of this paper, such arguments were identified as reflecting the legitimate interest view of contractual rights. The problem with these arguments is that they are based on the assumption that damages are compensation for financial loss. As a result, there is a perceived 'gap' in the law in cases where the plaintiff places a non-financial value on performance. In Chapter I of this paper, that assumption was shown to be erroneous. Moreover, it was shown that damages compensate a plaintiff for the loss of his right to performance of the contract. In assessing what a plaintiff has lost, and therefore the sum of damages which he ought to receive, the non-financial value which a plaintiff attributes to performance is not disregarded.

Even if we accept that there truly is a 'gap' in the law of contract, it is unclear why a restitutionary remedy is required to fill it. As Barker and Grantham argue, if the motivation behind awarding restitutionary remedies in these cases is to account for uncompensated loss, it would be better and less controversial to do so by expanding the scope of compensatory remedies.⁹⁶ As this paper has shown, once we abandon the erroneous assumption that damages only compensate a plaintiff for financial loss,

⁹³ In Chapter I of the paper, this value was described as the 'consumer surplus.'

⁹⁴ See, eg, Allan Farnsworth, 'Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract' (1984) 94 *Yale Law Journal* 1339, 1352; O'Dair, above n 75, 122-3; Virgo, above n 3, 495.

⁹⁵ Virgo, n 3, 486.

⁹⁶ Barker and Grantham, above n 81, 364-5.

a restitutionary remedy would be unnecessary in cases like *Wrotham Park*, for a compensatory remedy would produce the same result.

C ***The Problem with Blake***

This chapter has shown that there is little justification for interpreting *Wrotham Park* damages as a restitutionary remedy. In *Blake*, Lord Nicholls' treatment of *Wrotham Park* can be explained on two grounds. First, his honour took an unduly narrow understanding as to the meaning of loss. His honour assumed that damages were ordinarily assessed on the basis of compensation for financial loss.⁹⁷

The peculiar feature of Lord Nicholls' reasoning is that his honour came very close to accepting the broader understanding of loss argued for in this paper. In his judgement, Lord Nicholls recognised that a plaintiff might have an interest in performance which was not readily measurable in monetary terms.⁹⁸ His honour also recognised that in such cases, damages assessed on the basis of financial loss would not adequately compensate the plaintiff.⁹⁹ Yet, his honour chose to treat *Wrotham Park* damages as an award based on the defendant's gain and not the plaintiff's loss.

It is important to appreciate the policy context of the *Blake* case. In *Blake*, the Court clearly saw it just that the traitor *Blake* retained no part of his wrongfully acquired profit. Conversely, there was no precedent supporting the Crown's claim for a

⁹⁷ *Blake* [2001] 1 AC 268, 279, 283.

⁹⁸ *Ibid* 282.

⁹⁹ *Ibid*.

restitutionary remedy. In this respect, there were clear tactical reasons in treating *Wrotham Park* damages as a restitutionary remedy.¹⁰⁰

This point was made by Lord Hobhouse in a powerful dissent. Lord Hobhouse warned the majority against making bad law in order to reach an 'intuitively just decision' in the case.¹⁰¹ As this paper said in Chapter I, Lord Hobhouse's dissent is an illuminating one. Lord Hobhouse warned the majority against adopting an unduly narrow understanding of loss.¹⁰² His honour instead preferred the view that damages were a substitute for performance.¹⁰³ For this reason, Lord Hobhouse preferred the view that *Wrotham Park* damages were compensatory.¹⁰⁴

1 *The Reception of Blake in Australia*

Australian courts have generally expressed reservation at following *Blake*'s lead in awarding restitutionary remedies for breach of contract.¹⁰⁵ Should a case like *Wrotham Park* arise in Australia, this paper suggests that courts are likely to find Lord Hobhouse's dissent to be more persuasive. In this respect, there appears to be little possibility of Australian courts using cases like *Wrotham Park* as a vehicle for awarding restitutionary remedies for breach of contract.

¹⁰⁰ See also, Phang and Lee, above n 59, 247. The authors, after interpreting *Wrotham Park* damages as compensatory, question whether the majority in *Blake* was justified in reaching the conclusion that it did.

¹⁰¹ *Blake* [2001] 1 AC 268, 293.

¹⁰² *Ibid* 298.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid*.

¹⁰⁵ See, eg, *Short v Crawley* [2005] NSWSC 928, [24]; *Dalecoast Pty Ltd v Guardian International Pty Ltd* [2003] WASCA 142, [102]-[107]; *Biscayne Partners Pty Ltd v Valance Corp Pty Ltd* [2003] NSWSC 847, [236]; *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157, 196.

D Conclusion

This Chapter has served two functions. First, it has shown that in cases like *Wrotham Park*, a restitutionary remedy is simply unnecessary. The perceived need for such remedy only arises from an unduly narrow and erroneous understanding of loss. Secondly, it has reaffirmed the primacy of the compensation principle, as it was interpreted in *Tabcorp*, when assessing damages in cases like *Wrotham Park*. The rationale in cases like *Wrotham Park* would always appear to be compensation, albeit by carefully considering what the plaintiff had bargained for.

V CHAPTER IV

A Wrotham Park Damages as Equitable Damages

Wrotham Park damages are sometimes explained on the basis that they were awarded in equity ('equitable damages'),¹⁰⁶ under the jurisdiction previously conferred by *Lord Cairns' Act*.¹⁰⁷ This explanation assumes two things. First, it assumes that substantial damages would not be recoverable at common law in *Wrotham Park*. Secondly, it assumes that equitable damages are assessed on a basis that is different from common law.

In Chapter I of this paper, it was argued that *Wrotham Park* damages can be justified on the basis of the compensation principle at common law in Australia. Recourse to *Lord Cairns' Act* would therefore be unnecessary to explain the result in the case. However, should a case like *Wrotham Park* arise in Australia, and the arguments made in Chapter I of this paper not be accepted, the issue of whether equitable damages are assessed on a basis that is different from common law would be an

¹⁰⁶ Sharon Erbacher, *Australian Restitution Law* (Routledge-Cavendish, 2nd ed, 2002) 540.

¹⁰⁷ *Chancery Amendment Act 1858*, 21 & 22 Vict, c 27, s 2.

important one. Moreover, as this Chapter will show, there are unresolved questions in Australia about how equitable damages are assessed.

B Background to Lord Cairns' Act

Before the enactment of the *Judicature Act*,¹⁰⁸ common law and equity were administered by different courts. Under that system, it was generally accepted that Chancery would not entertain a claim for damages which was the principal relief at common law.¹⁰⁹ Therefore, a plaintiff who had a cause of action sounding in both legal and equitable relief was vexed with procedural difficulties.¹¹⁰ If Chancery refused his claim for specific relief, he was required to initiate fresh proceedings in a common law court to recover damages.¹¹¹ *Lord Cairns' Act* was part of procedural reforms which preceded the *Judicature Act*. The Act sought to address the problem of multiplicity of proceedings by empowering Chancery to award damages in some circumstances.

1 Lord Cairns' Act in Australia

The jurisdiction conferred by *Lord Cairns' Act* is reproduced in each Australian jurisdiction.¹¹² In New South Wales, s 68 of the *Supreme Court Act* provides that:

Where the court has power:

- (a) To grant an injunction against the breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act

¹⁰⁸ *Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66.

¹⁰⁹ Roderick Meagher, John Heydon and Mark Leeming, *Equity: Doctrines and Remedies* (Butterworths, 4th ed, 2002) 842.

¹¹⁰ Peter McDermott, *Equitable Damages* (Butterworths, 1994) 1-3.

¹¹¹ *Ibid.*

¹¹² See, eg, *Supreme Court Act 1970* (NSW) s 68; *Supreme Court Act 1933* (ACT) s 26; *Supreme Court Act 1986* (Vic) s 38. In Queensland, the statute conferring power has been repealed but the power is said to survive: *Barbagallo v J&F Catalen Pty Ltd* [1986] 1 Qd R 245.

(b) To order the specific performance of any covenant, contract or agreement

The Court may award damages to the party injured either in addition to or in substitution for the injunction or specific performance.¹¹³

C *The Significance of Lord Cairns' Act in Wrotham Park*

Having refused a mandatory injunction, Brightman J was required to consider what damages ought to be awarded under *Lord Cairns' Act*, in lieu of the mandatory injunction. It is unclear whether Brightman J was awarding damages on a different basis from common law. At no point did Brightman J expressly suggest that he was departing from common law principles. Nevertheless, parts of Brightman J's reasoning suggest that his honour was appealing to equitable considerations. For example, his honour opined that to award the plaintiffs nominal damages would have been a result of 'questionable fairness' for it would be unjust that the plaintiffs receive no compensation while the defendants were left with the fruit of their wrongdoing.¹¹⁴ Moreover when assessing damages, Brightman J asked himself what a 'just substitute' for a mandatory injunction would have been.¹¹⁵

1 *Cases Treating Lord Cairns' Act Damages as Sui Generis*

(a) *English Cases*

In *Bredero*,¹¹⁶ the English Court of Appeal awarded the plaintiffs nominal damages despite facts that were strikingly similar to *Wrotham Park*. The plaintiffs had sold a site to the defendants for development as a housing estate. The defendants

¹¹³ *Supreme Court Act 1970* (NSW) s 68. In this paper 'Lord Cairns Act' is used as a shorthand expression for its Australian equivalents.

¹¹⁴ *Wrotham Park* [1974] 2 All ER 321, 339.

¹¹⁵ *Ibid* 341.

¹¹⁶ [1993] 3 All ER 705.

subsequently breached a covenant to develop the site in accordance with the approved building scheme by building extra houses on the site without seeking modification of the scheme. As in *Wrotham Park*, the defendants' breach did not cause the plaintiffs to suffer financial loss.

What distinguished *Bredero* from *Wrotham Park* was that the plaintiffs in *Bredero*, although aware of the breach, did not protest or seek specific relief. Instead they waited until the defendants had disposed of the houses before commencing proceedings.¹¹⁷ Given the intervention of third party interests, specific relief was impossible at the time of proceedings. The impossibility of specific relief at the time proceedings were commenced meant that the court did not have jurisdiction to award damages under *Lord Cairns' Act*.¹¹⁸ Therefore, the claim was for common law damages only. Two judges distinguished *Wrotham Park* on the ground that damages in that case were awarded in equity and therefore assessed on principles different from common law.¹¹⁹

(b) Australian Cases

In *Longtom Pty Ltd v Oberon Shire Council* ('*Longtom*'), Young J suggested that although the measure of damages will generally be the same in equity and at law, there may be 'special circumstances' where a court should apply the 'more liberal rule' rule in *Wrotham Park*.¹²⁰ In *Longtom*, the defendants purchased land from the plaintiffs for gravel extraction purposes. The defendants later breached a covenant to

¹¹⁷ Ibid 709.

¹¹⁸ *Jaggard v Sawyer* [1995] 2 All ER 189, 201. Impossibility of specific relief goes to the jurisdiction of a court to award specific relief or damages in substitution for such relief.

¹¹⁹ *Bredero* [1993] 3 All ER 705, 712 (Dillon LJ), 715 (Rose LJ). Dillon LJ expressed doubts over whether *Wrotham Park* was correctly decided in this respect.

¹²⁰ (1996) 7 BPR 14,799, 14,810; See also, *Rosser v Maritime Services Board (No 2)* (Unreported, Supreme Court of New South Wales, Young J, 17 September 1996).

restore the land to its original condition by refusing to refill the gravel pit. The defendants' breach did not cause the plaintiff's land to diminish in value. In *Longtom* however, Young J ordered specific performance of the covenant. Therefore, it was unnecessary to decide what damages ought to have been awarded under *Lord Cairns' Act*. Although Young J's observations in this respect were purely obiter,¹²¹ his honour clearly saw *Wrotham Park* damages as being assessed on a different basis from common law.

2 The Problem With Treating Lord Cairns' Act Damages as Sui Generis

(a) The Decision in *Johnson v Agnew*

The problem with treating *Wrotham Park* damages as sui generis is that in *Johnson v Agnew* ('*Johnson*'), the House of Lords held that apart from cases where damages could not be awarded at common law, *Lord Cairns' Act* did not provide for damages to be assessed on any new basis.¹²² If *Johnson* is correct, then if only nominal damages are recoverable at law in cases like *Wrotham Park*, the same measure would apply in equity.

In *Johnson*,¹²³ Lord Wilberforce expressly disapproved of Megarry J's reasoning in *Wroth v Tyler* ('*Wroth*').¹²⁴ In *Wroth*, Megarry J refused specific performance of a contract for the sale of land on the ground that it would have caused hardship to the defendant. The issue for Megarry J then was whether damages should have been assessed at the date of breach or the date of judgement. At common law, the usual rule was to assess damages at the date of breach. Although Megarry J

¹²¹ *Longtom* (1996) 7 BPR 14,799, 14,810.

¹²² [1980] AC 367, 400; See also, Terence Ingman, 'Damages in Equity: A Step in the Wrong Direction?' (1994) *Conveyancer and Property Lawyer* 110, 119.

¹²³ [1980] AC 367, 400.

¹²⁴ [1974] Ch 30.

acknowledged that the common law rule was not inflexible, his honour held that equitable damages were assessed on a different basis from common law. Megarry J said:

*The power 'to award damages...in substitution for [specific relief]' at least envisages that the damages awarded will in fact constitute a true substitute for [specific relief].*¹²⁵

(b) The Status of *Johnson v Agnew* in Australia

The juridical status of *Johnson* is unclear in Australia. Although *Johnson* has been approved by one member of the High Court,¹²⁶ several Australian commentators have been highly critical of the decision.¹²⁷ These commentators have instead preferred Megarry J's view in *Wroth* that equitable damages are necessarily different from common law damages because *Lord Cairns' Act* contemplates that they be a true substitute for specific relief.¹²⁸ Moreover, there is lower court authority approving Megarry J's view that equitable damages are sui generis and assessed on a different basis from common law.¹²⁹

In *Wentworth v Woollahra Municipal Council* ('*Wentworth*'),¹³⁰ the High Court gave some guidance on how it might approach the issue. First, the High Court said 'damages under [*Lord Cairns' Act*] are not common law damages.'¹³¹ This in turn supports Megarry J's view in *Wroth*. On the other hand, the High Court muddled the waters by saying that the power to award common law damages in cases where

¹²⁵ Ibid 58.

¹²⁶ *Ansett Transport Industries v Halton* (1979) 25 ALR 639, 655 (Aickin J).

¹²⁷ Meagher, Gummow and Leeming, above n 109, 846-51; McDermott, above n 110, 108-9.

¹²⁸ Meagher, Gummow and Leeming, above n 109, 846, 852.

¹²⁹ *Madden v Keverski* [1983] 1 NSWLR 305, 307; *Mills v Ruthol* (2004) 61 NSWLR 1, 14.

¹³⁰ (1982) 149 CLR 672.

¹³¹ Ibid 678.

specific relief is sought in respect of a legal right diminishes the importance which *Lord Cairns' Act* would otherwise have.¹³² In this respect, the High Court also appeared to endorse the view that there are few, if any, differences between equitable and common law damages.

In this Chapter, it will be shown that the principles in this area are best understood by recognising that:

- i) In principle, equitable damages are different from common law damages
- ii) In most cases, the maxim "equity follows the law" will apply and there will be few differences between damages in equity and at law
- iii) Where required, courts will depart from that maxim

Moreover, it will be argued that far from justifying or mandating a departure from the compensation principle in cases like *Wrotham Park*, *Lord Cairns' Act* grounds the assessment of damages in the common law principle.

D *Are Equitable Damages the Same as Common Law Damages?*

In principle, there are clear differences between equitable and common law damages. The first reason for this is based on a contextual reading¹³³ of s 68 of the *Supreme Court Act*.¹³⁴ S 57 of the *Act* provides for the concurrent administration of law and equity by the Court.¹³⁵ S 63 further provides that the Court is to grant all remedies, whether legal or equitable, to which the parties are entitled.¹³⁶ Therefore,

¹³² *Ibid.*

¹³³ *Madden v Keverski* [1983] 1 NSWLR 305, 307.

¹³⁴ *Supreme Court Act 1970* (NSW) s 68.

¹³⁵ *Ibid* s 57.

¹³⁶ *Ibid* s 63.

the Court has a power that is separate and distinct from s 68 to award common law damages in cases where it has refused a plaintiff's claim for specific relief.

Moreover, s 68 confers upon a court the power to award damages where damages could not be awarded at common law. For example, damages could be awarded in substitution for a quia timet injunction to restrain an apprehended wrong.¹³⁷

Finally, unlike common law damages which are recoverable as of right, an award of equitable damages is discretionary. In this respect, some commentators have suggested that the discretion of the court extends to questions regarding the quantum of damages.¹³⁸

E Applying the Maxim 'Equity Follows the Law'

If both common law and equitable damages are recoverable in respect of the same cause of action however, it is said that the maxim 'equity follows the law' should apply.¹³⁹ Therefore, a court exercising jurisdiction under *Lord Cairns' Act* should generally apply the common law rules when assessing damages.

1 Why Should Equity Follow the Law?

First, the harmonious development of common law and equitable rules may be seen as desirable in itself.¹⁴⁰ If the plaintiff's claim for damages arises from the same set of facts, it is unclear why a plaintiff's ability to recover should depend on the jurisdiction in which damages are sought.

¹³⁷ *Leeds Industrial Co-operative Society v Slack* [1924] AC 851, 865.

¹³⁸ Michael Evans, *Equity and Trusts* (LexisNexis Butterworths, 2nd ed, 2009) 712; Spry, above n 12, 646-7; McDermott, above n 110, 110.

¹³⁹ See, eg, Spry, above n 12, 646; Seddon and Ellinghaus, above n 30, 1163.

¹⁴⁰ McDermott, above n 95, 109.

Secondly, as O'Dair has argued,¹⁴¹ having disparate rules between common law and equity may create a perverse incentive for defendants to act in a way which defeats a plaintiff's claim for specific relief. In this regard, it is useful to recall the facts in *Bredero*¹⁴²

In *Bredero*, there was seemingly little injustice in awarding the plaintiffs nominal damages. As Rose LJ said, the plaintiffs had deliberately sat on their rights and were guilty of unreasonable delay in commencing proceedings.¹⁴³ It is however easy to conceive of situations where the reasoning in *Bredero* may unduly prejudice a plaintiff. For example, had the defendants in *Bredero* gone behind the plaintiffs' back and disposed of the houses to make specific relief impossible, the justification for refusing a plaintiff damages on the basis that damages were sought at common law and not in equity would be severely undermined.

2 *The Maxim is Not a Rule of Law*

Although the maxim 'equity follows the law' should apply in cases where damages are available at common law and in equity, one must remember that it is only a maxim and not a rule of law. As Cardozo CJ said in *Graf v Hope Building Corporation*, 'equity follows the law, but not slavishly nor always.'¹⁴⁴

In this respect, the reasoning in *Johnson* can be criticised for establishing too absolute a rule. The better view would appear to be that in cases where the circumstances of the case would render the common law measure of damages

¹⁴¹ O'Dair, above n 75, 126.

¹⁴² [1993] 3 All ER 705.

¹⁴³ Ibid 715.

¹⁴⁴ (1930) 254 NY 1, 9.

unjust, equity would be justified in departing from the common law.¹⁴⁵ The next part of this Chapter will consider when such a departure can be justified.

F When Should Equity Depart from the Law?

1 Is it Paradoxical to Assess Equitable Damages on the Same Basis as Common Law Damages?

Those who believe that equitable damages are *sui generis* argue that it would be paradoxical to assess equitable damages on the same basis as common law damages.¹⁴⁶ It is pointed out that specific relief is only available when common law damages are an inadequate remedy. Yet, *Lord Cairns' Act* contemplates that specific relief be refused and equitable damages be awarded as a *proper substitute* thereof. Therefore, it is argued that if the amounts which could be awarded at law and in equity do not differ, equitable damages would hardly be a proper substitute for specific relief which was sought precisely because common law damages would have been inadequate.¹⁴⁷

Two objections shall be made to this view. First, it will be argued that equitable damages are better regarded as an alternative to specific relief than as a substitute for it. Secondly, it will be argued that the paradox only arises if we erroneously assume that common law damages only compensate a plaintiff for financial loss.

¹⁴⁵ Spry, above n 12, 648.

¹⁴⁶ Meagher, Gummow and Leeming, above n 94, 109.

¹⁴⁷ *Ibid.*

2 *Rejecting the Paradox*

(a) *Equitable Damages as an Alternative to Specific Relief*

Cunnington has argued that it is only where a full case for specific relief has been made out that equitable damages could be said to be a substitute for specific relief. Otherwise, Cunnington says, equitable are really an alternative to specific relief. By a 'full case' for specific relief, Cunnington means a plaintiff must clear all the jurisdictional and discretionary bars to specific relief.¹⁴⁸ So in cases like *Wrotham Park*, where the plaintiff was refused specific relief on the discretionary ground that it would have been socially and economically wasteful, an award of equitable damages cannot be regarded a substitute for a mandatory injunction which would not have been granted in the first place.

Cunnington's argument is a persuasive one. Under *Lord Cairns' Act*, a court has jurisdiction to award equitable damages where it has 'power' to award an injunction or specific performance.¹⁴⁹ The modern tendency has been to require a plaintiff to establish that the court would have had jurisdiction to award specific relief.¹⁵⁰ As Millet LJ said in *Jaggard v Sawyer* ('*Jaggard*'), the question is whether, at the date of the writ, the court could have granted the injunction and not whether it would have in fact done so.¹⁵¹ With most factors nowadays going to discretion and not jurisdiction,¹⁵² all that a plaintiff is likely to be required to show to be entitled to equitable damages is that damages at common law would be an inadequate remedy.

¹⁴⁸ Ralph Cunnington, 'Equitable Damages: A Model for Restitutionary Damages' (2001) 17 *Journal of Contract Law* 212, 234.

¹⁴⁹ *Supreme Court Act 1970* (NSW) s 68.

¹⁵⁰ John Jolowicz, 'Damages in Equity: A Study of Lord Cairns' Act' (1975) 34 *Cambridge Law Journal* 224, 240; Cunnington, above n 133, 232.

¹⁵¹ [1995] All ER 189, 205.

¹⁵² Mason, Carter and Tolhurst, above n 6, 744.

In this respect, there is force in Cunningham's argument that damages are really an alternative to specific relief.

(b) *Equitable Damages as Compensation for Loss of Performance Interest*

There is a more fundamental objection to the view that equitable damages are a substitute for an injunction. As Millet LJ was at pains to stress in *Jaggard*, the grant of an injunction is always discretionary.¹⁵³ When a court refuses to grant an injunction, a plaintiff cannot be said to have lost his right to an injunction for he never had that right. Instead as it was shown in Chapter I of this paper, what the plaintiff has lost is his right to performance of the contract. Therefore, this paper takes the view that whether awarded at law or in equity, damages compensate a plaintiff for the loss of his performance interest. Far from being a substitute for specific relief, equitable damages, like damages at common law, are simply a substitute for performance.

(c) *Equitable Damages as a Substitute for Specific Relief*

Even if we accept that equitable damages must constitute a proper substitute for specific relief, it is unclear how this would produce a result which is different from common law. Evans has argued that the purpose of an award of equitable damages is to put the plaintiff in the same position which he would have been in had the contract been specifically performed.¹⁵⁴ With respect, this paper asks how is that any different from the compensation principle at common law?

As shown in Chapter II, *Tabcorp* makes it clear that damages compensate a plaintiff for lost benefits in law. Damages therefore are a substitute for performance.

¹⁵³ [1995] All ER 189, 207.

¹⁵⁴ Evans, above n 138, 714.

Moreover, it was shown that it would be erroneous to assume that damages only compensate the plaintiff for financial loss. In this respect, this paper argues that the "paradox" in assessing equitable damages on the same basis as common law damages only arises if one makes this erroneous assumption. The cases treating *Wrotham Park* damages as being *sui generis* illustrate this.

In *Bredero*,¹⁵⁵ Dillon LJ accepted the proposition that damages were compensation for pecuniary loss. Similarly in *Longtom*,¹⁵⁶ Young J assumed that if left to recover damages at common law, the plaintiff's damages would have been nominal for no financial loss had flowed from the defendants' breach. In each case, the perceived need to award equitable damages on a different basis from common law arose from an incorrect understanding of the nature of contractual rights and therefore an unduly narrow understanding of loss. If at common law, the plaintiffs could only have recovered nominal damages, there would clearly have been paradoxical results in cases like *Wrotham Park* if nominal damages were also awarded under *Lord Cairns' Act*. Earlier in Chapter I, a similar criticism was made of the legitimate interest view of contract. There it was shown that the performance view of contract provides a more coherent explanation of the nature of contractual rights and obligations. The effect of this Chapter has been to reinforce this. Once we recognise that at common law, damages compensate the plaintiff for the loss of his performance interest, the paradoxical features of these cases simply fall away.

¹⁵⁵ [1993] 3 All ER 705, 710.

¹⁵⁶ *Longtom* (1996) 7 BPR 14,799, 14,809.

G Conclusion

This Chapter has shown that the outcome in *Wrotham Park* would not have differed according to whether damages were sought at law or in equity. In cases where *Wrotham Park* damages have been treated as sui generis, there is a twofold problem. The first is a tendency to overplay the discretionary aspect of equitable rules. The second is a tendency to deny the flexibility of common law rules. As this paper has shown, it is erroneous to assume that damages only compensate a plaintiff for financial loss. If we accept that damages are a substitute for performance, there would be little difference in the assessment of damages at law and in equity.

VI CONCLUSION

In Australia, *Tabcorp* establishes that it would be erroneous to treat damages as only compensating a plaintiff for financial loss. Instead, damages compensate a plaintiff for lost benefits in law and are a substitute for performance.

Should a case like *Wrotham Park* arise in Australia, the High Court's decision in *Tabcorp* is likely to have two implications. First, an award of substantial damages is would be available to the plaintiff on compensatory principles. Recourse to restitutionary principles would be unnecessary. Secondly, a plaintiff's ability to recover substantial damages will not depend on whether damages are sought in equity or at law.

What *Tabcorp* requires is for courts to carefully consider what the parties had bargained for and what sum of damages is required to give the plaintiff the benefit of his bargain. In cases like *Wrotham Park*, where the parties had bargained for a non-financial result, the assessment of damages is admittedly difficult. As this paper has

argued however, there may be merit in adopting Brightman J's approach in *Wrotham Park* for it seeks to place a commercial value on a right that is otherwise difficult to value. Therefore, there is a clear place for *Wrotham Park* damages in Australia.

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